

# KENYA

## 2017 ELECTIONS: BROKEN PROMISES PUT HUMAN RIGHTS DEFENDERS AT RISK

International Fact-Finding Mission Report



May 2017



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REPUBLIQUE ET CANTON DE GENEVE

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## LIST OF ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
APS	Administration Police Service
AU	African Union
CCI	Coalition for Constitution Implementation
CGHRDs	Coalition for Grassroots Human Rights Defenders
CIPEV	Commission on Investigations of the Post-Election Violence in Kenya
CSO	Civil Society Organisation
CSRG	Civil Society Reference Group
EAC	East African Community
EACC	Ethics and Anti-Corruption Commission
EHAHRDP	East and Horn of Africa Human Rights Defenders Programme
EU	European Union
FIDA - Kenya	Federation of Women Lawyers - Kenya
FIDH	International Federation for Human Rights
GNU	Government of National Unity
IAU	Internal Affairs Unit
ICC	International Criminal Court
ICJ-Kenya	International Commission of Jurists - Kenya
ICTJ	International Center for Transitional Justice
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electoral Systems
IGP	Inspector General of Police
IMLU	Independent Medico Legal Unit
INCLO	International Network of Civil Liberties Organisations
IPOA	Independent Police Oversight Authority
KHRC	Kenya Human Rights Commission
KICA	Kenya Information and Communication Act
KNCHR	Kenya National Commission for Human Rights
KPS	Kenya Police Service
LGBTI	Lesbian, Gay, Bisexual, Transsexual and Intersex
MUHURI	Muslims for Human Rights
NCHRD-K	National Coalition of Human Rights Defenders-Kenya
NGLHRC	National Gay and Lesbian Human Rights Commission
NGO	Non-Governmental Organisation
NPS	National Police service
NPSC	National Police Service Commission
ODPP	Office of the Director of Public Prosecution
OFFLAC	Oscar Foundation Free Legal Aid Clinic
OMCT	World Organisation Against Torture
PBI	Peace Brigades International
PBO	Public Benefit Organisation
PoTA	Prevention of Terrorism Act
UN	United Nations
WHRD	Woman Human Rights Defender

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## EXECUTIVE SUMMARY

Kenya, short from keeping its human rights obligations and commitments, particularly after the adoption of a very progressive Constitution in 2010, has in recent years chosen a different path. Since the victory of Uhuru Kenyatta at the 2013 general elections, his administration has been showing open hostility towards human rights defenders and has constantly been trying to undermine their freedoms of association and peaceful assembly and their legitimate work through judicial and administrative harassment and restrictive legislation. The severe crack-down and the progressive shrinking of the civil society space experienced by human rights defenders, combined with a worrying pattern of extrajudicial killings and police violence against defenders, has triggered the need for the Observatory for the Protection of Human Rights Defenders to conduct a fact-finding mission to the country. The present mission report highlights three major areas of concern that severely undermine the very existence of an enabling environment for human rights defenders to freely and legitimately operate in the country, and which are especially worrisome in view of the upcoming general elections planned for August 8, 2017.

First, human rights defenders are often confronted to **high levels of police violence**, especially when trying to hold public officials accountable for human rights violations. The violence includes harassment, torture, enforced disappearances and extrajudicial killings, including under the guise of security and counter-terrorism operations. The abduction, torture and killing of prominent Kenyan human rights lawyer **Willie Kimani** in June 2016 is only the tip of the iceberg of a pattern of violence, aimed at silencing dissenting voices and perpetuating police and State security forces' brutality and impunity. Moreover, the disproportionate use of force in managing public protests calls into question the prevailing standards in public order management and their actual use by the police. In this regard, it is necessary that the national authorities urgently address the **widespread impunity** of such cases.

Second, the increasing pattern of **criminalisation and intimidation of human rights defenders**, through trumped-up charges, episodes of frequent arrests, detentions in police stations and long trials, represent a serious concern, since they are used as a means to harass, traumatise and exhaust defenders, and, in fine, prevent them from defending human rights. Moreover, the effective promotion of constitutional fundamental rights to freedoms of expression, peaceful assembly and association of all Kenyan citizens can only be achieved through sustained State reforms, bringing national legislation and institutions in compliance with the principles enshrined in the 2010 Constitution.

Third, **delays in the commencement of the Public Benefit Organisations (PBO) Act 2013**, which streamlines the regulation of the civil society sector, have left the door open for abuses and administrative harassment of civil society organisations (CSOs), whose sector is still regulated by the NGO Coordination Act 1990. As a result, CSOs continue to operate in a hostile environment, characterized by the threat of arbitrary de-registration and asset freezes, continuous attacks and smearing campaigns. It is worrying that the past two years have witnessed various failed attempts to incorporate restrictive amendments into the PBO Act 2013, including severe restrictions to access to foreign funding, aimed at undermining its significant improvements. It is crucial that the Kenyan authorities immediately operationalise the PBO Act and ensure that the regulations and bodies that will be created, as well as any further amendment, will not seek to restrict the rights guaranteed under the Act.

The present report also addresses **specific challenges and obstacles faced by vulnerable categories of human rights defenders** for the nature of the rights they promote, such as women human rights defenders (WHRDs), lesbian, gay, bisexual, transsexual and intersex (LGBTI) rights defenders, land and environmental rights defenders and bloggers and journalists.

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In such a context, it is fundamental that **the Kenyan authorities, especially in view of the upcoming elections, publicly recognise the essential role played by human rights defenders** in every democracy as watchdogs of the rule of law and guarantee their protection in all circumstances.

The present mission report presents the main findings of the mission the Observatory for the Protection of Human Rights Defenders carried out in October 2016 and formulates recommendations to national, regional and international stakeholders.

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# I. INTRODUCTION

Concerned by the situation of human rights defenders in Kenya, and especially by the high levels of police violence against them and the attempts to restrict their working environment, the Observatory for the Protection of Human Rights Defenders (the Observatory), a partnership of the World Organisation Against Torture (OMCT) and FIDH, decided to carry out an international fact-finding mission in the country from October 24 to 28, 2016, with the objective of documenting *in situ* the situation of human rights defenders, as well as drawing international attention and contributing to their protection and to a more enabling environment for civil society in Kenya.

This mission delegation was composed of Mr. Peter Zangl (Germany), OMCT Representative at the European Union, Mr. Benson Olugbuo (Nigeria), Executive Director of CLEEN Foundation, and Ms. Chiara Cosentino (Italy), Human Rights Officer for the Observatory at OMCT.

During the mission, the delegation was offered the opportunity to discuss the situation of human rights defenders in Kenya with representatives of several Kenyan public institutions, and notably from the Office of the Inspector General of the National Police Service, the Independent Policing Oversight Authority, the Office of the Director of Public Prosecution, the Parliamentary Caucus on Human Rights, the Kenya National Commission for Human Rights, as well as the Chief Justice and President of the Supreme Court and the Spokesperson of the National Police Service.

The mission also met representatives of the Regional Office of the High Commissioner for Human Rights (OHCHR), the European Union Delegation as well as of the Embassies of Switzerland, Italy and France.

Moreover, the mission had the opportunity to meet several human rights defenders and representatives from international, national and grassroots human rights organisations in order to collect first-hand information and testimonies. These included members of the Kenya Human Rights Commission (KHRC)<sup>1</sup>, the Independent Medico-Legal Unit (IMLU)<sup>2</sup>, the Kenya National Coalition of Human Rights Defenders (NCHRD-K), the CSO Reference Group, the International Center for Transitional Justice (ICTJ), InformAction, the Federation of Women Lawyers (FIDA) - Kenya, Muslims for Human Rights (MUHURI), Haki Africa, the Coalition for Constitution Implementation (CCI) Kenya, the Coalition for Grassroots Human Rights Defenders (CGHRDs), Mathare Social Justice Initiative, Bunge La Mwananchi as well as representatives of Amnesty International (AI) - Kenya, Human Rights Watch (HRW), Peace Brigades International (PBI) - Kenya, and Protection International (PI).

The Observatory would like to thank all the persons who agreed to meet its delegation and, through the information provided and their collaboration, contributed to the success of its mission<sup>3</sup>. However, the mission delegates regret not to have been given the possibility to visit unannounced a police station of their choice, nor a specific police station preventively agreed upon, as per commitment of the National Police Service (NPS) during one of the meetings. Moreover, the Observatory regrets it was not able to meet with any Government representatives, notably from the Ministry of Devolution and Planning and the Ministry of Interior, in spite of formal request addressed in due course. This denial of dialogue is a worrying signal that adds to the preoccupying information received during the mission.

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1 KHRC is a member of FIDH in Kenya.

2 IMLU is a member of OMCT SOS-Torture Network in Kenya.

3 Unless specified, all information and cases documented in this report were provided by human rights defenders met by the mission.

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The Observatory would like to further extend special thanks to the Kenyan section of the International Commission of Jurists (ICJ-Kenya), a member of OMCT SOS-Torture Network in Kenya, for its valuable support before, during and after the mission, as well as Mr. Otieno Aluoka, who accompanied the mission as a consultant.



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## II. HISTORICAL AND POLITICAL CONTEXT: A COUNTRY MARRED BY ELECTORAL VIOLENCE

Kenya gained its independence from British colonialism in 1963, through armed resistance of the *Mau Mau* movement. Until 1992, the country was largely administered under a dominant single political party dictatorship - the Kenya African Nationalist Union (KANU) - that failed to secure national cohesion and equitable distribution of the post-independence economic benefits before re-introducing political pluralism towards the end of the cold war in the 1990s<sup>4</sup>.

Since 1992, Kenya has conducted democratic general elections on a regular basis, although very often marred with violence, but the "political parties have remained hostage to the logic of strong individuals and collectivist impulse of ethnic conglomerations"<sup>5</sup>. Despite strong and vibrant institutions including a robust culture of civil society activism, the country remains afflicted with challenges of ethnic clientele and patronage politics, political authoritarianism and corruption<sup>6</sup>.

The **post-election violence in Kenya in 2007-2008**, which resulted in the death of more than a thousand people and the displacement of up to 500,000 within a couple of months<sup>7</sup>, affirmed the acute crisis of public confidence in the State institutions and structures. This resulted, on the one hand, in an urge for a renewed scrutiny addressing some evident shortcomings in the Kenyan political system and, on the other hand, in an investigation by the International Criminal Court (ICC) on the international crimes committed during this period.

Within the framework of the Kenya National Dialogue and Reconciliation Agreement, in May 2009 the then President Mwai Kibaki appointed the National Task Force on Police Reforms to make proposals to reform the institution. Moreover, the executive, the judiciary as well as the legislative came under review under the new Constitution in 2010, which was adopted after a consultative process, which widely involved civil society. The Constitution grappled with some of Kenya's manifest historical problems especially the underlying issues of historical injustices and human rights violations, partly addressed in the Kenya Dialogue and Reconciliation negotiations that followed the surge of violence. The Constitution also addressed the numerous governance failures and issues of socio-economic inequalities.

More specifically, it created devolved administrative governance, dividing the country into 47 administrative units under an elected governor, and established a new progressive Bill of Rights. It also fostered new checks and balances between the three arms of Government and launched substantial reforms of State institutions such as the judiciary, the police and the public service, as detailed in Section III.1 of the present report.

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4 See Office of the African Union (AU) Panel of Eminent African Personalities Report, *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya*, April 2014. See also Rok Ajulu ed., *Two Countries One Dream: The Challenges of Democratic Consolidation in Kenya and South Africa*, KMM Review Publishing, Rosebank, 2009 and Steytler N and Yash Pal-Ghai, *Kenya - South African Dialogue on Devolution*, Juta and Company Ltd, Claremont, 2015.

5 See Rok Ajulu ed., *Two Countries One Dream: The Challenges of Democratic Consolidation in Kenya and South Africa*, KMM Review Publishing, Rosebank, 2009, page 70.

6 According to the Transparency International's 2016 Corruption Perception Index, Kenya ranks 145 out of 176 countries, which means that it is one of the countries with the highest public perception of corruption. See: [http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016)

7 See Human Rights Watch Report, *Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Governance*, March 16, 2008, at: <https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance>

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Meanwhile, in 2010, **the ICC Prosecutor initiated investigations for alleged crimes against humanity** against some of the main political leaders in the country, including Messrs. Uhuru Kenyatta<sup>8</sup> and William Ruto<sup>9</sup>, currently President and Deputy President of Kenya. The cases were terminated in 2015 and 2016 respectively, due to lack of evidence, after years of political obstruction, lack of cooperation, intimidation against witnesses and State-led smear campaigns against civil society working towards accountability and seeking justice and reparations for the victims, referred to as “evil society representing foreign powers”<sup>10</sup>. This episode shaped the recent adversity of the Kenyan executive, on the one hand, against the ICC, clear in the several threats of withdrawal from the Rome Statute<sup>11</sup>, and, on the other hand, against national and international civil society.

**The 2013 general elections were again characterised by excessive use of force and killings by the police**<sup>12</sup>, though in a lesser form, due to a blanket ban on public gatherings<sup>13</sup> declared between the elections results and the court ruling on their legitimacy<sup>14</sup>. After the court verdict upholding Kenyatta’s victory, in the last four years his administration has been showing open hostility towards human rights defenders, considered as enemies of the State serving foreign interests to destabilize the country, and has constantly been trying to undermine their legitimate work through judicial and administrative harassment and restrictive legislation.

**As the general elections scheduled for August 8, 2017 approach, there is uncertainty about their potential impact on the situation of human rights defenders** and civil society organisations, who are experiencing a renewed profiling by the Kenyan authorities as foreign agents, including for interfering in issues of corruption and rule of law during the pre-election period. The role CSOs played during the ICC investigations and trials is still very present nowadays, as the President and his deputy are running for their second mandate. Moreover, rumours of proliferation of non-State ethnic-based armed groups in the counties at the personal service of several politicians, as well as the appointment in the coastal region, in the hands of the opposition, of a majority of senior police officers from the President and Deputy’s tribes, raise serious concerns on how the forthcoming electoral period is being prepared and on its potential repercussion on civil society<sup>15</sup>.

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8 Mr. Kenyatta was accused of being criminally responsible as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute for the crimes against humanity of: murder (Article 7(l)(a)); deportation or forcible transfer of population (Article 7(l)(d)); rape (Article 7(l)(g)); persecution (Article 7(l)(h)); and other inhumane acts (Article 7(l)(k)). See ICC Case sheet on Kenyatta: <https://www.icc-cpi.int/kenya/kenyatta/Documents/KenyattaEng.pdf>

9 Mr. Ruto was accused of being criminally responsible as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute for the crimes against humanity of murder (Article 7(l)(a)); deportation or forcible transfer of population (Article 7(l)(d)); and persecution (Article 7(l)(h)). See ICC Case sheet on Ruto: <https://www.icc-cpi.int/kenya/rutosang/Documents/RutoSangEng.pdf>

10 See <https://www.opendemocracy.net/openglobalrights/njonjo-mue/icc-mustn%E2%80%99t-give-up-in-kenya>. See also the article written by James Kimalel on the *Daily Nation* entitled “Foreign interests funding civil society to compromise Kenya’s sovereignty”, March 18, 2013 at <http://www.nation.co.ke/oped/Opinion/440808-1723738-3185ff/index.html> and the reply of the Swiss Ambassador, March 23, 2013: [http://www.the-star.co.ke/news/2013/03/23/he-who-pays-the-piper-why-would-one-accuse-civil-society-to-serve\\_c753195](http://www.the-star.co.ke/news/2013/03/23/he-who-pays-the-piper-why-would-one-accuse-civil-society-to-serve_c753195)

11 A bill to trigger the withdrawal of Kenya from the Rome Statute was published in late 2015; it went through the first reading or the formal introduction in the House in June 2016, but was not pushed through the second reading and was left to lapse on a technicality. In December 2016, the President Kenyatta reiterated his commitment to pull the country out of the ICC.

12 In the wake of demonstrations against the court decision to uphold President Kenyatta’s victory, the police shot and killed at least five people and wounded at least another twenty-four.

13 See Joint Letter of Allegation of the UN Special Rapporteurs on the Promotion and Protection of the Right to Freedom of Opinion and Expression, on the Rights to Freedom of Peaceful Assembly and of Association and on the Situation of Human Rights Defenders in their Communication to the Government, March 28, 2013: [https://spdb.ohchr.org/hrdb/24th/public\\_-\\_AL\\_Kenya\\_28.03.13\\_\(1.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Kenya_28.03.13_(1.2013).pdf)

14 After the presidential poll results, a petition challenging Kenyatta’s victory was filed before the Supreme Court for alleged electoral fraud.

15 This information was provided to the mission during interviews with coastal human rights organisations.

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### III. LEGAL FRAMEWORK FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Kenyan civil society successfully campaigned for the inclusion of a clear legal framework on fundamental freedoms and rights into the Constitution adopted in 2010. Subsequently, Kenya adopted a Bill of Rights with extensive guarantees encompassing civil and political rights, as well as basic social and economic rights. However, despite such an undoubtedly progressive constitutional framework, the implementation and fulfilment of those rights are nonetheless very often undermined by the inadequacy of the legislation, too often not in line with the fundamental principles and values enshrined in the Constitution and Bill of Rights.

#### 1. The 2010 Constitution<sup>16</sup>

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The 2010 Constitution of Kenya is a hallmark of several years of struggle by human rights defenders and CSOs to entrench a culture of human rights in Kenya, including freedoms of peaceful assembly, association and expression<sup>17</sup>.

Significantly, within the new Constitution, Kenya adopted a monist approach in dealing with international treaties and law, committing that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya<sup>18</sup>. In this regard, Kenya ratified eight out of the nine main United Nations (UN) human rights treaties<sup>19</sup>, all of which create obligations that the 2010 Constitution domesticated. Within the regional setting, Kenya has also ratified the African Charter on Human and Peoples’ Rights (African Charter).

The Constitution enshrines several human rights provisions in Chapter Four – “**Bill of Rights**”, some of which include, among others, the right to information and to freedoms of expression, association and assembly:

Article 33(1)(a) on Freedom of Expression: “Every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas”;  
Article 34(1) on Freedom of the Media: “Freedom and independence of electronic, print and all other types of media is guaranteed [...]”;  
Article 35(1)(b) on Access to Information: “Every citizen has the right of access to (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom”;  
Article 36(1) on Freedom of Association: “Every person has a right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind”;  
Article 37 on Assembly, demonstration, picketing and petition: “Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities”.

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16 See the full text of the Constitution here: <https://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf>

17 The history of Kenya’s Constitutional reforms is well captured in the book written by PLO Lumumba and Luis Francheshi, *The Constitution of Kenya, 2010 – An introductory commentary*, Strathmore University Press, 2014.

18 Article 2(6) as read with Article 2(5) of the Kenya Constitution 2010.

19 ICCPR (International Covenant on Civil and Political Rights); CESCR (International Covenant on Social, Economic and Cultural Rights); CAT (Convention against Torture and other Cruel Inhuman or Degrading treatment or punishment); CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women); CERD (Convention on the Elimination of All Forms of Racial Discrimination); CRC (Convention on the Rights of the Child) and its optional protocol CRC-OP-AC; CRPD (Convention on the Rights of Persons with Disabilities). See: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN)

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Article 59 of the 2010 Constitution also established the **Kenya National Commission for Human Rights** (KNCHR), an independent national human rights institution in line with the Paris Principles<sup>20</sup>, to ensure the protection and promotion of human rights amongst all citizens as important national values under the new framework. Under Article 59(2), the KNCHR has the mandate of monitoring, reporting, receiving complaints and investigating human rights violations in all spheres of life in the country, including national security field, as well as making recommendations to improve the functioning of State organs<sup>21</sup>.

The KNCHR is a strong, independent and effective human rights institution, which provides periodic national human rights reports and cooperates closely with Kenyan civil society, including by assisting criminalised human rights defenders in public interest litigations and following up on harassment cases against them. Moreover, to address the lack of a national legal framework for the protection and support of human rights defenders<sup>22</sup>, which is seen by several civil society organisations as a crucial deficiency since it is the State's duty to protect its citizens and not the one of civil society to fill the State's protection gaps, the KNCHR drafted a Human Rights Defenders Policy and Action Plan, which is currently under revision by the Protection Working Group, a group of national and international NGOs led by the NCHRD-K, and is still receiving inputs from different stakeholders. The final version of the policy document is intended to be presented as a draft proposal to the executive.

Yet, despite the very important work it carries out, the KNCHR is not currently working at its full potential, due to the fact that two commissioners had still not been appointed as of April 2016 due to lack of political will, which clearly undermines the promptness and full effectiveness of its institutional work and creates a backlog of accumulated work.

Moreover, the 2010 Constitution put emphasis on the issue of police accountability by giving input to significant reforms of the sector. In Chapter Fourteen – “National Security”, Part Four – The National Police Service”, it established that the overall commander of the National Police Service (NPS) is the Inspector General of Police (IGP), in charge of the two arms of the police, the Kenya Police Service (KPS) and the Administration Police Service (APS)<sup>23</sup>. The Constitution gives the IGP operational independence without any political interference. An independent commission, the National Police Service Commission (NPSC), was also created under the Constitution with the mandate to prevent political interferences and manage recruitment, promotions, transfers and disciplinary sanctions of police.

As mentioned before, while the 2010 Constitution is a very progressive document, it is seriously undermined by significant contradictions existing between the principles and values enshrined in constitutional provisions and a series of laws.

## **2. Penal Code, Chapter 63 Laws of Kenya (last revision 2014)<sup>24</sup>**

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Despite constitutionally recognised rights and freedoms, such as the right to peaceful assembly, **a litany of offences is still available under the Penal Code that can be used to prosecute human rights defenders and civil society organisations** and force them to

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20 See: <http://www.knchr.org/Aboutus/Establishment.aspx>

21 The mandate and functions of the KNCHR are regulated into detail in the Kenya National Commission on Human Rights Act, 2011.

22 It has to be noted that the Victims Protection Act and the recently enacted Legal Aid Act could help human rights defenders at risk, but are not specifically aimed to address harassment against human rights defenders.

23 The respective roles of the KPS and the APS are established in Part III (Section 24) and Part IV (Section 27) of the National Police Service Act 2011. Apart from the general police duties, such as to preserve peace, maintain law and order and apprehend offenders, the KPS is mandated to investigate crimes, collect criminal intelligence and prevent crimes. On the other hand, the APS' duties include to provide border control and border security, provide protection of Government property, vital installations and strategic points, as well as to coordinate and complement Government agencies in conflict management and peace building.

24 See the full text here: <http://docplayer.net/12445599-Penal-code-chapter-63-laws-of-kenya.html>

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attend regular court hearings. Indeed, the Penal Code enshrines, among others, possible charges of "treason" (Section 40), "unlawful assembly and riot" (Section 78-80), "rioting after proclamation" (Section 83), "offensive conduct conducive to breaches of the peace" (Section 94) and "threatening breach of the peace or violence" (Section 95). Other such offences in the Code include "incitement to violence and disobedience of the law" (Section 96), "wrongfully inducing a boycott" (Section 98), "disobedience of lawful orders" (Section 131) and "undermining authority of a public officer" (Section 132). As detailed below under Section V.1, the abuse of these offences to crack down on the fundamental freedoms of civil society actors is in breach of the constitutional Bill of Rights that protect freedoms of assembly and association.

Moreover, political criticism can be censored under Section 77 of the Penal Code on "subversive activities", as well as through Section 52 on "power to prohibit publications" in the interest of public order or security, and under Section 194 on "libel", which bans unlawful publication of any defamatory matter concerning another person. Such provisions constitute a serious interference with constitutional rights to access information and freedom of expression, and undermines the role of the media to practice their profession without fear, violating Article 9 of the African Charter, as noted in the African Commission on Human and Peoples' Rights (ACHPR) Resolution 169/2010<sup>25</sup>. In the same resolution, the ACHPR required States parties to the African Charter, among which Kenya, to repeal criminal defamation laws or insult laws that impede freedom of speech, and to adhere to the provisions of freedom of expression.

In a ground-breaking ruling, on February 6, 2017, the **High Court declared Section 194 of the Penal Code unconstitutional** since it violates the right to freedom of expression as guaranteed under Article 33 of the 2010 Constitution. However, the abuse of such criminal provisions to silence critical voices, including human rights defenders, and to escape public scrutiny has been well documented in the past years, as detailed under Section V.1 below. Moreover, the National Police, which bear the primary responsibility in the enforcement of the Penal Code, too often add to the restrictions placed on the citizens' enjoyment of their fundamental rights.

### **3. National Police Service Act<sup>26</sup> and Independent Policing Oversight Act<sup>27</sup>, 2011**

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At the end of 2009, the National Task Force on Police Reforms recommended making the Police more professional, accountable and human rights focused. The following year, the promulgation of the new Kenyan Constitution paved the way for the creation of the **National Police Service (NPS)** and for a **structural reform of the whole police system**. The National Police Service Act, which was adopted in 2011, by the Parliament in order to fulfil the constitutional arrangements, pledged the departure from the past, when police were seen as a "force" rather than a "service"<sup>28</sup>, in an aspiration to make the police more professional, people-oriented and accountable. In order to regulate what was already foreseen in the 2010 Constitution, the National Police Service Act 2011 established that the police are placed under a single hierarchy led by an IGP with authority over Kenya's two police services, the APS and the KPS. The two services, in turn, each have a Deputy Inspector General (DIG) reporting to the IGP. Moreover, the law gave the National Police Service Commission (NPSC) the responsibility and authority over recruitment, staffing, and posting operation of all police officers, as well as the responsibility to protect the rights and liberties of the service officers. The NPSC is also responsible for the development of administrative instruments such as manuals, the Police Code of Conduct and the standing orders necessary for clear operational functions and obligations of the police. However, there is a clear competition

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25 See the full text here: <http://www.achpr.org/sessions/48th/resolutions/169/>

26 See the full text here: <http://www.cickenya.org/index.php/legislation/acts/item/238-the-national-police-service-act-2011>

27 See the full text here: <http://www.refworld.org/docid/544fa69e4.html>

28 See Kenya Police Service Delivery Charter, 2015.

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between the IGP, whose statutory independence is tacitly consumed by the fact that it is a direct presidential appointment, and the NPSC, more and more relegated to an irrelevant and silent role. Such rivalry places decision making in jeopardy, and is a further element undermining both the independence and effectiveness of the police.

Moreover, in the same year the Independent Policing Oversight Act 2011, which established the **Independent Policing Oversight Authority (IPOA)**, was enacted. This was seen as a significant step towards promoting police accountability and enhancing access to justice because of the civilian oversight mandate it held over the National Police Service (NPS). IPOA was mandated to independently investigate allegations of police misconduct, specifically involving deaths or other serious injuries allegedly caused by a member of the police, in order to prevent excessive use of force and extrajudicial killings; inspect police premises; monitor and investigate policing operations; promote police accountability to the public; and provide independent oversight of internal disciplinary processes and complaints handled by the police. However, as of now, IPOA has not extended substantively its presence beyond the capital city in Nairobi, which undermines its outreach in other counties. At the same time, it faces acute financial and human resources constraints.

Besides the establishment of the IPOA, Section 87 of the National Police Service Act 2011 created an **Internal Affairs Unit (IAU)** within the NPS, mandated with complementary investigative powers with respect to IPOA to deal with other human rights violations committed by the police and with public complaints against the police. However, the IAU is not only under-capacitated, lacking the basic necessary resources, such as an adequate infrastructure and means to work, and inadequately staffed, but also it lacks the independence needed to properly monitor the NPS. As a result, six years after its establishment, its effectiveness is still undermined by institutional inertia.

Although considerable work has been done for the transformation of the NPS into a public service institution, subjecting itself to independent scrutiny and accountability, recent reports by national and international organisations show the high prevalence of corruption within NPS<sup>29</sup>. Moreover, **police officers are reportedly responsible for many human rights violations in Kenya**, including in particular acts of torture and ill-treatment<sup>30</sup> towards the civilian population, excessive use of force during crowd-control and security operations as well as abusive criminal complaints against human rights defenders as detailed below under Sections IV.1 and V.1.

**Six years after the commencement of the police reforms, an increased commitment is much needed to bolster the security sector reforms**, which seem now to be dragging back. Beyond policies and guidelines complying with the constitutional thresholds, the implementation gap can only be filled with more resources and a clear political will.

#### 4. From the NGO Coordination Act 1990<sup>31</sup> to the Public Benefit Organisations Act 2013<sup>32</sup>: a missed opportunity

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The NGOs sector has been regulated by the NGO Coordination Act since 1990. The Act provides "for the registration and co-ordination of Non-Governmental Organisations in Kenya" and established the **NGO Coordination Board (NGO Board)**, which in turn is vested with authority to facilitate and coordinate the work of NGOs in Kenya, including their registration. In this

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29 See Transparency International Kenya Report, *Kenya Police Service Satisfaction Survey and Needs Analysis Report, 2016*, 2016, available at: <http://www.tikenya.org/images/downloads/Police%20Report%20Survey%202016.pdf>

30 According to the Independent Medico-Legal Unit (IMLU), almost 75% of the torture perpetrators are National Police Service officers (61,4% KPS officers and 13% AP officers). See IMLU Factsheet, *National Torture Prevalence Survey, 2016* available at: <http://www.imlu.org/2011-06-30-23-44-4/2015-08-28-09-08-23/reports/summary/2-reports/464-summary-of-the-national-prevalence-torture-survey-2016.html>

31 See the full text here: <http://www.icnl.org/research/library/files/Kenya/coord2.pdf>

32 See the full text here: <http://pboact.or.ke/resources/documents/category/3-legislation>

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regard, the Board may refuse to register an organisation without being legally required to give the applicant an explanation, and may cancel or suspend a certificate, where it is satisfied that the organisation has violated its conditions of operation, with no specific timeframe set for it. This prevents organisations from being able to legally work since registration is compulsory. Several provisions in the law are extremely vague and ambiguous, giving wide discretionary power to the NGO Board, which sometimes arbitrarily abuses its mandate, either for repressive reasons or as a method of general deterrence. The NGO Board is also mandated to advise the Government on the activities of the NGOs and monitor their role, since the Kenya NGO Coordination Act requires organisations to align their activities with the State's development policies and to comply with "the national interest". Moreover, the NGO Coordination Act also established an NGO Council, to which registered NGOs are required to apply for membership, and should represent the interests of its members.

In the aftermath of the promulgation of the 2010 Constitution, which witnessed a renewed public participation into governance issues, CSOs started advocating for the introduction of a voluntary self-regulation model for the non-governmental sector to replace the too restrictive NGO Coordination Act. A single agency bringing together several international and local CSOs in Kenya, under the aegis of the CSO Reference Group, spearheaded the development and support of the new enabling legal, regulatory and institutional framework for the sector involved in public benefit work. After years of broad multi-stakeholder consultative process, dating as far back as 2009, the Parliament approved the Public Benefits Organisations Act (PBO Act), which was signed into law on January 14, 2013 by the then President Mwai Kibaki. However, **more than four years after its enactment, and following the rise to power of the Kenyatta administration, the PBO Act 2013 has still not yet been implemented, while several attempts have been made to introduce new restrictive amendments<sup>33</sup> prior to its official commencement.**

The PBO Act 2013 aims at providing an enabling environment for the work of civil society, ensuring, on the one hand, good governance by the CSOs, while protecting civil society activity on the other. Moreover it has a clearer and more streamlined regulatory and institutional framework for the PBOs to be registered and to operate. Previously, various laws including the NGO Coordination Act of 1990, the Companies Act Cap 486 (for Companies Limited by Guarantee), Societies Act CAP 108, Trustee Perpetual Succession Act CAP 164, and Trustees Act CAP 167 provided the main avenues for registration of CSOs in Kenya. In the PBO Act, some of the discrepancies on registration, coordination, compliance and accountability issues of CSOs are addressed. Furthermore, it solves the main shortcomings of the NGO Coordination Act, both in terms of clarity of registration criteria and timelines for processing applications (Sections 6-13), and of limitation of powers for the new monitoring body, the PBO Regulatory Authority (PBO Authority), which can cancel or suspend registration of a PBO only under specific instances and following clear procedures (Sections 18-19). Finally, the PBO Act also addresses regulatory institutional challenges presented by the country's nascent constitutional framework of devolution and explicitly presents effective mobilisation of the CSOs towards realisation of their association rights enshrined in the constitution.

Throughout the years, there have been attempts by several CSOs to advocate for the commencement of the PBO Act 2013, through proposed amendments to the Act<sup>34</sup> and Public Interest Litigations<sup>35</sup>. On September 9, 2016, the Cabinet Secretary for Devolution and Planning, Mr. Mwangi Kiunjuri, under whose Ministry the regulation of the non-governmental sector was falling until then, gave notice to commence the PBO Act, and on October 19, he

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33 According to the Convener of the Civil Society Reference Group interviewed by the mission, as of 2014, a total of 54 amendments had been tabled.

34 In April 2016, several CSOs, supported by Member of Parliament Mr. Agostinho Neto, member of the Parliamentary Caucus for Human Rights, tabled the PBO (Amendment) Bill 2016, proposing to eliminate the discretion given to the Cabinet Secretary of the Ministry for Devolution and Planning regarding setting a date for the commencement of the PBO Act. The Bill passed the first and second reading in April and August 2016 respectively, and is waiting for the third reading.

35 Trusted Society Alliance of Human Rights, a Nakuru based organisation, filed a Petition on the Commencement of the PBO Act to oblige the Cabinet Secretary of the Ministry of Devolution and Planning to commence the implementation of the Act.

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dissolved the NGO Board, sending its Executive Director to compulsory leave. However, the NGO Board obstructed both decisions: first, by joining a suit opposing the commencement notice<sup>36</sup> and, secondly, by successfully seeking in court its Director's reinstatement, due to procedural breaches. Moreover, on October 6, 2016, an affidavit with allegations of bribery and abuse of office were lodged to the Ethics and Anti-Corruption Commission (EACC), alleging that the Cabinet Secretary had received money by some CSOs to commence the Act without amendments, with the clear aim of discrediting his integrity and the one of the accused NGOs<sup>37</sup>. Even after a High Court ruling on October 31, 2016 following a petition to commence the Act filed by a human rights organisation in April 2016<sup>38</sup>, ordering that after more than 1,000 days the PBO Act should be operationalised within the following 14 days, no further development followed. Instead, the control of the non-governmental sector was moved under portfolio of the Ministry of Interior, rendering ineffective the Court order, which was directed to the Ministry of Devolution and Planning, and indicating increased securitization of the control of the sector. Moreover, this gave a clear signal of discontinuity with the willingness showed by the Ministry of Devolution and Planning to commence the PBO Act. Due to the failure to comply with the court directive, the same aforementioned human rights organisation filed a Contempt of Court Procedures before the High Court in Nairobi<sup>39</sup>. During the first hearing on March 15, 2017, the State counsel representing the three respondents declared that they had not received the affidavit and therefore were not able to file their response. On the same day, upon production of evidence by the lawyer representing the applicants, the Judge granted the State an additional delay of one week to respond. Nevertheless, at the hearing set for March 23, the State counsel had not yet filed any response, which forced the Judge to postpone the case until May 23, 2017.

As a consequence, **with the delay of the entry into force of the PBO Act of 2013, which would have created a more enabling legal, regulatory and institutional environment for civil society, the current administration takes advantage of the more restrictive NGO Coordination Act of 1990, still in place.**

**Moreover, not only the PBO Act remains non-functional, but fears of administrative harassments of NGOs have only become more prominent with county authorities being given powers to monitor activities of the groups in the regions and the elections coming up in the next months.**

## **5. Prevention of Terrorism Act 2012<sup>40</sup> and Security Laws (Amendment) Act No. 19 2014<sup>41</sup>**

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In the context of the war against terrorism, especially after the attacks at Westgate Shopping Mall on September 23, 2013 and at Garissa University on April 2, 2015 by militants of the fundamentalist group *Al-Shabaab*, a multi-agency security approach has directed the State response to terrorism. However, even before that, in 2012, Kenya adopted a specific law dealing with the detection and prevention of suspected terrorist activities in the country, known as the **Prevention of Terrorism Act (PoTA)**.

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36 This case became stale with the High Court judgment on the Trusted Societies delivered on October 31, 2016 (see below herein this same Section).

37 The three NGOs accused of having allegedly bribed the Ministry with 20,000,000 KSH (approximately 182,600 EUR), namely the Kenya Human Rights Commission (KHRC), the Society for International Development and Trocaire International, dismissed the accusation as fabricated. It has also to be noted that the only signatory of the affidavit, Ms. Delphine Christopher Bram, may be a fake identity and not at all exist, as she is not known among the Kenyan civil society and even the EACC failed to trace her.

38 See above.

39 Once again, the Trusted Society Alliance of Human Rights filed a Contempt of Court Procedures against the Cabinet Secretary for Devolution and Planning, the Ministry of Interior and the Attorney General in the Nairobi High Court, before Justice Mativo.

40 See the full text here: <http://www.icnl.org/research/library/files/Kenya/PreventionofTerrorism2012.pdf>

41 See the full text here: <https://kenopalo.files.wordpress.com/2014/12/the-security-laws.pdf>



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The nature of the law and response to terrorism in the country has encouraged security enforcement agencies to view terrorism as an ominous, unprecedented and exceptional challenge that should be overpowered at all costs. This notion has allowed the undermining of human rights and personal freedoms in the interest of security and protection from terrorism and has opened the doors for widespread human rights violations by the Kenyan security forces, including patterns of extrajudicial killings and enforced disappearances<sup>42</sup>. This has particularly affected some areas of the country, especially in the Muslim dominated areas<sup>43</sup> where security crackdowns and surveillance have become a standard practice rather than an exception.

The PoTA established an Anti-Terrorism Centre and a special **Anti-Terrorism Police Unit** (ATPU), with authority to arrest any person who is reasonably suspected to have committed or is committing offences under the Act. The Act envisages the limitation of fundamental rights of accused persons under the Act, for the purpose of investigating terrorist acts. However, if some of the general provisions seem to be in accordance with international standards, others are clearly open for abuse. For instance, although according to Kenyan law arrested suspects are not to be held for more than 24 hours without formalized charges, under the PoTA such period of detention while under investigation can be extended through a Court order up to 90 days (Section 33(10)) and be applicable to anyone suspected of terrorist acts. However, the possible broad interpretation to which the vague definitions of "terrorist act" and "terrorist group" are subjected is a worrying source of abuse of the legislation to silence, criminalise and delegitimize human rights defenders and organisations (see Section IV.1 below). Moreover, according to the "**specified entities order**" (Section 3), entities that are acting "in association with" a terrorist group, without specifying the meaning of this term, are subjected to sanctions enshrined in Section 46 on "Refusal of applications for registration, and the revocation of registration, of associations linked to terrorist groups". This section has been used against human rights organisations in order to restrict their freedom of association and undermine their ability to work (see Section VI.1 below).

Moreover, on December 10, 2014, the Government enacted the **Security Laws (Amendment) Act (SLAA) No 19** to amend the provisions of at least 22 pieces of legislation concerned with matters of national security to strengthen the framework of the war against terrorism<sup>44</sup>. These amendments precipitated fears that they would extensively degrade human rights in the country, specifically due to the vagueness of some provisions with overly broad offences incapable of precise or objective legal definition and understanding, in breach of the principle of legality<sup>45</sup>. Several human rights CSOs together with the Kenya National Commission for Human Rights (KNCHR) challenged the conformity of some of the proposed amendments

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42 See Open Society Foundation and MUHURI Joint Report, 'We're Tired of Taking You to the Court!': *Human Rights Abuses by Kenya's Anti-Terrorism Police Unit*, 2013 at <https://www.opensocietyfoundations.org/sites/default/files/human-rights-abuses-by-kenya-atpu-20140220.pdf>. See also KNHRC's Preliminary Report, *The error of fighting terror with terror*, September 2015: <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf>, and Human Rights Watch Report, *Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya*, 2016: <https://www.hrw.org/report/2016/07/19/deaths-and-disappearances/abuses-counterterrorism-operations-nairobi-and>

43 Affected regions include Coastal Kenyan counties of Mombasa, Lamu, Malindi as well as the counties found in Northern Kenya and previously affected by terrorist attacks such as Garissa, Wajir and Mandera.

44 Namely the Public Order Act (Cap 56), the Penal Code (Cap 63), the Extradition (Contagious and Foreign Countries) Act (Cap 76), the Criminal Procedure Code (Cap 75), the Registration of Persons Act (Cap 107), the Evidence Act (Cap 80), the Prisons Act (Cap 90), the Firearms Act (Cap 114), the Radiation Protection Act (Cap 243), the Rent Restriction Act (Cap 296), the Kenya Airports Authority Act (Cap 395), the Traffic Act (Cap 403), the Investment Promotion Act (Cap 485B), the Labour Institutions Act of 2007, the National Transport Safety Authority Act, Refugee Act No. 13 of 2006, the National Intelligence Service Act No. 28 of 2012, the Prevention of Terrorism Act No. 30 of 2012, the Kenya Citizenship and Immigration Act (Cap 172), the National Police Service Act (Cap 84) and the Civil Aviation Act No. 21 of 2013.

45 See Joint Communication to the Government of the United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Chair-Rapporteur of the Working Group on Arbitrary Detention, Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Special Rapporteur on the Situation of Human Rights Defenders and Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, December 18, 2014: [https://spdb.ohchr.org/hrdb/29th/Public\\_-\\_OL\\_Kenya\\_18.12.14\\_\(7.2014\).pdf](https://spdb.ohchr.org/hrdb/29th/Public_-_OL_Kenya_18.12.14_(7.2014).pdf)

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with the Bill of Rights and Constitution before the Nairobi Constitutional and Human Rights Division of the High Court in Nairobi<sup>46</sup>. Among the contested provisions, there are, restrictions to the constitutional right to bail (Section 20) in case the Director of Public Prosecution (DPP) wants to appeal it, as well as openings for arbitrary arrest and detention, with the extension for terrorism suspects of the lawful period of detention without charges to up to 90 days (Section 18) and remand for up to 360 days pending trial (Section 77). Moreover, there are also limitations to the right to privacy due to the possibility for national security organs to intercept communication for the purpose of detecting, deterring and disrupting terrorism (Section 69). This provision could easily lead to arbitrary mass surveillance without the requirement of reasonable suspicion or judicial oversight. The SLAA also restricts freedoms of assembly (Section 4), expression and access to information, with the criminalisation of publication of 'harmful' information, specifically concerning certain information or photographs related to terrorism acts (Section 15), which could only be published following the authorisation of the NPS, placing restraint on media freedom. This legislation has resulted in widespread and systematic human rights violations including arbitrary arrests and detentions, torture, killings and disappearances<sup>47</sup>.

## 6. Kenya Information and Communication Act (last revision 2013)<sup>48</sup> and Access to Information Act 2016<sup>49</sup>

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For the past years, access to information has been regulated by the **Kenya Information and Communication Act** (KICA), among others. The introduction of Section 29 within the KICA, after a review of the law in 2013, which criminalises the publication of certain information in vague and overbroad terms has allowed for State prosecution of social media users in violation of the right to freedom of expression. Indeed, under such provision, anyone posting "a message or other matter that is grossly offensive or of an indecent, obscene or menacing character" or "false for the purpose of causing annoyance, inconvenience or needless anxiety" could be committing such an offence.

Several bloggers were prosecuted under this provision until 2015 (see Section VII.4 below), when human rights defenders brought their concerns to the High Court<sup>50</sup>. As a result, in May 2016 **Section 29 of the KICA was declared unconstitutional**, due to its vagueness, broadness and lack of certainty on what constitutes a criminal offence.

Moreover, in line with Article 35 of the Constitution, on August 31, 2016, the **Access to Information Act 2016** was enacted and gives effect to such constitutional provision. It imposes increased transparency to public entities, by penalising the withholding of information. However, it appears to exempt cabinet deliberations and records from disclosure. It is crucial that the regulations that will ensure the implementation of the Act will correct these deficiencies. The good implementation of such legislation will open a critical path in the work of human rights defenders since access to information conditions the full exercise of freedom of expression and is necessary for a democratic and transparent society.

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46 See Constitutional Petition No. 628 of 2014 (consolidated with Petition No. 630 of 2014 and Petition No. 12 of 2015) filed by KNCHR and 2 others against the Attorney General and another. In the 231 pages judgment delivered in February 2015, the High Court struck down a number of suggested amendments to various acts that significantly derogated from the constitutional rights, while upholding some of the impugned amendments where it found that adequate due process and constitutional guarantees could be exercised before the limitation of such rights.

47 Extrajudicial killings have often spiraled during security operations such as when law enforcement officers countered the Sabot Land Defense Forces (SLDF), a rebel group that violently opposed government land allocations in the region around Mt. Elgon, Western Kenya, or the *Mungiki* sect. The 'shoot to kill' policy adopted by the police against the *Mungiki* has caused hundreds of documented cases of deaths and disappearances. However, often such the fight against the *Mungiki* is used to legitimize larger scale of extrajudicial killings, not necessarily linked with the group.

48 See the full text here: [http://kenyalaw.org/ki/fileadmin/pdfdownloads/AmendmentActs/2013/KenyaInformationandCommunications\\_Amendment\\_Act2013.pdf](http://kenyalaw.org/ki/fileadmin/pdfdownloads/AmendmentActs/2013/KenyaInformationandCommunications_Amendment_Act2013.pdf)

49 See the full text here: <http://www.africafoicentre.org/index.php/foi-laws/218-kenya-access-to-information-act-2016/file>

50 See Petition No. 149/2015, *Geoffrey Andare vs Attorney General & 2 others*.

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## IV. EXCESSIVE USE OF FORCE AND HARASSMENT BY THE POLICE AGAINST HUMAN RIGHTS DEFENDERS IN IMPUNITY

The lack of human rights based policing has been historically a running thread in the country's police system. As reported, the trend of using the police to contain public protests was traced back to the colonial administration that modelled the police to align completely to the executive<sup>51</sup>.

This became evident in the aftermath of the 2007-2008 post-election violence, as the United Nations (UN) Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions strongly condemned the **widespread excessive use of force by the police** after his official visit to the country<sup>52</sup>. The Rapporteur concluded that police frequently executed individuals and that a climate of generalised impunity prevailed in the country. He found extremely worrisome the existence of police death squads operating under the orders of senior police officials and charged with eliminating criminal suspects. Moreover, the Rapporteur denounced the fact that several human rights defenders who testified during the mission were threatened and harassed by Government officials and members of security forces, and that two among them were killed<sup>53</sup> only two weeks after the mission, in an extreme attempt to **silence any criticism and perpetuate impunity**.

Afterwards, the Commission on Investigations of the Post-Election Violence in Kenya (CIPEV), also known as the Waki Commission, established rather shockingly that, police were responsible for 405 deaths during the 2007-2008 post-election violence (about 36% of all post-election deaths). It also found that the police "lacked discipline and impartiality, and used unjustified force in responding to post-election demonstrations and violence". Nevertheless, no serious prosecution of the police and officials responsible for the deaths took place.

Subsequently, Kenyan authorities agreed to set up various mechanisms to unearth and hold to account the perpetrators of the post-election violence. Local civil society groups working under the banner of Kenyans for Peace, Truth and Justice (KPTJ)<sup>54</sup> relentlessly advocated for the adoption of a transitional justice framework that would address the root causes of the political crises in the country and hold accountable the sponsors of violence. The political leadership similarly favoured a mechanism to punish those who were found to bear the greatest responsibility for the violence in line with the Kenya National Dialogue and Reconciliation process (KNDR) encompassing the recommendations of the CIPEV and later, the Truth Justice and Reconciliation Commission (TJRC)<sup>55</sup>.

**However, ten years later, the extrajudicial killings of civilians by police and security forces in Kenya remains a key issue of concern, with a 7% increase in 2016 compared to the**

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51 See Commonwealth Human Rights Initiative (CHRI) and KHRC Joint Report, *The Police, The People, The Politics: Police Accountability in Kenya*, 2006.

52 See UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum - Mission to Kenya*, UN Document A/HRC/11/2/Add.6, May 26, 2009.

53 See case story in Section IV.2 below.

54 Convened in the aftermath of the post election violence in 2008, KPTJ is a coalition of over 30 Kenyan and East African human rights and governance organisations. They include *inter alia* KNCHR, KHRC, the International Commission of Jurists (ICJ-Kenya), IMLU, the Africa Centre for Open Governance (AfriCOG), the Centre for Multiparty Democracy (CMD), the Centre for Law and Research International (CLARION), the Federation of Women Lawyers (FIDA-Kenya) and the Gay & Lesbian Coalition of Kenya (GALCK).

55 The TJRC report shows that extrajudicial killings have been the norm rather than the exception in Kenya and formulated a series of recommendations for the Government to implement on this matter.

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**previous year**<sup>56</sup>. Summary executions of criminal suspects and enforced disappearances of suspected terrorists are becoming **systemic and legitimised** in Kenya's security approach, also thanks to the widespread impunity and corruption.

## 1. Peaceful demonstrations disrupted by the police with violence

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As already noted (see Section III.1 above), Article 37 of the 2010 Constitution guarantees the right to peaceful demonstrations. Moreover, the **Public Order Act** regulates the organisation of public marches and demonstrations, requiring in its Section 5(2) that the conveners of public meetings or processions notify in writing the regulating officer at least three days but not more than fourteen days in advance, for purposes of ensuring orderliness of the meeting. This 'notification regime' to assemble has replaced the 'permit system', in order to increase freedom of assembly, following a recommendation to reform the Public Order Act made by the Kenyan Inter-Parties Parliamentary Group (IPPG). However, too often NPS officers still believe that they are authorized by law to license public gatherings and therefore disrupt them for not being licensed.

Despite the police reform and the constitutional principles in force, which should be respected by national security organs under Article 238<sup>57</sup>, **human rights compliance in police activities is still low, and the exercise of the right to peaceful assembly and public demonstration continues to be met with lethal force**. However, Section 14(1) of the Public Order Act outlines several restrictions on use of force by the police and places the obligation of caution and reasonableness on the officers using it. A similar responsibility on conditions as to use of force as well as firearms is restated in the National Police Service Act 2011 and a dedicated chapter in the Force Standing Orders, a set of policing rules and regulations. In both, claiming that an officer is following orders of a superior cannot be considered as a lawful excuse exempting from responsibility. Despite the existence of internal "Rules of engagement regarding crowd control" and specific trainings on crowd control, disperse riotous mobs and handle public gatherings without the use of violence, peaceful notified demonstrations are routinely broken by the police using force to stop them. The police have serially beaten up protesters with batons and truncheons, fired tear gas or otherwise violently called off demonstrations, marches or rallies. This practice has always intensified during pre-electoral and post-electoral periods.

In such a context, it is feared that the country's **next general elections scheduled for August 8, 2017 may again be plagued by violence**. After the latest general elections in 2013, which took place within the new legal and institutional framework, widespread protests followed the court ruling that confirmed the victory of the current President Uhuru Kenyatta, and in Kisumu<sup>58</sup> clashes with the police ended with five people shot dead<sup>59</sup>. **Without effective implementation of the security sector reforms and the new crowd control methods, the disproportionately violent police response to peaceful demonstrations is expected to continue to cause serious wounds and deaths**. This is extremely worrisome in the current context of intensification of public demonstrations ahead of the 2017 elections<sup>60</sup>.

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56 On October 2, 2016, the leading local newspaper *Daily Nation* ran an Editorial asking the Government to put a stop to extrajudicial killings. Noting that, reflecting data provided by Amnesty International Kenya, more than 140 people had died at the hands of the police in 2015, it estimated that 122 people had been killed by police in the previous eight months. The frightening trend, the editorial argued, would occasion public protests against members of a force mandated to ensure the security of the citizens in the first place. See <http://www.nation.co.ke/oped/Editorial/stop-extrajudicial-killings-by-police/440804-3402764-8md0uu/>

57 The principles include compliance with the rule of law democracy, human rights and fundamental freedoms.

58 In the 2007-2008 context, according to the Waki Commission Report, 82 people were killed by the police in Kisumu.

59 See the chapter on "KENYA: Police Excesses in Kisumu, Kenya, as the citizens protest court ruling on the March 2013 General Elections", pages 38-43, in International Network of Civil Liberties Organizations (INCLC) Report: *"Take back the streets" repression and criminalization of protests around the world*, October 2013.

60 For instance, in May and June 2016, demonstrations across the country, especially in Kisumu, Siaya, Nairobi, Migori, Kakamega and Mombasa demanding reforms of the Independent Electoral and Boundaries Commission (IEBC) were met with brutal force by the police. Demonstrators were calling in particular strong demand for the resignation of current commissioners of the IEBC, which had been strongly contested following the announcements of the 2013 election results with the victory of Uhuru Kenyatta, who at that time was still under trial before the ICC. In Siaya and Kisumu, Western Kenya, three protesters were shot dead during the demonstrations of May 23, 2016. During protests held on May 23 and June 6 in the Nyanza region (Western Kenya) and on June 6 in Nairobi, the police repression resulted in at least five extrajudicial killings and 60 wounded among the peaceful demonstrators.

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Irresponsible and reckless crowd control approaches by the police are among the main causes of the human rights violations, injuries and killings during demonstrations. The indiscriminate use of tear gas on the public, which remains a very common practice within the police, constitutes a misuse of the weapons, and does not take into consideration the proportionality of the reaction, nor its detrimental health effects<sup>61</sup>. Nevertheless, bad practices are still extremely common as a result of insufficient training and regulations on crowd control weapons, a rapidly growing commercial weapons industry and finally the lack of accountability for the officers who commit abuses. Going towards another general election in the next few months, this trend questions the preparedness and tactics of the police in crowd control during public protests.

### **Police use tear gas against students protesting against grabbing of school playground in 2016**

On January 19, 2016, at least ten children were injured by police dispersing a demonstration to protest against the annexation by a private enterprise of the Lang'ata Road Primary School playground. Allegedly a powerful politician with interest in a hotel nearby was behind the land grab in a bid to expand the hotel parking.

As the school reopened for the new year, students and their parents found that the school playground had been fenced off and barricaded during the school break. The parents and school children, with the support of CSO leaders, moved to protest peacefully the illegal grabbing and claim back the land, but in the early morning, the local police surrounded the protesters and dispersed them violently. The police officers threw tear gas on the children, their parents and civil society activists accompanying them and involved the dog unit, with at least five dogs used in the confrontation. One child was immediately admitted for medical treatment in Kenyatta Hospital. Two human rights defenders were arrested during the demonstrations and charged with "incitement of violence".

The Government, through the National Land Commission, later confirmed that the land belonged to the school and took steps to restore its ownership.

### **Violent dispersal of anti-corruption demonstration in November 2016**

Following media reports on possible corruption scandals within the Ministry of Health and National Youth Service Program (NYS), on November 3, 2016, KHRC, co-organised with other civil society groups<sup>62</sup> a protest rally gathering around 500 people at Nairobi's Uhuru Park. The crowd intended to peacefully reach the Presidential Palace and give a petition<sup>63</sup> to the President, when the police abruptly and violently dispersed the demonstration, through firing tear gas and water canons. Moreover, some police officers were also filmed beating up unarmed protesters and journalists. At least ten protesters and journalists were injured, and 24 peaceful protesters were arbitrarily arrested, briefly held at the Central and Parliament police stations and released a few hours later without charges<sup>64</sup>.

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61 See also Physicians for Human Rights (PHR) and the Kenyan International Network for Civil Liberties Organisations (INCLO), Report, 2016, *"Lethal in Disguise- Health Consequences of Crowd Control Weapons"*, 2016: <http://www.khrc.or.ke/publications/113-lethal-in-disguise-health-consequences-of-crowd-control-weapons/file.html>

62 Namely PAWA 254, the Inter-Religious Council, Transparency International Kenya, Civil Society Reference Group, Sauti ya Wanjiku, Katiba Institute, among other partners.

63 The petition : <http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/567-petition-to-his-excellency-the-president-uhuru-kenyatta-for-expedient-and-decisive-action-against-grand-corruption.html>

64 See UN Special Rapporteurs on the Rights to Freedom of Peaceful Assembly and of Association, on the Promotion and Protection of the Right to Freedom of Opinion and Expression and on the Situation of Human Rights Defenders Joint Press Release, November 10, 2016, available here: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20850&LangID=E>

It has to be recalled that the year before, on December 9, 2015, a similar peaceful protest, led by human rights defender Mr. **Boniface Mwangi**, to give a petition to the President urging him to act firmly against corruption, was prevented. That time, the request made by the protesters to the authorities to hold a march ending in front of the President's official residence, was rejected without providing reasons<sup>65</sup>.

## 2. Threats, harassment and killings of defenders fighting impunity

Efforts to hold **accountable police and security forces or public officials for human rights violations** remain sensitive in Kenya and often at the origin of tensions between the Government and civil society, notably in the context of the ICC investigations and of an unfinished transitional justice agenda. Moreover, civil society is also concerned about police accountability in the framework of the fight against terrorism and the security agenda. Human rights defenders, especially those working on accountability and transitional justice issues, have been particularly targeted by attacks and other acts harassment for exposing some of these issues.

In this context, **police threats and harassment against human rights defenders aim at perpetuating corrupt practices and impunity, in an attempt to silence those who seek to bring the authorities under public scrutiny.**

### Assassination of Messrs. Oscar Kang'ara and John Paul Oulu in March 2009

On the evening of March 5, 2009, Messrs. **Oscar Kamau King'ara** and **John Paul Oulu**, respectively Chief Executive Officer and Advocacy Officer of the Oscar Foundation Free Legal Aid Clinic Kenya (OFFLACK), were shot and killed as they drove out of town. Their NGO had been documenting cases of enforced disappearances and extra-judicial killings. As the two were driving along the state house road, next to the University of Nairobi, a motor vehicle overtook them and slowed down, blocking their way while another one blocked their way from behind. Two men from the first car walked to their car and shot them through the window at point-blank range, killing them instantly. The killers then jumped into their car and sped away.

The organisation had worked boldly to raise awareness on the Mungiki sect<sup>66</sup> killings. In November 2007, OFFLACK reported that in the five years up to August 2007, Kenyan police had killed over 8,000 people in crackdowns against the Mungiki, with further 4,000 people still missing. Meanwhile, the KNCHR linked the police to the execution of 500 Mungiki over the previous five months. The police described the reports as fictitious.

In 2008, OFFLACK released a report on this case entitled *The veil of impunity – Who is guilty?*. OFFLACK also engaged on different occasions with the Parliament on the issue of extrajudicial killings. Moreover, both Messrs. King'ara and Oulu had met the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions during his country visit, two weeks before they were killed<sup>67</sup>. One day before the assassination

65 See *Amicus curiae* brief filed by the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Maina Kiai before the High Court in the case opened by Boniface Mwangi, May 2016: <http://freeassembly.net/news/kenya-amicus-brief/>

66 The Mungiki sect is a politico-religious group and a banned criminal organisation in Kenya.

67 The UN Special Rapporteur even mentions them in his country visit report. See UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum - Mission to Kenya*, UN Document A/HRC/11/2/Add.6, May 26, 2009.

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of the two human rights defenders, the Government Spokesman Dr. Alfred Mutua, at his weekly briefing, made public allegations according to which OFFLACK was a civil society front for Mungiki, and “[they were] going to deal with it”.

As it is generally the case with summary executions in the country, this incident was treated with callous denial of any State involvement and no prosecutions ever followed, with the assassination of the two human rights defenders remaining in impunity as of today.

Moreover, during the period of the **ICC investigations and prosecutions** of several Kenyan leaders, including the current President and his Deputy, a great number of civil society leaders and human rights defenders engaged in an open cooperation with the Office of the Prosecutor. As a result, the Kenyatta administration conducted a smear campaign blaming NGOs and human rights defenders for instigating crimes-against-humanity charges against him and others, and many hate blogs mushroomed, which had the goal to publicly identify the various ICC witnesses to expose them, putting their lives in great danger. **Many human rights defenders and other witnesses, whose names were mentioned in the media, were similarly intimidated, threatened, attacked and in some cases killed<sup>68</sup> or forced to flee into exile.**

Even after charges against Kenyatta were withdrawn and vacated concerning Ruto, threats and intimidations continued to be directed at CSOs cooperating with the ICC. At the last Assembly of States Parties (ASP) to the Rome Statute of the ICC, which took place in November 2016 in The Hague, participants in a side event on the protection of human rights defenders (with a particular focus on Kenya and Palestine) witnessed renewed and direct threats against a Kenyan human rights activist from a member of the Kenyan delegation. On November 24, 2016, the ASP adopted an *omnibus* resolution including a paragraph recognising for the first time the concrete dangers human rights defenders working on ICC issues are exposed to in their respective countries and in The Hague<sup>69</sup>.

#### **Threats against Mr. Maina Kiai under threat for his accountability work in 2013**

On September 20, 2013, Mr. **Maina Kiai**, former Chairman of the KNCHR at the time of the 2007-2008 post-election violence and at that time UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, issued a media briefing declaring he was targeted with intimidation and threats because of his suspected cooperation with the ICC. On this date, armed police officers stormed his family's rural house in Nyeri, accompanied with police dogs. They claimed they were there to protect the homestead against purported threats by the militia group Nyaribo Support Group, which would have allegedly threatened to burn the house down. The police had been seen several times around the homestead before this date and the police commander had visited Mr. Kiai's mother, without having notified anyone of any threats from any militia group. The secrecy around the police operation, and the way in which it was carried out, seems to suggest that this was rather aiming at silencing and instilling fear in Mr. Kiai and other human rights defenders. Indeed, these events followed the publication of a post on a blog that claimed that Mr. Kiai was one of the prosecution witnesses in the case against President Uhuru Kenyatta at the ICC.

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68 A clear example of a targeted attack towards an ICC witness is the enforced disappearance and extrajudicial killing of Mr. Meshack Yebei, in December 2014, before he was due to testify in the case against the Deputy President Ruto before the ICC. His widow is still nowadays facing surveillance, threats and violent attacks.

69 See Resolution ICC-ASP/15/Res.5, “Strengthening the International Criminal Court and the Assembly of States Parties”, ICC-ASP/15/20, November 24, 2016, page 37: “Concerned by the recent reports of threats and intimidation directed at some civil society organizations cooperating with the Court”.

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Mr. Kiai on occasions also indicated that he received direct threats and was followed by security agencies because of his human rights work. An email account of one of his colleagues was hacked and messages uploaded on the Internet. While he was its Chairman, the KNCHR conducted ground-breaking investigations into the 2007-2008 electoral violence and published a report on how it was planned, funded and executed<sup>70</sup>, which was published after Mr. Kiai's tenure had ended.

No investigation was carried out into the aforementioned events.

### **Assassination of human rights defender Hassan Guyo in 2013<sup>71</sup>**

In the evening of August 7, 2013, Mr. **Hassan Guyo**, founding member and Programmes Director at Strategies for Northern Development (SND)<sup>72</sup>, was shot dead by a military officer in Moyale (Marsabit County). After receiving reports of excessive use of force during a joint operation of the Kenya Defence Forces and the NPS in Moyale, including live bullets, against demonstrators to disperse the crowds<sup>73</sup>, Mr. Guyo arrived as a human rights observer to monitor and document the human rights violations occurring. While driving to meet the victims, he found the road blocked by army officers, therefore he stopped and stood near the barricade, when army officers started shooting against the crowd. He raised his hands showing he was unarmed and turned towards his motorcycle, when he was shot dead from behind. Reportedly army officers kept shooting even when a Kenyan Red Cross official arrived to provide medical assistance to Mr. Guyo. At Moyale General Hospital, the post mortem report indicated his cause of death as "chest and abdominal injuries due to a perforating single gunshot. There was also a major laceration of the left lobe of the liver tearing through the inferior and superior surfaces".

The inquest into the death was closed without pinpointing any responsibility, but agreed that a single gunshot had killed Guyo. The file was subsequently closed<sup>74</sup>.

### **Killing of human rights lawyer Peter Wanyama Wanyonyi in 2013<sup>75</sup>**

On September 17, 2013, shortly after midnight, in the town of Bungoma (Western Kenya), Mr. **Peter Wanyama Wanyonyi**, a human rights lawyer, was shot several times in the chest by unknown individuals as he was returning home from a meeting. He was assisting families of victims in documenting cases of enforced disappearances in the context of a joint security operation conducted by the military and the police against the Saboat Land Defence Force (SLDF) in 2008, known as the "Okoa Maisha" operation<sup>76</sup>. In

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70 See KNCHR Report, *On The Brink Of The Precipice: A Human Rights Account Of Kenya's Post-2007 Election Violence*, 2008, available here: [http://www.knchr.org/Portals/0/Reports/KNCHR\\_REPORT\\_ON\\_THE\\_BRINK\\_OF\\_THE\\_PRECIPE.pdf](http://www.knchr.org/Portals/0/Reports/KNCHR_REPORT_ON_THE_BRINK_OF_THE_PRECIPE.pdf)

71 See also the Joint Communication to the Government of Kenya by the UN Special Rapporteurs on the Promotion and Protection of the Right to Freedom of Opinion and Expression, on the Rights to Freedom of Peaceful Assembly and of Association, on the Situation of Human Rights Defenders and on Extrajudicial, Summary or Arbitrary Executions, September 4, 2013: [https://spdb.ohchr.org/hrdb/24th/public\\_-\\_AL\\_Kenya\\_04.09.13\\_\(4.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Kenya_04.09.13_(4.2013).pdf)

72 SND is an organisation that promotes human rights for women, children and refugees and also works on human trafficking issues in the region.

73 The demonstration was held in the town by residents to protest the suspension and arrest of a local chief.

74 Additional information in the Inquest Case No. 1/2014 in the Principal Magistrate's Court at Marsabit, DPP Marsabit V Hassan Ali Guyo.

75 See Joint Communication to the Government of Kenya by the Chair-Rapporteur of the UN Working Group on Enforced or Involuntary Disappearances and Special Rapporteurs on the Promotion and Protection of the Right to Freedom of Opinion and Expression, on the Rights to Freedom of Peaceful Assembly and of Association, on the Situation of Human Rights Defenders, on the Independence of Judges and Lawyers, and on Extrajudicial, Summary or Arbitrary Executions, September 26, 2013: [https://spdb.ohchr.org/hrdb/24th/public\\_-\\_UA\\_Kenya\\_26.09.13\\_\(5.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_UA_Kenya_26.09.13_(5.2013).pdf)

76 "Okoa Maisha" means "save life" in Kiswahili.



this framework, several of these cases of enforced disappearances were communicated to the UN Working Group on Enforced or Involuntary Disappearances (WGEID).

Mr. Peter Wanyama Wanyonyi's killing occurred in a climate of intimidation targeting anyone engaging with UN human rights mechanisms, in pursuit of accountability, justice and redress. Several families of victims of killings by the SLDF in the city of Bungoma and human rights defenders reported being also harassed and attacked by local authorities, including through summons for interrogation by the police regarding submissions made to the WGEID, as well as harassment and threats from their neighbours, for being linked to the SLDF. Many of them had to flee their homes in fear of reprisals.

No investigation was carried out into the murder and, as of today, the case remains unpunished.

**The most recent killing that pricked the conscience of the country**, once again bringing the issue on extrajudicial killings to light, was the murder in 2016 of Mr. **Willie Kimani**, a human rights lawyer who was abducted and killed alongside his client after leaving court, together with his cab driver. The police responsibility over the murder was initially denied, but both domestic and international pressure led to concerted police investigations. Indeed, the case provoked international outrage, making foreign newspapers' headlines, and mobilising international non-governmental as well as governmental organisations, including UN and ACHPR<sup>77</sup>, to urge Kenyan authorities to put in place a prompt, thorough and independent investigation. Moreover, at national level, the killing sparked protests actions against the excessive use of force by the police and the generalised impunity. The extrajudicial killing of Mr. Willie Kimani was also a trigger for the Observatory fact-finding mission to take place.

### **The murder of human rights lawyer Willie Kimani in June 2016**

Mr. **Willie Kimani**, a human rights lawyer based in Nairobi, specialized in representing indigent victims of police brutality and other police malpractices, worked with the International Justice Mission (IJM) and served as a board member of the Right Promotion Protection (RPP). As a lawyer, he was also affiliated with the Law Society of Kenya (LSK). On June 23, 2016, at around 12 pm, as he left the Mavoko Law Courts in a taxi together with his client, Mr. Josephat Mwenda, the three were kidnapped and went missing.

Willie Kimani was representing his client in a case against an array of offences including what were believed to have been trumped-up charges brought to frustrate him after he lodged complaints to the IPOA for police excessive use of violence. On April 10, 2015, Mr. Mwenda was riding with a friend on his motorcycle when they were stopped by two AP police officers in civilian clothes. One of the officers reportedly shot Mr. Mwenda in the arm, after which he and his friend were taken to the hospital and then placed in police custody. After filing a complaint against the police, Mr. Mwenda was charged with "being in possession of narcotic drugs", "gambling in a public space" and "resisting arrest".

On June 30, 2016, the LSK filed a petition to the High Court under certificate of urgency<sup>78</sup> on the "mysterious and enforced disappearance of Willie Kimani – advocate, Josephat Mwenda and Joseph Muiruri". An *habeas corpus* hearing was set for the

77 See Joint Press Release by seven UN human rights experts, July 28, 2016: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20316&LangID=E>. See also Joint Press Release by the ACHPR Commissioner Rapporteur for the Republic of Kenya, Special Rapporteur on Human Rights Defenders in Africa and Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, July 5, 2016: <http://www.achpr.org/press/2016/07/d305/>

78 Law Society of Kenya & 3 others v Attorney General & 3 others No. 244/2016. See <http://kenyalaw.org/caselaw/cases/view/124821/>

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following day, where the police declared that there was no evidence the petitioners were ever in police custody. The court ordered to the IGP and the Director of Criminal Investigations to provide an interim report by 2 p.m. on the same day, July 1.

When the court reconvened at 2.30 p.m., the police declared that the mutilated bodies of the lawyer, together with that of his client and taxi driver, Mr. Joseph Muiruri, were found in gunny bags in the Ol-Donyo Sabuk River in Machakos Country, about 73 km northeast of Nairobi. The post-mortem report showed that they were brutally beaten up and tortured before being killed. The pathologist found that Mr. Kimani had suffered from a skull fracture after being repeatedly hit in the head with a heavy object. The taxi driver appeared to have been strangled, while the client had suffered injuries to his head, neck and chest. He also suffered from a skull fracture and had internal bleeding in his chest.

According to the reconstruction of the facts made during the investigations, it appeared that after being arrested by the police, the three were brought to the Syokimau Administration Police (AP) Camp<sup>79</sup> and secretly detained there in a police container, converted into an illegal holding cell. While inside the container, at about 4.30 pm on June 23, Mr. Willie Kimani wrote a note on a piece of tissue and threw it to a motorcycle driver passing by after calling for his attention. On the note, he wrote two contact numbers and asked to inform them that he was in danger. The tests subsequently done on the note officially confirmed that the writing was the authentic one of the human rights lawyer. The fact was reported to the police by the relatives of the disappeared, but investigations stalled and no steps were taken to verify the alleged facts and the illegal detention of the three.

On July 2, 2016, Inspector General of Police Joseph Boinett confirmed the arrest of three AP officers in charge of the Syokimau AP camp, Frederick Leliman, Stephen Chebulet and Sylvia Wanjiku in relation to the killings. A fourth police officer, Leonard Maina, was also later arrested and joined his co-accused in court, as well as a civilian, Peter Kamau. The defendants were all charged with "murder". On July 18, they pleaded not guilty.

The first part of the trial was held on a day-to-day hearing from November 7 to 17, 2016 at Milimani High Court in Nairobi before Justice Ruth Sitati. The court denied the five defendants bail, since they could interfere with the course of investigations in the case, and therefore ordered to remand them into custody until the end of the trial.

On February 14, 2017, the trial resumed *in camera* before Justice Jessie Lessit to protect the identities of the witnesses, among which the motorcycle driver who had received the alarm message from Mr. Willie Kimani, who feared for their lives. Therefore, journalists, civil society members and family members of the victims were prevented from entering the courtroom. Only two representatives from the American Bar Association were allowed in as observers. At the moment of issuing this report, hearings are still ongoing.

**Those who are most vulnerable and exposed to police abuses and harassment are probably "grassroots" human rights defenders,** namely human rights defenders operating in informal settlements (or slums) in the country, which are generally the areas with the highest level of poverty and illiteracy. In these areas, the challenges faced by defenders are compounded by the asymmetrical power relationships between the police authorities in charge of security in the informal settlements and the residents. While micro-criminality increases the daily

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79 A police base run by the AP in Nairobi.

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challenges faced by law enforcement officers in the crowded urban informal settlements, the high number of police extrajudicial killings in slums shows the existence of a trend of excessive use of force by law enforcement agents. In some of the areas, the fear of death in the hands of the police has unfortunately become such an ordinary problem that both police and residents have developed a Kiswahili slang for it, '*kuangushwa*' meaning 'to fall'. This denotes that victims have been falling down to the point that it has become common, callous and ordinary to die in the hands of police officers whose primary duty should be, instead, to protect lives and properties of Kenyan citizens.

**Within the informal settlements, the ones who stand up for the rights of the other residents and the community**, by creating grassroots voluntary groups and networks to monitor and document violence and extrajudicial killings and to bring perpetrators to justice and restore accountability, **are at great risk of severe threats and retaliations from law enforcement agents**. Moreover, the level of visibility, as well as the degree of national and international connection and networks, which contributes partly to an increased protection from human rights abuses, is much lower compared to the situation of the high-profile defenders or those who work for national and international NGOs.

In particular, when slums residents turn towards community human rights workers in search for help to denounce exactions committed by the police in the framework of counter-terrorism and security operations, allegedly to target and neutralise people suspected to have links with the terrorist group Al-Shabaab or other criminals, the defenders are often in turn exposed to serious threats, including death threats, in person or through mobile phone text messages, either to cooperate with the police's requests to produce the alleged criminals, who very often are just regular residents of the area, or 'go down six feet under' (common coded message for death). Most of the time, reporting harassment by a police officer in a local police station is not an option, as the complaints are not taken into consideration and this might trigger more harassment<sup>80</sup>.

#### Chilling warning against human rights defender Suba Churchill in 2015

On September 26, 2015, Mr. **Suba Meshack Churchill**, Convener of the Civil Society Reference Group (CSRG), which promotes an enabling environment for civil society in Kenya, received a text message threatening him with death unless he stopped his demands for public accountability. The text message came within weeks after Mr. Suba Churchill, jointly with others, petitioned the Kenya National Assembly to sanction the then Cabinet Secretary for the Ministry of Devolution and Planning Ms. Anne Waiguru for failing to gazette a commencement date for the PBO Act 2013 as required under the law. The text message sent to his personal mobile number in Kiswahili read '*Leo Lazima Ukatwe Katwe Uwekwe Kwa Gunia. Huo Upuzi Wako Lazima Utakoma Leo*' meaning "Today you will be cut into pieces and your body parts stuffed into a gunny bag. That nonsense of yours must be brought to an end today". In the past he had received two other threatening text messages.

Although he reported the incident and filed a complaint on three different occasions at the Central Police Station in Nairobi, no step was ever made in that direction, notwithstanding the fact that the telephone numbers of the sender were reported and that it is a criminal offence under the Penal Code to threaten to kill a person.

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80 On this pattern of harassment against human rights defenders and journalists working towards accountability of the Kenyan defence organs within counter-terrorism and security operations, specifically in Nairobi and Northeastern Kenya, see Human Rights Watch (HRW) Report, *Deaths and Disappearances*, July 19, 2016: <https://www.hrw.org/report/2016/07/19/deaths-and-disappearances/abuses-counterterrorism-operations-nairobi-and>. It has to be noted that several defenders cooperating with HRW for the realisation of this report were in turn threatened and intimidated, and some needed to be temporarily relocated.

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### Attack and harassment of Ms. Rachael Mwikali Mueni in 2015

On December 18, 2015, Ms. **Rachael Mwikali Mueni**, Convener of the Coalition for Grassroots Human Rights Defenders (CGHRDs), a coalition providing defenders in the informal settlements with solidarity, support and capacity building, was participating together with other Kenyan defenders in a vigil organised in solidarity with the Burundian population after the massacres of December 11, 2015. After hearing a woman in the crowd screaming after being allegedly harassed by two men, allegedly county *askaris*<sup>81</sup>, she tried to intervene, but she was in turn beaten up. To stop the fight, the Kenyan police came and dragged her violently to a police van, and once in the vehicle, they continued beating her and called her a prostitute. Later on, they took her to Nairobi central police station and charged her with "assault", "obstruction" and "incitement of violence". Members of CGHRDs, NCHRDs-K, PBI-Kenya and other witnesses, arrived at the police station to monitor the situation, testify having seen her only wearing one boot, with a swollen lip and a puffy face. She was finally released with the help of other members of CGHRDs, NCHRDs-K and PBI-Kenya. The police never followed up on the accusations made against her.

### Police harassment against Mr. Muchangi (Zangi) Nyaga since 2014

Mr. **Muchangi (Zangi) Nyaga**, a human rights defender who operates in the Huruma/Mathare slums in Nairobi, has been on several occasions victim of police harassment, including physical assaults and multiple arbitrary arrests and detentions, for bringing to justice police officers who abused of their power. Mr. Nyaga is the Coordinator of Ghetto Green Foundation (GGF), a community youth empowerment initiative, and he is currently the Assistant Coordinator in the campaign against police brutality of the Mathare Social Justice Center, a community-based group in Mathare slum set to be a platform against police killings, land grabbing, forced evictions and gender-based violence.

For example, in February 2014, police officers broke into Mr. Zangi's home and ransacked his property, including the GGF's cash record and minutes record books after he brought a drunken police officer who threw teargas in a house to a police station to be arrested. He was later illegally detained for a few days, physically assaulted by the police and then released without charges.

On December 23, 2016, at around 8.30 p.m., while he was buying food he was stopped by police officers, who took all the money he had on him (only 100 KSH, approximately 1 Euro), arrested him, brought him into custody, where the police officer whom he held accountable for the teargas incident in 2014 choked him almost to the point of unconsciousness. Afterwards, he was thrown into a cell and illegally held for three days at the Huruma police station without even his detention being registered. On December 24, 2016, he managed to call his family and colleagues who were denied entrance in the police station to visit him. He was finally released without charge.

On December 31, 2016, Mr. Zangi was again assaulted by police officers, who dragged him into a car and told him in Kiswahili "hatutakushika rasta...tutakutengeneza", meaning this time "we won't arrest you rasta... we will beat you". Afterwards they beat him up, injured him on his left rib, took out scissors and partly shaved his dreadlocks, forcing him to shave off and drop his *rastafarian* identity. Fearing for his life, Mr. Zangi went into hiding until mid-January 2017.

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81 During the colonial period, *askaris* were local soldiers normally not wearing uniform nor having a standardized weaponry, serving the armies of the British rulers. Despite the decolonisation, these figures of local public officials remain in county governments.

### Threats and harassment against Mr. Khelef Khalifa in 2016

Mr. **Khelef Khalifa**, Chairperson of the Board of Directors of Muslims for Human Rights (MUHURI), an organisation that promotes a counter-terrorism framework that respects human rights, has been subjected to acts of harassment and intimidation as retaliation to his stand for police and security forces' accountability in cases of enforced disappearances and extrajudicial killings targeting the Muslim community in the Coast, and specifically in Mombasa County. In particular, thanks to his tireless commitment against impunity during counter-terrorism and security operations, a case of extrajudicial killing by the police was investigated by IPOA, prosecuted by the Office of the Director of Public Prosecution (ODPP) and finally led to the conviction of two police officers on February 15, 2016.

In September 2016, Mr. Khelef Khalifa started to receive threats on his phone, on social media and even publicly proffered by senior police officers shortly after calling for a prompt and impartial investigation by the IPOA on the killing by police officers of the central police station in Mombasa on September 11, 2016 of three Muslim girls who were suspected of hiding petrol bombs under their burqas.

Moreover, on October 25, 2016, at 4 a.m., while he was not home, his house was broken into while his family was sleeping. The unknown intruder(s) removed the burglar-proof grill, entered the living room of the house and reportedly stole three mobile phones belonging to family members. As of April 2017, no investigation had been carried out into the incident.

### 3. A culture of violence fuelled by widespread impunity

In the past, despite committing atrocities, police officers have been rarely held accountable for alleged human rights violations, a situation that the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions named as 'zero accountability', especially looking at the predominant silence, denial or justifications by members of the police to cover for each other. **Such widespread climate of impunity can only favour the perpetuation of human rights violations by the police.**

Police and security sector reforms have tightened some of these gaps, with the establishment of an external oversight agency, IPOA, and the requirement for all police killings to be centrally reported. Within this reformed framework to fight against police impunity, since its inception in 2012 IPOA has referred 67 cases to the ODPP for prosecution, 42 cases have been brought to court and so far only one<sup>82</sup> of them ended with conviction of two police officers<sup>83</sup>. Moreover, it is expected that the Leadership and Integrity Act of 2012, the statute drawing from constitutional national values and principles that require high standards of integrity from all State officials, will positively impact the ethical conduct of public officers. However, there is a long journey ahead to eradicate police impunity. The provisions for checks and balances embedded in the National Police Service Act of 2011, such as the independence of

82 On February 15, 2016, the Mombasa High Court sentenced to seven years of jail two police officers accused of the murder of a 14-year-old schoolgirl happened on August 22, 2014. The determination of Khelef Khalifa, Chairperson of MUHURI, as well as the forensic documentation and legal support provided by IMLU, were crucial to start the investigations, which finally led to the conviction of the two police officers.

83 Between June 2012 and December 2016, IPOA received 8,232 complaints, including 2,580 in 2016. As of December 31, 2016, IPOA had completed 465 investigations and cumulatively made recommendations to the ODPP on 67 cases, out of which 53 have been processed and returned to IPOA for subsequent processes that include courts and inquests. So far, overall 42 complaints have been brought to court, out of which only one ended with the conviction of two police officers. Several of them are still undergoing trial.

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the IGP, in line with the 2010 constitutional aspirations, have been watered down in practice, particularly due to his presidential appointment. Recently established police oversight bodies such as IPOA or IAU still **lack sufficient resources** and cannot function properly<sup>84</sup>.

**Ethnic patronage and corruption** also pose a serious threat to the fight against impunity within the police. Several cases were reported to the mission in which the police failed to register the names of people placed in custody at the police station in the Occurrence Book (OB), or did not record reports and complaints, in violation of procedural law in force. This creates a legal vacuum, thus paving the way for abuses, impunity and corruption. Moreover, often the superior officers' unwillingness to register and investigate complaints brought against officers acting under their responsibility is perceived as tacit approval of police misconduct.

**Initially, the police invariably deny involvement in any abuses, and then attempts to cover up and justify**, without acknowledging the gravity of the issue as a widespread pattern within the NPS. In their official discourse and rhetoric, the police often blame individual officers, calling them 'rogue elements' or 'bad apples' within the service for some of the illegal actions in which the police are involved, such as torture or extrajudicial killings, justifying those episodes as private disputes and bluntly refusing to acknowledge any responsibility on the part of the agency. On the contrary, they constantly hide behind the façade of the police reforms, with all the institutions and regulations put in place to combat police abuses, claiming that now the NPS operates within a solid framework, which clearly forbids and prevents such incidents. On the other hand, human rights defenders keep stressing that **the pattern of police violence is entrenched, systemic and a trend that is characteristic of Kenya policing methods, particularly fuelled by the generalised climate of impunity**.

The police's **failure to cooperate** in police abuse cases continues to greatly undermine investigations, particularly since only NPS officers have the power to conduct arrests. Moreover, should ODPP decide to prosecute after investigation has been completed, criminal cases can be frustrated by delays, caused by incomplete investigations, as well as shoddy evidence, which, once more, can only be undertaken and collected by the police<sup>85</sup>. A High Court judge highlighted the pattern of inferior police investigations conducted into the murder of human rights lawyer **Willie Kimani**, his client and the taxi driver. During the hearing of the *habeas corpus* application on the disappearance of the lawyer, his client and the taxi driver, and the subsequent discovery of the bodies, the court requested the police to take action, warning that insufficient investigations and non-cooperation by the police in the case will not be permitted: "Notwithstanding that the investigator got information that the three petitioners, or at least one of the petitioners, was in the container at Syokimau Chief's Camp, it was apparent that the Administration Police Officers at the said Camp were not interrogated to establish the veracity of the information given to the investigator by the witness. It is tragic that even when this information was within the knowledge of the police, the initial statements issued by the police consisted of denials"<sup>86</sup>. In the particular case of Mr. Willie Kimani's murder, the international community's pressure on the Government to unravel the circumstances surrounding his death significantly impacted the course of events. As suspects are still being prosecuted, it is crucial to ensure that the quality of evidence does not undermine the trial proceedings and that there is no latent support and connivance given to the police suspects by their former colleagues.

As it appears evident, achieving justice is very much dependent on limiting substandard work, fraud and non-professionalism during the investigation phase conducted by the police, which remain central to any effective prosecution. In this regard, the adoption on March 21,

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84 Moreover, according to its mandate, IPOA, beyond conducting investigation, does not have the power to arrest suspects, which is still the primary responsibility of the police. This mandate limitation can severely jeopardize the fight against police impunity.

85 See IMLU's Report, *Guns: Our Security, Our Dilemma*, 2014, analysing post-mortem records on police-shooting victims between 2009 and 2013 and gaps in their recording and investigation by the police: <http://www.imlu.org/2011-06-30-23-44-4/2015-08-28-09-08-23/reports/summary/2-reports/51-guns-our-security-our-dilemma-2014.html>

86 See Miscellaneous Criminal Application No 244 of 2016: In the matter of mysterious and enforced disappearance of Willie Kimani, Joseph Mwendwa and Joseph Muiruri – July 2016.

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2017 by the National Assembly of the **National Coroners Service Act** of 2017, which aims at establishing an agency to investigate suspicious deaths and to create a coroner office in each county with the power to collect forensic evidence in relation to such deaths, is a great step forward. The Act has now been transmitted to the President for assent and must be operationalised as soon as possible by establishing the National Coroner Service.

Moreover, **acts of torture and ill-treatment cannot be prosecuted** as such. For instance in the case of human rights lawyer Mr. Willie Kimani, who was victim of enforced disappearance, acts of torture and ill-treatment and eventually extrajudicial killing, suspected police officers are only being prosecuted for "murder". Although Article 95 of the National Police Service Act of 2011 foresees the prosecution for the offence of torture and ill-treatment against police officers, with respectively a jail term of twenty-five and fifteen years, the Penal Code does not yet enshrine this offence. The **Prevention of Torture Bill** of 2016 is currently under discussion in the Parliament, in the third reading stage and will hopefully be adopted soon to put an end to this deficiency and make torture and ill-treatment prosecutable offences<sup>87</sup>.

In such a context, **widespread excessive use of force by the police, relentless harassment against human rights defenders who try to hold public officials accountable and generalised impunity** do not leave much room for optimism ahead of the upcoming general elections, particularly considering the violations that characterised the past two elections.

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**Ahead of anticipated renewed electoral tensions, it is urgent that the pattern of police violence that aims at silencing human rights defenders and perpetuating impunity is countered through effective and fully implemented State reforms, which would ultimately bring police activities in full compliance with the human rights principles enshrined in the 2010 Constitution.**

**At the same time, it is essential that the Kenyan authorities carry out independent and impartial investigations - into all allegations of human rights violations committed by the police against defenders, with the aim to finally put an end to impunity for such violations, and in turn break an endless circle of violence.**

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<sup>87</sup> According to the Bill, the offence of torture will be punishable with up to 25 years of jail, and the offence of ill-treatment with up to 15 years.

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## V. CRIMINALISATION OF HUMAN RIGHTS DEFENDERS AND DELEGITIMISATION OF THEIR WORK

### 1. Arbitrary arrest, detention and judicial harassment of defenders

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During its mission, the Observatory delegation noted how much human rights defenders in Kenya are **particularly vulnerable to criminalisation, as part of a broader pattern of harassment and stigmatisation** against them<sup>88</sup>. They often face trumped-up charges, including in the context of duly notified peaceful protests, which are often declared unlawful just prior to or during the event. They are also often accused of defamation, an offence used to silence them and delegitimise their work. **The use of arbitrary arrest, detention and judicial harassment to undermine the work of human rights defenders and in turn silence their criticism of Kenya's human rights record is alarming.** Disproportionate penalties or fines, criminal records, multiple arrests and summoning to appear before police station or court to undergo trial, with all the financial and moral consequences this entails, aim at intimidating the defenders and their families, but also at delegitimising and paralysing their daily work.

A wide range of offences in the Penal Code can be used and have been used to criminalise legitimate human rights work<sup>89</sup>. In addition to that, defenders are also frequently arrested and detained for no reason for less than 24 hours in a local police station, and subsequently released without charges. This practice repeated against the same individuals over and over seeks to punish, warn and intimidate defenders. Moreover, often these short-term detentions are not even recorded by the police officers and are accompanied by violence and ill-treatment committed inside police stations.

When defenders are charged, detained and brought to court, they have the constitutional right to be released on reasonable bail conditions<sup>90</sup> while awaiting trial. To that extent, the "Bail and Bond Policy Guidelines", which were issued by the judiciary in 2015<sup>91</sup>, emphasize the principles of affordability of bail and bond terms<sup>92</sup>, proportionality between bail conditions and offences committed, and situational analysis, including the personal circumstances of the accused person<sup>93</sup>. However, the final decision on the bail terms is left to the court's discretion. This often results in disproportionately high, unaffordable and punitive bail terms (up to 300,000 KSH, approximately 2,700 EUR, per person) for the defenders, thus preventing them from being released. Indeed, defenders are very often criminalised for their peaceful and legitimate human rights work with trumped-up charges such as public order offences like "unlawful assembly", "riot" and "incitement to violence", which carry very high bail terms if compared with suspects of serious felonies like "money laundering", "rape" and even "terrorism". High bail conditions, which make it very difficult for defenders, and especially for grassroots defenders living in the informal settlements<sup>94</sup>, to be able to pay<sup>95</sup>, linked with the multiple trials some may face, appear

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88 See also KNCHR Report, *Human Rights: The Elusive Mirage - The 4th State of Human Rights Report: Post - Promulgation 2010-2014*, 2015: <http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf>

89 See Section II.2 above.

90 See 2010 Constitution, Article 49(1)(h).

91 See [http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail\\_and\\_Bond\\_Policy\\_Guidelines.pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf)

92 Ibid. "[B]ail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial".

93 Ibid. "[B]ail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person".

94 As a consequence, these defenders risk staying behind bars for long periods as they are often not able to afford the high bails, especially since they usually carry out small-scale family activities in the informal sector to make a living and conduct their human rights work on a voluntary basis. To respond to this situation, the NCHRD-K, KHRC and IMLU, along with other partner international organisations, have established a small fund dedicated to the support of jailed defenders (bail payment and provision of legal support).

95 It has to be noted that the accused is entitled to appeal bail terms, should they be deemed disproportionate. NCHRD-K often helps defenders filing petitions for the revision of punitive bail measures, and has in a number of occasions been successful.



to be aimed at preventing them from pursuing their human rights work<sup>96</sup>. This also increases the economic vulnerability of defenders. The criminalisation of defenders clearly appears to be used as a deterrent to discourage others from joining the human rights and social justice movements.

Although it is undeniable that the issue lays primarily on the type of charge formulated against the defender by the police, and on the corresponding bail conditions, the judiciary should acknowledge this abuse of the criminal justice system to harass human rights defenders and apply its margin of discretion in their favour to make the bail affordable for them. Moreover, the "Bail and Bond Policy Guidelines" should be fully implemented both in police stations and in courts, in line with the constitutional right to be granted bail, instead of representing an unbearable burden.

### Ongoing judicial harassment against members of Bunge La Mwananchi in 2013-2014<sup>97</sup>

On October 15, 2013, the police violently dispersed a demonstration held against the tax regime system declaring it illegal, arresting and then releasing without charges six members of Bunge La Mwananchi<sup>98</sup>, and reportedly sexually abusing one of them. Mr. **Wilfred Olal**, National Coordinator of Bunge La Mwananchi, who, together with several other members of his organisation has been criminalised on multiple occasions, particularly in the context of peaceful demonstrations, was one of them.

On February 13, 2014, during a duly notified lawful peaceful protest organised to denounce corruption, high living costs and the high levels of unemployment in the country, more than 500 police officers violently disrupted the march and arrested several protestors, among them Messrs. Wilfred Olal, **Gacheke Gachihi** and two other members of Bunge La Mwananchi. The four were charged with "riot after proclamation" and released after the payment of a cash bail of 200,000 KSH (approximately 1,800 EUR) each<sup>99</sup>, thanks to the support of NCHRD-K, IMLU and DefendDefenders. The defenders were then prosecuted before Milimani Law Courts in the criminal case *Republic v. Gacheke Gachihi & 3 others* (referred to as the 'State of the Nation' case). Shortly after, NCHRD-K and Katiba Institute<sup>100</sup> filed a constitutional petition (*Wilfred Olal & 5 Others v Attorney General and 3 others*) before the High Court at Milimani Law Courts to challenge the constitutionality of their charges as well as the punitive bail terms imposed. The criminal case is now pending, waiting for the constitutional petition to be considered by a new presiding judge to be appointed by the Chief Justice, as the previous one was transferred to the Supreme Court.

On December 18, 2014, while protestors marched peacefully towards the Parliament against the Presidential assent of the Security Laws (Amendment) Act 2014, the demonstration was violently dispersed by the General Service Unit Police and several protestors were violently arrested, among which Mr. Wilfred Olal, Mr. Gacheke Gachihi and six other members of Bunge La Mwananchi. They were charged with "taking part in an unlawful protest" and "inciting violence". After being denied bail,

96 Even while free on bail, criminalised defenders need to attend regular court hearings, and trials can last up to five years, which inevitably affects their capacity to conduct human rights work and has an impact on their limited resources.

97 See NCHRD-K.

98 Bunge La Mwananchi is a social movement advocating for social justice and human rights in the informal settlements of Nairobi, including fighting against extrajudicial killings, police violence and harassment in the slums.

99 See Joint Communication of the UN Special Rapporteurs on the Promotion and Protection of the Right to Freedom of Opinion and Expression, on the Rights to Freedom of Peaceful Assembly and of Association, on the Situation of Human Rights Defenders, on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and the Chair-Rapporteur of the Working Group on Arbitrary Detention, March 18, 2014: [https://spdb.ohchr.org/hrdb/27th/Public\\_-\\_AL\\_Kenya\\_18.03.14\\_\(3.2014\)\\_Pro.pdf](https://spdb.ohchr.org/hrdb/27th/Public_-_AL_Kenya_18.03.14_(3.2014)_Pro.pdf)

100 Katiba Institute is an NGO established in 2011 to facilitate the implementation of Kenya's new constitution and through that, achieve social transformation.

the court released them on a very high bond of 300,000 KSH (approximately 2,700 EUR) each<sup>101</sup>. Their trial in the case *Republic v. Wilfred Olal and 7 others Case No 1812/2014* (also referred to as the Security laws case), is ongoing, and the next hearing is scheduled on April 7, 2017.

### Harassment against Mr. Bernard Macharia Mwangi in 2013<sup>102</sup>

In 2013, in Bahati Nakuru County, Mr. **Bernard Macharia Mwangi**, a quarry labourer and a member of the Mid Rift Human Rights Network<sup>103</sup>, witnessed the assault by the area administrative chief of an artisan in the area and encouraged the victim to report the incident to the police and take action against the officer. One month later, he was summoned to the Bahati police station where the Officer in Charge of the Station (OCS) personally asked him to withdraw his witness statement, and threatened him that if he failed to do so the police would file a charge against him that he would not escape. On April 9, 2013, he was arrested together with the assault victim and subsequently charged with the offence of "conspiracy to defeat justice" in the criminal case *Republic v Bernard Macharia Mwangi and Isaac Waitharero No. 470/2013*. He was then discharged after the prosecution withdrew the case under Section 87(a) of the Criminal Procedure Code.

On August 23, 2013, he was arrested from his home in Nakuru and later charged before court with "imitation of firearms". He was released on a bail of 200,000 KSH (approximately 1,800 EUR). His criminal case *Republic v. Bernard Macharia Mwangi No. 2891/2013* was concluded on October 31, 2016. On January 26, 2017, the court acquitted him.

Mr. Macharia believes that his judicial harassment emanated from his pursuit of cases involving officers of the provincial administration (now county administrators). He had in the past reported various complaints on behalf of various victims to the ODPP and the Commission on Administrative Justice seeking their intervention.

### William Ruto v Boniface Mwangi in 2016

**Mr. Boniface Mwangi**, former Director of PAWA254<sup>104</sup> and a very active blogger, has been fighting high-level corruption both on social media and by leading several public protests against some of the main national scandals. He has also been very vocal against Deputy President William Ruto, openly criticising him and linking him to corruption scandals, the 2007-2008 post-election violence in Kenya, as well as cases of land grabbing.

On September 28, 2016, Mr. Boniface Mwangi expressed on his *Twitter* account his fear that the Deputy President Ruto intended to kill him, the same way he killed in May 2016 businessman Jacob Juma, who also publicly criticized him on social media<sup>105</sup>. As a

101 See Joint Communication of the UN Special Rapporteurs on the Promotion and Protection of the Right to Freedom of Opinion and Expression, on the Rights to Freedom of Association and Peaceful Assembly and of Association, on the Situation of Human Rights Defenders, on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and the Chair-Rapporteur of the Working Group on Arbitrary Detention, March 18, 2014: [https://spdb.ohchr.org/hrdb/27th/Public\\_-\\_AL\\_Kenya\\_18.03.14\\_\(3.2014\)\\_Pro.pdf](https://spdb.ohchr.org/hrdb/27th/Public_-_AL_Kenya_18.03.14_(3.2014)_Pro.pdf)

102 See NCHRD-K.

103 The Mid Rift Human Rights Network is a network of human rights defenders and organisations, which particularly focuses on gender-based violence, the rights of street children, forceful evictions, extra-judicial killings, and the accountability of perpetrators of human rights violations.

104 PAWA254 is an arts and culture social accountability organisation.

105 The tweet read: "I hope Deputy President has no plans of killing me the way he killed his old friend, Jacob Juma, a fellow thief who became a whistle blower".

consequence, Mr. Ruto demanded Mr. Mwangi to retract the tweet and apologise, which he refused to do. Therefore, Mr. Ruto filed a complaint against him for defamation, which Mr. Mwangi claimed to be an attempt to gag him. Mr. Mwangi has faced many criminal complaints before, mostly related to the multiple public protests and demonstrations he led against corruption and human rights violations in the country.

On October 21, 2016, Mr. Mwangi's legal team lost a laptop which reportedly contained crucial evidence on the case, after a suspicious break-in at the house of Mr. Mwangi's leading lawyer Mr. **Gitobu Imanyara**. Mr. Imanyara later claimed he had been put under surveillance by State agencies and that his email and telephone communication had been hacked. Investigations on the burglary were still ongoing at the time of publication of this report, but nobody has been arrested so far, nor the stolen property returned.

### **Ongoing criminalisation of Joel Ogada by Kurawa Salt Industries Limited<sup>106</sup>**

Mr. **Joel Ogada**, a farmer and member of the Malindi Rights Forum<sup>107</sup>, was arrested several times and faced at least four criminal charges linked to his active role in defending community land in Kurawa and Kanagoni, Kilifi. Mr. Ogada and his family have owned the land they live in since 1960s, where, since 2002, a private salt manufacturing firm, Kurawa Salt Industries Limited, allegedly attempted to forcefully evict residents from the area to expand its development. In 2004, the Malindi High Court granted Mr. Ogada and twelve other residents an injunction against any evictions and the right to rebuild their houses (case No. 73/2004).

In 2011, Mr. Ogada was charged at the Malindi Law courts with "breach of peace" (Section 95(1)b of the Penal Code) (Criminal Case No. 677/11) after another unsuccessful round of evictions, but in 2015 he was acquitted. Before the case had ended, Mr. Ogada was again arrested on November 17, 2013, on suspicion of "forcible detainer" (Section 91 of the Penal Code). The prosecution later withdrew the charge and the accused was acquitted on September 21, 2015. Mr. Ogada was also arrested in February 2016 with the charge of "arson" against another salt company located in Tana, Garsen, about 60 kilometres away from his home. Malindi Law courts sentenced him to seven years of prison, but the penalty was reduced to two years. While he was serving his jail term, unknown people burnt down his home and destroyed his property.

After he came out of prison, in June 2016 he filed a petition (*Joel Ogada v Kurawa Salt Industries Limited and 2 others* No. 9/2016) to the Malindi Environment and Lands Court, and he obtained a court order to reclaim the land and to restrain the respondents, among them the Commissioner of Lands and the Police, from leasing, selling, alienating, transferring, dealing or in any way interfering with the land. However, he has not been able to rebuild his home. On March 15, 2016, Mr. Ogada was again arrested and charged with "threatening to kill" a guard of the Kurawa company (Section 223 of the Penal Code), together with an unknown person. He was released on bail the same morning. At the time of publication of this report, the criminal case (No. 177/2016) is ongoing at Malindi High Court. Reportedly, the lawyers defending Mr. Ogada have been directly approached by the company and asked to stop providing legal representation to him.

106 See KNCHR Report, *Report of a Public Inquiry into allegations of Human Rights Violations In Magarini, Malindi*, 2006.

107 The Malindi Rights Forum, created in 2006, is a human rights organisation working on awareness-raising about land rights and other human rights related issues.

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### Judicial harassment against eight land rights defenders in Taita Taveta

On October 31, 2016, eight members of the network organisation Building Africa<sup>108</sup>, namely Messrs. **Charles Mwanzia, Ramadhan Mathenge Kamosu, Justus Munyao, Fabian Ngure, Julius Kimondio, Frank Mbomani, Ambrose Hemed, Msafiri Mkillio**, together with two beneficiaries of the organisation's services, Messrs. Julius Masuma and Peter Kithome, were arrested while attending a public meeting on land grabbing and corruption in the city of Taveta, in Taita (Taveta County). The meeting, which concerned corruption and irregular distribution of land in the territory due to the Phase 1 and 2 of the Taita Taveta Settlement Project, was held in the offices of Building Africa, a registered local NGO, when the police made the arrests.

They were charged by the Taveta Court the day after with "participation in an unlawful assembly" (Section 79 of the Penal Code) in the criminal case *Republic v. Ramathani Mathenge Kamosu and 9 others No 381/2016*. The ten immediately challenged this accusation, claiming that they had not committed any crime. The Court set bond at 300,000 KSH (approximately 2,700 EUR) for each of the accused. The defendants, helped by the NCHRD-K, filed an application to the High Court asking for the review of the excessive bond imposed on them, since its purpose should not be to ensure the inability of the defendant to pay it, but it should rather be an incentive to return to court. The hearing took place on November 23, 2016 and on December 21, the defenders were released on a personal surety, after the court indicated that they had erred in their ruling, and reduced the bail to 50,000 KSH (approximately 450 EUR) each.

## 2. Delegitimisation and slandering of human rights defenders, particularly ahead of the 2017 elections

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Under the Kenyatta administration, **human rights defenders often face hostile discourse from State officials** and are denigrated via smear campaigns with the aim to delegitimise their work. On several occasions, State officials have conducted smear campaigns against human rights NGOs, labelling them as "corrupt" and "foreign agents", or have questioned the usefulness of their work. As detailed in Section I of the present report, this has notably originated from the ICC investigations that were launched against the President and his Deputy, who in turn have held and civil society responsible for the charges of crimes against humanity brought against them.

Most recently, **this has particularly affected human rights defenders and civil society addressing voters' education and electoral monitoring** ahead of the general elections scheduled for August 2017. As Election Day approaches, Kenyan political authorities have seemed increasingly reluctant to work with civil society on the issue, and have publicly condemned and limited civil society planned activities around voters' education and electoral observation. While under previous administrations the Government had welcomed civil society support in civic education and electoral assistance, today it has championed the view that NGO civic education programs are infiltrated by "foreign interests", delegitimising their work around governance and democratisation issues<sup>109</sup>.

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108 Building Africa is an umbrella organisation, aimed at building Africa and especially Taita-Taveta County through implementation of Sustainable Development Goals (SDGs) through Human Right Based Approach to achieve among others food security, industrialisation and poverty reduction while seriously observing environmental protection and conservation.

109 See the case of the attacks against the electoral assistance programme carried out through its Kenya offices by the International Foundation for Electoral Systems (IFES), an American NGO, ahead of the upcoming general elections of August 2017. See IFES Press Release, December 20, 2016: <http://www.ifes.org/news/ifes-statement-kenya-electoral-assistance-program>

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In his speech during the *Jamhuri* (Independence) Day Celebrations held in Nyayo Stadium Nairobi, on December 12, 2016, President Uhuru Kenyatta condemned the work of NGOs, targeting especially the ones working in the field of civic education ahead of 2017 general elections. Instead of praising the crucial role of civil society in educating the population on the political system and the electoral process so as to ensure free, fair and transparent elections, he accused them of being agents of foreign powers trying to influence the electoral process and threatened to forbid them from receiving foreign funding<sup>110</sup>. Soon after the President's speech, Mr. Jackson Mandago, Uasin Gishu County Governor, announced that all NGOs and civil society groups planning to carry out civic education and peace work in the Rift Valley ahead of the general elections would be vetted, and monitored closely. County security teams will clear all NGOs "so that their activities are clearly known", he added.

Worryingly, the renewed public attacks against civil society including from high-level public officials is targeted more generally against all human rights NGOs operating in the country. For instance, most recently, on January 6, 2017, in a governmental directive addressed to the 47 county Commissioners, the Interior Principal Secretary Karanja Kibicho<sup>111</sup> accused NGOs of 'nefarious activities' that pose a serious threat to national security including money laundering, diversion of donor aid and terrorism financing, and asked for stricter monitoring on CSOs throughout the country.

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**Criminalisation and vilification of human rights defenders clearly aim at delegitimising and undermining their legitimate human rights activities. An end should immediately be put to any act of judicial harassment against human rights defenders. Kenyan authorities should also publicly recognise the positive and legitimate role played by human rights defenders in guaranteeing democracy and the rule of law in Kenya.**

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110 See Joint Statement by several Heads of Mission in Kenya (including US, Canada, Australia, EU and some of its member States), December 19, 2016: <https://ke.usembassy.gov/joint-statement-international-support-2017-elections/>. See also UNDP Statement, December 21, 2016: <http://www.ke.undp.org/content/kenya/en/home/presscenter/pressreleases/2016/statement-on-united-nations-support-to-the-electoral-process-in-.html>

111 The Ministry of Interior is now in charge of the civil society sector regulation, after the competence was taken away from the Ministry of Devolution and Planning in November 2016, as detailed in Section III.4 of the present report.

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## VI. RESTRICTIONS TO THE RIGHT OF FREEDOM OF ASSOCIATION

Although civil society is vibrant in Kenya, over the years, the different governments and political leaderships have increasingly expressed distrust against it, as detailed in Section V.2 above. Moreover, the NGO Coordination Act of 1990, which still regulates the NGO sector today despite the adoption of a more progressive law in 2013, has failed to establish a clear legal environment for civil society, leaving room for discretionary decisions and arbitrariness. In addition to that, the Government has often used the pretext of terrorism and security challenges to tighten the grip on the NGO sector, both from an administrative and a judiciary point of view.

### 1. Legal and administrative restrictions to freedom of association

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As detailed in Section III.4 above, despite the signing into law of the PBO Act in January 2013, the failure to commence its operationalisation after more than four years maintains the NGO Coordination Act 1990's authority to regulate NGOs in Kenya. This situation has maintained civil society organisations in a highly restrictive environment. Illegitimate legal constraints are still placed on the work of NGOs, and the situation has been going from bad to worse as the elections are approaching.

One of the main concerns in terms of restrictions to freedom of association has been the multiple **attempts** of the current administration **to curtail civil society access to foreign funding**, including via accounts freezing. This pattern is extremely worrying, since most CSOs rely heavily on international donors as local sources of funding for NGOs are scarce<sup>112</sup>. As of April 2017, the Kenyatta Government has attempted to limit NGOs' access to foreign funding six times, sponsoring draconian amendments to restrict freedoms enshrined in the PBO Act of 2013 before even allowing for its commencement.

On October 30, 2013, the Statute Law (Miscellaneous Amendments) Bill of 2013 was tabled before the Parliament<sup>113</sup>, seeking to cap foreign funding to 15% (Section 27(a))<sup>114</sup>, to impose excessive executive interference, and to undermine the independence of the PBO Authority and create uncertainty as to its powers<sup>115</sup>. CSOs successfully campaigned for the withdrawal of these restrictive amendments, thus after its adoption in first reading on November 27,

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112 Most NGOs in Kenya are funded by international sources (91%) or local private sources (8%). Only 1% of NGO funds are derived from the government of Kenya at the national or local level. See Institute for Security Studies (ISS), "The Kenyan NGO Bill is a threat to democracy development and the very survival of citizens in the region", November 12, 2014: <https://issafrica.org/iss-today/democracy-and-development-under-siege-in-kenya>

113 See UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Opinion, November 25, 2013: <http://freeassembly.net/news/africa-civil-society-under-attack/>, Joint Communication to the Government of Kenya with UN Special Rapporteurs on the Promotion and Protection of the Right to Freedom of Opinion and Expression and on the Situation of Human Rights Defenders, November 15, 2013: [https://spdb.ohchr.org/hrdb/24th/public\\_-\\_OL\\_Kenya\\_15.11.13\\_\(8.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_OL_Kenya_15.11.13_(8.2013).pdf) as well as African Commission for Human and Peoples' Rights Press Release, December 4, 2013: <http://www.achpr.org/press/2014/04/d198/>

114 Section 27A(2) prohibited PBOs from receiving more than 15% of their total funding from foreign donors and Section 27A(5) established that regulations "shall establish percentage ceilings of funding to public benefits organizations by overseas development assistance". Such limits can be increased only at the discretion of the Cabinet Secretary of the Ministry of Devolution and Planning (Section 27A(3)).

115 Section 42(1) conferred to the members of the PBO Authority, among others, the faculty "to register and de-register public benefits organizations"; to "interpret the national policy on national public benefits organizations"; and "to institute inquiries to determine if the activities of a public benefits organization do not comply with this Act or with any other law". Moreover, Section 35(1)(a) established that the Chairperson of the PBO Authority would not be appointed by the Cabinet Secretary of the Ministry of Devolution and Planning, but directly by the President.

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2013, it was rejected in second reading. Although defeated in the Parliament, during the following years, the Kenyatta administration repeatedly sought to re-introduce new foreign funding limitations and greater executive control over the PBO Authority.

In 2014, another process of amendment of the PBO Act in the Parliament started with the proposal tabled by MP Moses Kuria who sought to introduce the obligation for NGOs exceeding the 15% threshold of foreign funding to get a “foreign agents” certificate. During the same period, the Government created a PBO Taskforce to collect views and proposals from different stakeholders on amendments of the PBO Act of 2013.

In September 2015, the Ministry of Devolution and Planning declared its intention to table new amendments in Parliament. In all occasions, the Kenyan civil society sector massively mobilised and successfully deterred the adoption of draconian amendments.

In addition to the numerous legislative attempts to shrink freedom of association in the Kenyan legal framework, **Kenyan NGOs have been facing serious administrative and judicial impediments** undermining their capacity to conduct human rights activities. In particular, the NGO Board, going beyond its supposedly neutral regulatory role, has been playing an active role in the **clampdown faced by NGOs, abusively accusing them of failure to comply with the law or suspecting them of affiliation to terrorist groups**. For instance, in December 2014, the NGO Board de-registered more than 500 organisations, among which 15 for suspected links with the terrorist group *Al Shabaab*. Two weeks later, the NGO Board reinstated 179 of them, after they proved their compliance with the law.

On October 29, 2015, the crackdown went one step further, as the NGO Board announced that it had carried out a forensic audit of the 10,015 NGOs registered under the NGO Coordination Act of 1990, and that the audit had established that some of them had failed to account for a total of 1,200,000,000 KSH (approx. 10,700,000 EUR) they received. The Board stated issued a public “notice of intended cancellation of registration certificates” requesting the de-registration of 957 ‘non-compliant organisations’ if the latter failed to present audited accounts within a 14-day notice. Moreover, it asked the Central Bank of Kenya and the Kenya Bankers Association to freeze the bank accounts of organisations deemed to be non-compliant. In addition, the NGO Board alleged that some of the organisations were suspected of “being associated with terrorism”, “money laundering” and possibly “embezzlement” of donor funds, all constituting criminal offences, without providing any supporting evidence for any of the aforementioned allegations, nor informing or communicating in advance with the concerned NGOs to give them the opportunity to respond and address any existing concerns brought by the Board<sup>116</sup>. The Board referred the cases to the Financial Reporting Centre and the Directorate of Criminal Investigations for further investigations and possibly prosecutions. Such a disproportionate move, targeting human rights organisations with unsubstantiated allegations appeared clearly aimed at intimidating the whole Kenyan civil society and at shrinking the operational space for NGOs’ legitimate work. The list included prominent Kenyan human rights organisations, such as the KHRC, as well as a number of international NGOs. The blacklisting and freezing of NGO accounts in the country was unprecedented, and following national and international mobilisation, on October 30, 2015, the Government decided to suspend the NGO Board notice.

These **patterns of administrative and judicial harassment against NGOs**, accused without any evidence of wrongdoing, represent a means of intimidation used by the Kenyan authorities to keep the sector under control. Although most of the times the judiciary provides redress during trials, nevertheless they serve the purpose of paralysing organisations during a certain period of time and producing a chilling effect on the whole civil society.

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<sup>116</sup> It has to be noted that the majority of Kenyan NGOs are audited financially by independent auditors, regularly report to the Government on an annual basis, and are also accountable to their donors for the funds they receive.

## Harassment of MUHURI and Haki Africa in 2015

On April 7, 2015, a few days after the terrorist attack at Garissa University College, the IGP ordered to publish in the Gazette Notice 2326 a "List of Entities Suspected to be Associated with Al-Shabaab", as provided for under Section 3(3) of the PoTA on "specified entities order"<sup>117</sup>. The list included 85 companies, businesses and individuals, together with MUHURI and Haki Africa, two human rights organisations based in Mombasa that advocate for the respect of human rights in the fight against terrorism. However, according to Section 3(2) of the PoTA, the IGP, before making a "specified entity order" listing groups suspected of involvement in terrorism, should provide the targeted entity the opportunity to prove its innocence. On the contrary, the two human rights organisations have had no contact with the IGP and were only informed about this decision when they read the Kenya Gazette<sup>118</sup>.

Being labelled as such an entity can trigger a number of measures, pursuant Section 46 of the PoTA on the "refusal of applications for registration, and the revocation of registration, of associations linked to terrorist groups". Among them is the freezing of the bank accounts of the suspected entities, which was done on April 8, 2015. Haki Africa's medical insurance cover for its staff was also suspended. On April 7, 2015, the two organisations wrote to the IGP, denouncing the baseless allegations of their links with *Al-Shabaab*, and providing all relevant documentation related to their work, audited accounts, program descriptions, list of board members and donors. Afterwards, MUHURI and Haki Africa moved to court to challenge their inclusion in the Gazette Notice 2326. On June 11, 2015, the Mombasa High Court ordered that the Kenyan State remove both organisations from the list of entities suspected to be affiliated with *Al-Shabaab*. On November 12, 2015, the same court ordered the unfreezing of their bank accounts, on the grounds that their freezing was unconstitutional.

Moreover, on April 20 and 21, 2015, respectively, officers of the Kenyan Revenue Authorities (KRA) raided the premises of Haki Africa and MUHURI in Mombasa and seized computers, hard disks, documents and financial files, in the context of a criminal investigation on allegations of tax evasion. On May 27, 2015, the two organisations were informed by the media that the NGO Board had again decided to de-register them and cancel their licences. The reasons provided this time were the following: in the case of MUHURI, the failure to notify the NGO Board on the change in the composition of the board, allegations of tax evasion and employment of foreign personnel, while in the case of Haki Africa, operating without valid registration. The two were given a 14-day notice to prove their compliance with the law.

Within the given timeframe, MUHURI proved its full compliance and obtained from the KRA a tax compliant certificate. Afterwards, MUHURI filed a lawsuit for damages and defamation against the IGP, the Attorney General and the Central Bank, among others. As of April 2017, they were awaiting the Chief Justice to appoint Judges to handle the matter in court. As for Haki Africa, at the time of publication of this report, the NGO Board was refusing to register them, despite their monthly follow-up letters inquiring on the status of their registration application. Haki Africa is currently registered as a Trust and is operating normally.

117 Under Section 3 of the PoTA, a "specified entity" is an entity that has committed, has attempted to commit, has participated or facilitated the commission of a terrorist act, or that is linked or in association with a terrorist group.

118 See Joint Communication of the UN Special Rapporteurs on the Promotion and Protection of the Right to Freedom of Opinion and Expression, on the Rights to Freedom of Peaceful Assembly and of Association, on the Situation of Human Rights Defenders and on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, April 20, 2015: [https://spdb.ohchr.org/hrdb/30th/public\\_-\\_AL\\_Kenya\\_20.04.15\\_\(2.2015\).pdf](https://spdb.ohchr.org/hrdb/30th/public_-_AL_Kenya_20.04.15_(2.2015).pdf)



### Recurring administrative harassment of KHRC between 2015 and 2017

KHRC was one of the organisation targeted in October 2015, during the massive crackdown launched by the NGO Board against Kenyan civil society organisations, with the announced de-registration of 957 NGOs for failure to account for funds and supporting terrorism. After the NGO Board refused to meet and reply to correspondence sent by KHRC inquiring on its case, the organisation filed a complaint on November 12, 2015 (Petition 495/2015). The High Court ruled that the failure by the NGO Board to hear KHRC before deciding to cancel its registration violated the Constitution and that this failure was compounded when the NGO Board failed to respond in writing to the organisation.

However, one year later, on January 6, 2017 the NGO Board sent an email to KHRC, threatening to open an investigation regarding allegations of mismanagement and offences perpetrated by KHRC, which were included in an “internal memorandum” issued by the NGO Board on November 4, 2016. The KHRC only learnt about this memorandum on January 8, 2017 from media reports, which widely distributed the document<sup>119</sup>.

The document addressed several government agencies with a number of recommendations against KHRC. It advised the Central Bank of Kenya to take steps to freeze KHRC's bank accounts. It requested the Directorate of Criminal Investigation to commence criminal investigations against KHRC and the KRA to commence measures to recover taxes that KHRC purportedly owed the government. The document contained further recommendations for the Institute of Certified Public Accountants, the authority that regulates the public accountancy profession, to commence investigations against the two audit firms working for KHRC, Price Waterhouse Coopers (PWC) and PKF<sup>120</sup>.

Most recently, on January 6, 2017, the Interior Principal Secretary wrote to the 47 county Commissioners directing them to shut down NGOs that are not properly licensed or are implementing projects that are not in line with licences provided. The governmental directive further required all NGOs to place their registration permits at all times in their offices in case of inspection conducted by county authorities.

## 2. Obstacles to international and foreign NGOs operating in Kenya

Kenya is a hub for many international non-governmental and governmental organisations operating in the Eastern Africa region. Yet, **the operation of international NGOs has been increasingly monitored by the Government** and some of them have faced severe restrictions to their human rights work.

**International and foreign NGOs** that have offices in Kenya or seek to fund Kenyan NGOs **have been increasingly portrayed as foreign agents** interfering into domestic issues and undermining Kenyan national sovereignty. This might be linked to the positioning of the international community in support of the ICC investigations in the run up to the 2013 elections.

This hostility also has affected the work of foreign staff working both in national and international organisations based in Kenya, resulting in arbitrary withdrawal of work permits and denial of renewal of permits. In fact, the NGO Coordination Act of 1990 requires organisations employing expatriate staff to seek authorisation from the NGO Board before

119 See KHRC Statement, January 11, 2017: <http://www.khrc.or.ke/images/docs/StatementontheattacksbytheNGOboardagainsttheKHRC.pdf>

120 PWC is KHRC current auditor and PKF is KHRC previous auditor. The NGO Coordination Board is accusing both firms of helping KHRC in covering financial mismanagement.

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applying for a work permit. The NGO Board is entitled to deny authorisation without providing explanations. The NGO Board may also recommend non-nationals who do not comply with the aforementioned Act for deportation. These legislative provisions are increasingly being used to discourage unwanted international NGOs from operating in the country. An example of this is the governmental directive of the Interior Principal Secretary sent on January 6, 2017 to the 47 county Commissioners, which, among other things, required all NGO foreign employees to be ready to produce on demand a valid work permit issued by the Directorate of Immigration Services, within a stricter monitoring framework.

### **Hurdles over licenses of international NGOs and work permits of foreign staff**

In 2016, **Amnesty International** - Regional Office for East Africa, the Horn and the Great Lakes was summoned and questioned by the Department of Immigration regarding the needed approval by the NGO Board of applications and renewals of some entry and work permits for their regional staff. Amnesty International, which is registered in Kenya as a company and not as an NGO, therefore not falling within the mandate of the NGO Board, replied accordingly, and rectified the situation. This episode, although being a one-off instance, shows again the continued attempt by the NGO Board to exert undue control on the civil society sector.

Moreover, the registration application of **Peace Brigades International (PBI) - Kenya** has been pending since 2013, and to the organisation's knowledge it has been under the intelligence services' scrutiny for the past months. Since application, PBI - Kenya has been receiving contradictory instructions from the authorities regarding the legal framework under which to register as an NGO, whether it would be better under the NGO Coordination Act, or whether it would be better under the PBO Act. It appears therefore evident that the failure of commencement of the latter has generated confusion among authorities in charge and has created a legal limbo, which undermines the ability of NGOs to conduct work in full compliance with legal provisions.

On June 16, 2016, the **International NGO Safety Organisation (INSO)**, an NGO headquartered in the UK with offices in Nairobi, got a copy of a letter sent by the NGO Board to a private bank explaining that INSO's licence had been withdrawn and its bank accounts frozen, on allegations of conducting irregular activities contrary to its stated objective, namely sharing sensitive national security information with foreign governments. INSO was never given a notice nor the possibility to defend itself, as required by law. After going to court, the judge issued a temporary lift of its suspension, and of its account freeze. As of today, the trial is still ongoing, and INSO has resumed its normal operations, backed by the court order.

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**The failure to start the operationalisation of the PBO Act 2013 maintains civil society organisations in a restrictive environment as illegitimate legal constraints are still placed on their work. Kenyan NGOs also face serious administrative and judicial impediments undermining their capacity to conduct their activities. Moreover, fears of administrative harassment of NGOs have become more prominent with county authorities being given powers to monitor activities of the groups in the regions and the elections coming up in the next months.**

**The PBO Act 2013 should therefore be operationalised without any further delay and Kenyan authorities should put an end to any form of harassment - including at judicial and administrative levels - against national and international human rights NGOs in Kenya to enable them to carry out their legitimate activities without hindrance.**

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## VII. CATEGORIES OF HUMAN RIGHTS DEFENDERS PARTICULARLY TARGETED

Without being exhaustive, the present report also addresses **specific challenges and obstacles faced by vulnerable categories of human rights defenders** particularly targeted for the work they carry out. Many of them were met during the mission. This short section briefly describes the specific risks, harassment and restrictions to their freedoms of association, peaceful assembly and expression they face.

### 1. LGBTI rights defenders

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Advocacy on Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) issues remains particularly challenging for local human rights defenders. 90% of Kenyans are allegedly against homosexuality and believe homosexuality should not be accepted by society<sup>121</sup>.

Kenya has kept the anti-sodomy laws it inherited from the British colonial era and Sections 162, 163 and 165 of the Penal Code still criminalise sexual liaisons 'against the order of nature'<sup>122</sup>. On the other hand, the 2010 Constitution provides, in its Article 27, a legal framework for the protection of the rights of all Kenyans without any discrimination<sup>123</sup>.

In this context, LGBTI rights defenders face difficulties in registering an NGO advocating for LGBTI rights. For instance, when in 2013 LGBTI rights defenders filed an application to officially register an NGO, namely the National Gay and Lesbian Human Rights Commission (NGLHRC), the NGO Board refused, claiming that the organisation would allegedly be promoting criminal offences. However, in a landmark judgment in 2015, in response to a petition (No. 440/2013) before the Constitutional and Human Rights Division, the High Court ordered that the NGO be registered, as failure to do so on the basis of its members' identity would be discriminatory.

### 2. Women human rights defenders (WHRDs)

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In Kenya, "**women human rights defenders are especially susceptible to sexual harassment** especially in police stations, and rape. Verbal attacks including death threats occur in some cases as a result of direct confrontation but often happen through social media posts and text messages"<sup>124</sup>.

The discrimination generally experienced by women in society represents an additional challenge for WHRDs when they exercise their human rights work. Indeed, they do not only face harassment by State actors and are more vulnerable to gender-based violence by the security forces, as a means of intimidation, but they are also facing hostility by the general public, when addressing traditional prejudices, particularly in rural areas. WHRDs are also likely to face negative family pressure and other constraints in their work, and in some cases, WHRDs are hounded out of their community and family because of it.

Several cases of public harassment, insults and threats against women staff of women's rights organisations because of their work were reported during the mission. The case of a

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121 See <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>

122 Eric Gitari, leading LGBTI defender moved to court in 2016, instituting a suit to decriminalize these sections of the Penal Code on grounds that they are unconstitutional.

123 Article 27 provides for the principle of non-discrimination.

124 See KNCHR Report, "*Human Rights: The Elusive Mirage -The 4th State of Human Rights Report: Post - Promulgation 2010-2014*", 2015: available at <http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf>

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WHRD<sup>125</sup> providing support to a victim of domestic violence and abuses faced by a woman and her three-month-old baby, was subjected to a verbal and almost physical assault by a group of men in the neighbourhood who called her names and threatened to lynch her since her organisation was “breaking up families”. Luckily, other individuals present on the spot helped the WHRD avoiding the escalation of violence against her.

Moreover, the mission heard testimonies of increased gender-based violence, including sexual assault, against WHRDs in the context of the upcoming general elections or when participating in public demonstrations.

### 3. Land and environmental rights defenders

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As investors’ appetite on land rises in sectors such as oil and coal exploitation and land competition increases, threats and harassment to activists defending the lands of their community have intensified. Threats to community land and natural resources rights come both from foreign businesses, as well as from local political leaders, who have transferred plots of land used by communities for their livelihoods with little or even no consultation with the affected community members. Human rights defenders fighting against land grabbing, claiming land fraudulently acquired by private actors, or seeking the legal protection of community land from forced evictions very often come under serious pressure and harassment such as intimidation, arbitrary arrests and even extrajudicial killings, with the aim of forcing them to relinquish their fight, as illustrated by the case of eight land rights defenders from Taita Taveta who were arrested on October 31, 2016 in their offices and charged with “unlawful assembly” (see Section V.2 above).

For instance, on April 11, 2016, Mr. **John Waweru**, Director of Githunguri Constituency Ranching Company, who was fighting against forced evictions of residents of a contested land in Kiambu County, was killed in Zimmerman, Nairobi<sup>126</sup>.

Extractive industries and infrastructure development, especially in the coastal region, have very often created situations of land encroachment and grabbing, which encountered the firm opposition of community land rights defenders for the negative environmental consequences entailed by such projects, as well as their interference with local cultural heritage and customary sites.

For example, in Siaya County, the American subsidiary agricultural group Dominion Farms Ltd has been entangled for many years in disputes with community activists who oppose the lease of 3,200 hectares of land to the company. Land rights defenders feared the potential threat to the wetlands and the loss of traditional land if it was turned into commercial farming. In return, the defenders were depicted as being anti-development, misrepresented in the media by the local leaders, beaten up and harassed by private gangs allegedly linked with the company, criminalised and subjected to arbitrary arrests. Long running trials and police harassment of land rights defenders is a pattern repeated in several areas, particularly in parts of the country where extractive operations are conducted, such as Kwale, Turkana and Kitui. Other megaprojects facing local opposition are, for instance, large governmental infrastructural projects such as the Standard Gauge Railway (SGR) between Mombasa and Nairobi, or the Lamu Port South Sudan Ethiopia Transport Corridor (LAPSSET) in Kenya. In Marereni (coastal Kenya), community land rights defenders have reported facing threats, harassment, criminalisation and violence when conducting their activities to protect local community lands from encroachment by the Kurawa salt extractive industries, as shown by the case of relentless judicial harassment faced by Mr. Joel Ogada (see Section V.1 above). Moreover, in February 2017, four members of the Center for Justice Governance

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<sup>125</sup> The identity of the defender remains confidential for safety reasons.

<sup>126</sup> See NCHRDs-K and DefendDefenders Joint Statement, April 13, 2016.

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and Environmental Action (CJGEA), in Mombasa county, were attacked, subjected to death threats, two had their houses burned down and were forced into hiding for having filed a law suit against a lead smelter severely poisoning and affecting the residents of the area<sup>127</sup>.

#### 4. Bloggers and journalists

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The freedom of expression enjoyed by human rights defenders, including bloggers and journalists, both online and offline, has been shrinking in Kenya, through legislative restrictions, criminalisation, threats and in some cases even enforced disappearances.

The newly proposed **Films, Stage Plays and Theatre Bill of 2016** seeks to expand the mandate of the Kenya Film Classification Board (KFCB), the State regulatory body monitoring the creation, broadcasting, possession, distribution and exhibition of films, to include broadcast content, online content, outdoor advertisements, print publications and registration of cinemas and theatres. Sections of the proposed law attempt to regulate and penalise Internet service providers for actions of their users and would grant the police powers to allow the making of a film. A requirement for objectionable and non-objectionable publication would be introduced, determination of which is left at KFCB's discretion. This could potentially censor inconvenient documentaries or surveys, such as the ones broadcasted by the independent investigative journal *Africa Uncensored* shedding a light on the phenomenon of extrajudicial killings committed by members of Kenya's security agencies.

Another legislative proposal, the **Computer and Cyber Crimes Bill 2016**, is set to introduce 'content crimes' such as hate speech, cyber harassment, online pornography etc. However, despite its aim to protect Kenyans from online fraud and immorality, there is fear that its vague and broad provisions could be misused to undermine media freedom. Moreover, many of the offences set in the Bill are already dealt with under the Penal Code. Such a legislative panorama, together with the legislation already analysed, might further intimidate and prevent people from expressing themselves freely, including in particular human rights defenders.

In the past, hundreds of bloggers have disproportionately faced the charge of "improper use of a licensed telecommunication system", under Section 29 of the KICA Act, before the provisions was declared unconstitutional<sup>128</sup>. Nevertheless, even in absence of such provision, the Penal Code still offers a wide range of offences under which bloggers and social media users can be criminalised. Defamation charges or accusations of misusing social media, before being declared unconstitutional as well, have often been brought against those inclined to bring up issues related to the accountability of business corporations and executives, as well as that of political leaders<sup>129</sup>.

In some instances, threats and harassment become even more serious. For example, on January 15, 2009, journalist **Francis Nyaruri**, who wrote pieces on a fraud and corruption scandal involving high-ranked police officers, went missing and his decapitated body bearing signs of torture was found two weeks later in the Koderia Forest in western Nyanza province. Likewise, Mr. **Bosire Bogonko**, a pioneer blogger and former journalist running the *Jackal News* website, who had reported on corruption scandals in the Kenyan political elite, remains disappeared since September 18, 2013<sup>130</sup>.

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127 Ms. Phyllis Omido, 2015 winner of the Goldman Prize and founder of the CJGEA, and her colleagues Wilfred Kamencu, Anastacia Nambo, and Alfred Ogola went into hiding at the end of February 2017 after the 12-year-old son of one of them was kidnapped for three days and then released on the side of a road. They are all fearing for their lives. See Press Release by the UN Special Rapporteur on the Issue of Human Rights Obligations related to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, February 24, 2017: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21224&LangID=E>

128 See Section III.5 above.

129 See for instance the case of Mr. Boniface Mwangi in Section V.1 above.

130 See Article 19.

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## VIII. CONCLUSION AND RECOMMENDATIONS

### CONCLUSION

In the aftermath of the 2007-2008 post-election violence, Kenya chose, with the promulgation of the 2010 Constitution, to set up a strong rights-based legal framework and system of democratic governance, promoting integrity in public leadership, wide-ranging reforms enhancing accountability, citizens' participation, and a strengthened system of checks and balances between the three arms of government and the police and security sectors.

However, while the past ten years have seen commendable attempts to reform the Kenyan legal system, to date, the **effective implementation of this progressive framework has remained a mirage and still needs to be substantially improved**. Indeed, despite the work of human rights defenders and organisations to keep alive the promises of the Constitution and claim for the public enjoyment of the country's robust Bill of Rights, the Kenyan authorities continue to resort to restrictive national laws that undermine the positive impact of a very progressive Constitution; the lack of implementation of a new legal framework to support and strengthen civil society is still striking; impunity remains rampant for gross human rights violations and the police and security sector reforms are still far from being complete.

**With all the right instruments put in place to fulfil dreams for change, lack of implementation and political will appear to be the main reasons for such disillusionment**. In this context, State agencies have pursued efforts to crack down on all critical voices, in particular human rights defenders. The Kenyan authorities are using the country's legal framework, including criminal law as well as administrative regulations to exert control and restrict the capacity of NGOs, and excessive use of force by the police and security forces to intimidate, threaten, harass and silence human rights defenders and organisations. It is worth noting that some courts, including the High Court, have remained ramparts against arbitrariness and criminalisation of human rights defenders, as illustrated by various positive rulings issued by such courts, upholding freedoms of expression, association and assembly, and putting an end to arbitrary prosecution of human rights defenders.

Throughout its mission, the Observatory Delegation noted that human rights defenders, including those acting within grassroots organisations and/or those living in the informal settlements, who seek public accountability, access to justice for victims of human rights violations, and enhanced governance and rule of law, were at particular risk of criminalisation, threats, harassment and violence. As rightly stated by three UN Human Rights Experts recently, it indeed appears that **"there is a systematic and deliberate pattern to crack down on civil society groups which challenge governmental policies, educate voters, investigate human rights abuses and uncover corruption"**<sup>131</sup>. Other categories of defenders who are LGBTI rights defenders, WHRDs, land and environmental rights defenders, bloggers and journalists are also particularly targeted.

Moreover, delay in implementing the PBO Act, adopted four years ago, and signed into law before the Kenyatta administration came into power, combined with the many attempts to restrict it through draconian amendments before it even entered into force, is telling about the role the current political leadership wants civil society to play. In such context, **this reluctance to stand with human rights defenders and to truly partner with civil society is extremely regrettable**.

Much remains to be done to uphold the principles and values enshrined in the 2010 Constitution, which is all the more needed as the country is preparing for the upcoming general elections on August 8, 2017. Not only the country will have to do everything possible to avoid that ethnic

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<sup>131</sup> See UN Special Rapporteurs on the Rights to Freedom of Peaceful Assembly and of Association; on Freedom of Expression; and on the Situation of Human Rights Defenders Joint Statement, February 14, 2017: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21172&LangID=E#sthash.kiZuvQRO.dpuf>

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polarisation and political tensions deteriorate into uncontrollable ethnic-based violence, but it is also feared that the space for civil society will continue to shrink as the elections approach, while "attempting to shut down the debate taking place in the civic space threatens to irreparably taint the legitimacy of the upcoming elections"<sup>132</sup>. It is therefore urgent to **publicly recognise the legitimate and crucial role human rights defenders play** as pillars of democracy and watchdogs of the rule of law, **improve their safety and security, truly implement the police and security sector reforms, hold perpetrators of human rights violations accountable, acknowledge the misuse of criminal law to harass defenders**, and finally **commence the PBO Act of 2013** in order to provide for a new legal framework providing an enabling environment for Kenyan civil society and put an end to the arbitrariness of the current framework.

The factors and root causes undermining the reform process also need to be addressed, including fighting corruption, putting an end to impunity and to governmental distrust towards the civil society sector.

## RECOMMENDATIONS

**In light of the findings on the situation of human rights defenders presented in this report, the Observatory makes the following recommendations:**

### **To Kenyan authorities to:**

#### *Regarding State reforms and the national framework for the protection of human rights:*

- Put an end to the prevailing culture of impunity for human rights violations in the country, notably by carrying out independent investigations and effective prosecutions into all allegations of human rights violations, including extrajudicial killings, torture and enforced disappearances;
- To this extent:
  - ensure that the IPOA, the Internal Affairs Unit of the NPSC have sufficient financial and human resources to effectively carry out their mandate;
  - amend the IPOA Act of 2011 to give arrest powers to IPOA in order to better tackle police impunity and not have to rely disproportionately on the same police when investigating police crimes;
  - ensure that, in the presence of evidence of acts of torture, public officials are prosecuted for the crime of torture; in this connection, adopt the Prevention of Torture Bill of 2016 in Parliament, so that its provisions, which render all acts of torture punishable by appropriate penalties, become the applicable law;
  - immediately operationalise the National Coroners Service Act of 2017 by establishing the National Coroner Service;
- Ensure that all police and military operations, including counter-terrorism activities, are carried out in full compliance with Kenya's obligations under international law;
- Ensure that the NPS complies with constitutional safeguards and standards on human rights and fundamental freedoms, including by avoiding excessive use of force in dispersing demonstrations;

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<sup>132</sup> See UN Special Rapporteurs on the Rights to Freedom of Peaceful Assembly and of Association; on Freedom of Expression; and on the Situation of Human Rights Defenders Joint Statement, February 14, 2017: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21172&LangID=E#sthash.kiZuvQRO.dpuf>

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- Ensure that the forthcoming general elections are held in a peaceful, credible and fair atmosphere, and in full compliance with human rights standards, without episodes of excessive use of force by the police and security forces;
  - Ensure that the KNCHR has sufficient financial and human resources to effectively and independently carry out its mandate, including monitoring, reporting and investigating human rights violations as well as protecting human rights defenders at risk; and fully implement its recommendations;
  - Develop and adopt comprehensive anti-discriminatory laws, prevent discrimination against vulnerable groups, including LGBTI persons, and in particular repeal Sections 162, 163 and 165 of the Penal Code which still criminalise sexual liaisons 'against the order of nature';
  - Protect the rights of communities to their land and natural resources against land grabbing and exploitation without consent by national and international enterprises in the field of extractive industries, infrastructure development, commercial farming through increased participation and involvement in decision-making on developments likely to affect their land entitlements;
  - Amend provisions within the Films, Stage Plays and Theatre Bill of 2016 and in the Cyber Crimes Bill of 2016, to avoid putting an excessive burden of regulation on internet users, including granting the police discretionary powers to allow the making of a publication; and ensure that regulations and bodies that will implement its provisions in practice will not restrict the scope of the right to access to information enshrined in the Access to Information Act of 2016;
  - Ratify the African Charter on Democracy, Elections and Governance and establish a national framework to fully implement it at domestic level;
  - Fully implement the decisions and recommendations of the UN Human Rights Committee and Committee Against Torture (UN Document CCPR/C/KEN/CO/3, 2012 and UN Document CAT/C/KEN/CO/2, 2013) and submit its follow-up reports to these Treaty Bodies in due time;
  - Strengthen its cooperation with UN and ACHPR human rights mechanisms, including by inviting the UN Special Rapporteur on the Situation of Human Rights Defenders and the Working Group on Enforced and Involuntary Disappearances to visit the country; as well as by issuing a standing invitation to all UN and ACHPR special mechanisms and procedures;
  - Ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments ratified by Kenya.

*Regarding the protection of human rights defenders  
and fostering an enabling environment for civil society to:*

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- Guarantee in all circumstances the physical and psychological integrity of all human rights defenders in Kenya, including defenders fighting against impunity, WHRDs, LGBTI rights defenders, land and environmental rights defenders, bloggers and journalists;
- Put an end to any kind of harassment, including at the administrative and judicial level, against all human rights defenders and organisations, and ensure that they are not criminalised as retaliation to their legitimate human rights activities;
- To this extent, ensure that bail and bond conditions granted to human rights defenders judicially harassed are affordable, in order not to turn them into additional punitive measures;



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- Put an end to the public stigmatisation of human rights defenders and organisations and publicly recognise the legitimate and crucial role they play as pillars of democracy and watchdogs of the rule of law, including in the context of the upcoming elections;
  - Ensure that all members of the police and other security forces are made aware of the role of human rights defenders and their responsibility to protect them, as set out in the United Nations Declaration on Human Rights Defenders;
  - Put an end to the culture of impunity for human rights violations, including extrajudicial killings, of human rights defenders, by carrying out thorough, impartial, and transparent investigation into all allegations of such violations, in order to identify all those responsible, bring them before an independent tribunal, and sanction them as provided by the law;
  - Review existing laws and policies in close consultation with human rights defenders to ensure full compliance with human rights standards in order to create an enabling environment that allows human rights defenders to be able to work effectively and without threat of attack or judicial harassment by State or non-State actors; legislation that restricts their work, including in particular legislation that unnecessarily and disproportionately restrict the exercise of the rights to freedoms of association, expression and peaceful assembly should be ended, amended and/or repealed;
  - In this connection, guarantee the fundamental right to freedom of peaceful assembly, including in the context of the forthcoming elections, notably by ensuring that demonstrations are not disrupted with unnecessary and disproportionate violence by the police forces, and that no unnecessary bans or limitations are imposed to peaceful demonstrations and protests;
  - Implement the High Court ruling of October 31, 2016 so as to put an end to the current legal limbo concerning the regulations of NGOs and immediately operationalise the PBO Act of 2013, without any restrictive amendment that could undermine the principles enshrined in the Act as signed into law on January 14, 2013; in this connection create the new necessary institutions, such as the PBO Authority and the National Federation of PBOs, and allocate them the required human and financial resources so they can fully implement the Act;
  - Adopt the Human Rights Defenders Policy that is being drafted upon the KNCHR's initiative in partnership with civil society, with the aim to increase the protection and improve the working environment of Kenyan human rights defenders; in this connection, put in place within the Policy a specific protection mechanism for WHRDs and LGBTI rights defenders, capable of tackling the discrimination perspective and the unique gaps and challenges for WHRDs and LGBTI defenders; in the implementation phase, make sure that the entities put in place have a protection outreach component to the informal settlements;
  - Establish quarterly CSO-Ministerial roundtables, in order to facilitate a structured dialogue between civil society and Government officials, as well as provide a crucial arena for a civil society oversight on the implementation of the PBO Act of 2013;
  - Ensure that any legislation adopted on the regulation of NGOs fully conforms to Kenya's national and international human rights obligations and ensure that the adoption of such a legislation is preceded by effective and meaningful consultation with CSOs and consideration of their concerns and recommendations;
  - Fully implement the recommendations formulated by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions following the visit he carried out in 2009 (UN Document A/HRC/11/2/Add.6) and the follow-up country recommendations his successor formulated in 2011 (UN Document A/HRC/17/28/Add.4);

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- Fully implement the decisions and recommendations of the UN Human Rights Committee and Committee Against Torture and in particular:
    - conclude investigations into the killing of Oscar Kamau King'ara and John Paul Oulu and ensure that the alleged perpetrators are prosecuted, and if convicted, punished with appropriate sanctions (UN Document CCPR/C/KEN/CO/3, 2012);
    - take effective steps to ensure that all persons reporting acts of torture and ill-treatment are protected from intimidation and reprisals in any form; and ensure prompt, effective and impartial investigations of any allegations of abuse or intimidations against human rights defenders (UN Document CAT/C/KEN/CO/2, 2013);
  - Fully implement recommendations accepted by Kenya during the Second Cycle of the Universal Periodic Review (UPR) in 2015, particularly concerning proper investigations on intimidation and harassment of human rights defenders and operationalizing the PBO Act of 2013 (UN Document A/HRC/29/10);
  - Comply with all the provisions of the United Nations Declaration on Human Rights Defenders adopted by the UN General Assembly on December 9, 1998, as well as with the provisions of ACHPR Resolutions on the protection of human rights defenders in Africa and the situation of human rights defenders in Africa.

#### **To the United Nations to:**

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- Continue to grant particular attention to the protection of human rights defenders in Kenya, in accordance with the UN Declaration on Human Rights Defenders;
- Call upon the Kenyan authorities to implement recommendations addressed to Kenya by UN human rights mechanisms, in particular the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Human Rights Committee, the Committee Against Torture and the UPR, to regularly report to the UN Treaty Bodies and to better cooperate with the UN human rights system;
- Contribute to the establishment of a constructive dialogue between the Kenyan Government and civil society;
- Continue to condemn publicly violations against human rights defenders and stress that those responsible for such abuses must be held accountable.

#### **To the International Criminal Court (ICC) and the Assembly of States Parties (ASP) to the Rome Statute to:**

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- Continue to grant particular attention to the protection of human rights defenders who collaborate with the ICC in Kenya, and follow up on their concern, expressed at the last session of the ASP in November 2016, regarding dangers human rights defenders working on ICC issues are exposed to;
- Take a strong stance against threats against human rights defenders collaborating with the ICC in Kenya, and stress that those responsible for such abuses must be held accountable.

#### **To the African Commission on Human and Peoples' Rights (ACHPR) to:**

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- Publicly denounce the vulnerability of human rights defenders in Kenya, in particular the legal and practical infringements to their freedoms of association, expression and assembly;

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- Call upon the Kenyan authorities to guarantee the physical and psychological integrity of human rights defenders and ensure that those found responsible for human rights abuses are held accountable;
  - Encourage the ACHPR Country Rapporteur, the Special Rapporteur on Human Rights Defenders, the Special Rapporteur on Freedom of Expression and the Working Group on Death Penalty and Extrajudicial, Summary or Arbitrary Killings to continue to grant particular attention to the situation of human rights defenders in Kenya, including by conducting a joint official fact-finding and/or promotion mission to the country prior to the August general elections;
  - Address the critical situation of human rights defenders and civil society in Kenya during the 60th session of the ACHPR in May 2017;
  - Call for free, peaceful and democratic general elections in August 2017;
  - Call upon Kenya to make a declaration under Article 34.6 of the Protocol to the African Charter on the establishment of the African Court, allowing direct access to the Court to NGOs and individuals;
  - Call upon the Kenyan authorities to fully conform its national legal and institutional framework with the human rights guarantees provided by regional and international treaties, as well as by the Constitution of Kenya;
  - Demand that Kenya ensures that its 2017 elections conform to the principles of the African Charter on Human and Peoples' Rights with respect to freedoms of association, assembly and expression as well as to the African Charter on Democracy, Elections and Governance;
  - Deploy human rights monitors in Kenya ahead of August 2017 general elections to document instances of violation and abrogation of freedoms of association, assembly and expression that have the potential to impact adversely on the legitimacy of elections.

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**To the African Union and the East African Community (EAC) to:**

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- Call upon the Kenyan authorities to fully conform its national legal and institutional framework with the human rights guarantees provided by regional and international treaties, as well as by the Constitution of Kenya;
- Call upon the Kenyan authorities to support, both politically and financially, the full implementation of State and security sector reforms;
- Contribute to the establishment of a constructive dialogue between the Kenyan Government and civil society in the country;
- Demand that the 2017 general elections in Kenya adhere to the principles of free, fair and credible elections as articulated in the African Charter on Democracy, Elections and Governance which the country has ratified;
- Engage with the Kenyan authorities in order to guarantee the presence and deployment of local and international electoral observers during the general election of August 2017; and make every effort to ensure that the military and security sector, as well as private militias, are not involved in the management of the next general elections;
- At the level of the EAC, finalise and uphold the Regional East African Community Bill of Rights, with a particular emphasis on recognising and protecting the rights of human rights defenders.

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**To the European Union (EU), its Member States  
and other diplomatic representations in Kenya to:**

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- Continue to grant particular attention to the protection of human rights defenders in Kenya, in accordance with the UN Declaration on Human Rights Defenders, the EU, the Swiss, the French the Irish, the Dutch, the Finnish, the Norwegian and the Canadian Guidelines on Human Rights Defenders;
- Condemn, including through high-level public statements, harassment, arbitrary arrests, and violence against human rights defenders, and stress that those responsible for such abuses and violations must be held accountable;
- Engage a dialogue with the Kenyan authorities on the concerns set out in this report as well as on the measures to be taken by the Kenyan authorities to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under the Kenyan State's jurisdiction, individually and in association with others, are able to enjoy all human rights and fundamental freedoms;
- Ensure that the delegations and Head of Missions take all protective, preventive, and reactive measures, including local statements and proactive démarches, in line with the EU, Swiss, French, Irish, Dutch, Finnish, Norwegian and Canadian Guidelines, including by:
  - meaningfully and constantly engaging with civil society and human rights defenders, including from grassroots organisations (also in line with the EU CSO Roadmap set by the EU Heads of Mission in Kenya);
  - using public and silent diplomacy in order to raise with Kenyan authorities individual cases of human rights defenders harassed, arbitrarily detained, criminalised or extra-judicially killed;
  - publicly recognising the crucial role of human rights defenders as pillars of democratic society;
  - monitoring trials held against human rights defenders;
- Continue supporting the KNCHR, especially its human rights defenders capacity building project, and other public institutions within the framework of the State and security sector reforms, and engage with Kenyan authorities to call on them to step up their support and ensure the independence of constitutional human rights bodies and oversight commissions in order to make them fully operational;
- Withdraw financial support from businesses in the fields of extractive industries, infrastructure development, commercial farming that do not engage in meaningful consultation with the affected communities and obtain their consent to proceed with megaprojects, in order to protect the rights of communities to their land and natural resources;
- Ensure a thorough and human rights based monitoring of the 2017 general elections through sending election observation missions to Kenya, and coordinate efforts in this regard within the donor group on elections, co-chaired by Norway and Denmark;
- In the framework of the Long-term Electoral Assistance Programme (LEAP), a UNDP-led "basket fund" set to contribute to fair and credible 2017 elections, work towards the full respect and protection of human rights, including prevention of election violence;
- Condition all security sector cooperation and technical assistance provided on counter-terrorism and policing to an accountability and respect for human rights clause.



Created in 1985, the World Organisation Against Torture (OMCT) works for, with and through an international coalition of over 200 non-governmental organisations – the SOS-Torture Network – fighting torture, summary executions, enforced disappearances, arbitrary detentions, and all other cruel, inhuman and degrading treatment or punishment in the world.

#### **Assisting and supporting victims**

OMCT supports victims of torture to obtain justice and reparation, including rehabilitation. This support takes the form of legal, medical and social emergency assistance, submitting complaints to regional and international human rights mechanisms and urgent interventions. OMCT pays particular attention to certain categories of victims, such as women and children.

#### **Preventing torture and fighting against impunity**

Together with its local partners, OMCT advocates for the effective implementation, on the ground, of international standards against torture.

OMCT is also working for the optimal use of international human rights mechanisms, in particular the United Nations Committee Against Torture, so that it can become more effective.

#### **Protecting human rights defenders**

Often those who defend human rights and fight against torture are threatened. That is why OMCT places their protection at the heart of its mission, through alerts, activities of prevention, advocacy and awareness-raising as well as direct support.

#### **Accompanying and strengthening organisations in the field**

OMCT provides its members with the tools and services that enable them to carry out their work and strengthen their capacity and effectiveness in the fight against torture.

OMCT presence in Tunisia is part of its commitment to supporting civil society in the process of transition to the rule of law and respect for the absolute prohibition of torture.

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#### **Establishing the facts**

Investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed rigorous and impartial procedures to establish facts and responsibility.

Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1,500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

#### **Supporting civil society**

Training and exchanges

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level.

#### **Mobilising the international community**

Permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations.

FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

#### **Informing and reporting**

Mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.

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17 passage de la Main-d'Or - 75011 Paris - France  
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The Observatory

KENYA – 2017 elections: broken promises put human rights defenders at risk



The Observatory  
for the Protection  
of Human Rights Defenders

**The Observatory for the Protection of Human Rights Defenders,  
a partnership of OMCT and FIDH**

Created in 1997, the Observatory is an action programme based on the belief that strengthened co-operation and solidarity among human rights defenders and their organisations will contribute to break the isolation they are faced with. It is also based on the absolute necessity to establish a systematic response from NGOs and the international community to the repression of which defenders are victims. The Observatory's activities are based on consultation and co-operation with national, regional, and international non-governmental organisations.

With this aim, the Observatory seeks to establish:

- a mechanism of systematic alert of the international community on cases of harassment and repression of defenders of human rights and fundamental freedoms, particularly when they require urgent intervention;
- the observation of judicial proceedings, and whenever necessary, direct legal assistance;
- international missions of investigation and solidarity;
- a personalised assistance as concrete as possible, including material support, with the aim of ensuring the security of the defenders victims of serious violations;
- the preparation, publication and world-wide dissemination of reports on violations of the rights and freedoms of individuals or organisations working for human rights around the world;
- sustained action with the United Nations and more particularly the Special Rapporteur on the Situation on Human Rights Defenders, and sustained lobbying with various regional and international intergovernmental institutions.

With efficiency as its primary objective, the Observatory has adopted flexible criteria to examine the admissibility of cases that are communicated to it, based on the "operational definition" of human rights defenders adopted by OMCT and FIDH: "Each person victim or at risk of being the victim of reprisals, harassment or violations, due to his or her commitment, exercised individually or in association with others, in conformity with international instruments of protection of human rights, to the promotion and realisation of the rights recognised by the Universal Declaration of Human Rights and guaranteed by the different international instruments".



**To ensure its activities of alert and mobilisation, the Observatory has established a system of communication devoted to defenders in danger. This system, called Emergency Line, can be reached through:**

E-mail: [Appeals@fidh-omct.org](mailto:Appeals@fidh-omct.org)  
**OMCT** Tel: + 41 22 809 49 39 Fax: + 41 22 809 49 29  
**FIDH** Tel:+ 33 1 43 55 25 18 Fax: + 33 1 43 55 18 80

