



**Kenyans
for Peace,
Truth and
Justice**

**4th Extraordinary Session of the
African Commission on Human and Peoples' Rights (ACHPR)**

**MEMORANDUM TO THE ACHPR
ON THE HUMAN RIGHTS SITUATION IN KENYA**

I – OVERVIEW

The International Federation for Human Rights (FIDH), its member organisation, the Kenya Human Rights Commission (KHRC), and the Kenyans For Peace, Truth and Justice (KPTJ – a coalition of Kenya's governance, human rights and legal organizations), welcome the decision of the African Commission on Human and Peoples' Rights (ACHPR) to examine the human rights situation in Kenya at the occasion of its 4th extraordinary session which will be held in Banjul, The Gambia, from 15 to 24 February 2008.

Our organizations request you to:

- Invite Kenyan, African and International NGOs to present their assessment of the human rights situation in Kenya;
- Adopt a general resolution condemning the serious violations of human rights guaranteed in the African Charter on Human and Peoples' Rights;
- Demand accountability and an end to impunity, and to make recommendations to support return to democratic governance, respect for human rights and just peace in the country;
- Adopt a specific resolution on the intimidation and harassment of human rights defenders in Kenya;
- Request, together with Kenyan and International NGOs, a meeting with the African Union Peace and Security Council, to present the human rights situation in the country so as to mitigate or prevent further or imminent violations; and

- Urge the Member States to adopt the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

II – IRREGULARITIES AND FRAUD AT THE OCCASION OF THE GENERAL ELECTION OF 27 DECEMBER 2007

On Thursday 27 December 2007, Kenyans went to the polls to vote for presidential, parliamentary and civic candidates. High voter turn out characterised the elections on the polling day, which was generally peaceful and without any gross irregularities. Casting and counting of votes at the polling stations was free, fair and transparent. Tallying and the declaration of civic and parliamentary results at constituency tallying centres was also deemed largely free and fair. The outcome of these two elections is considered to reflect the will of the people and to conform to high standards of democratic elections.

However, subsequent events in counting and tallying the presidential poll that led to swearing-in of Mwai Kibaki on 30th October 2007 was heavily flawed and devoid of credibility.

After two days of controversy over the tally, the executive arm of government usurped the role of the Electoral Commission of Kenya (ECK). Paramilitary troops (the General Service Police Unit- GSU) invaded the tallying centre, escorted the Chairman of the ECK out of the hall and proceeded to disperse the contestants, observers, agents and media. Subsequently the ECK Chairman announced a result that was not backed by the required statutory documentation and shortly thereafter, Mwai Kibaki was sworn in as President in a private and evidently pre-arranged ceremony.

Domestic and international observers have since tabled evidence of irregularities and fraud.¹ Since then, the Chairman and Commissioners of the ECK have also cast aspersions on the integrity of the results².

1 See Commonwealth Secretariat, Kenya General Election, The Report of the Commonwealth Observer Group (London, January 2008) available at www.thecommonwealth.org
EAC Secretariat, The East African Community Observer Mission Report Kenya General Elections December 2007 (Arusha, January 2008)(on file with the KHRC),
Statement of the Pan African Parliament Election Observer Mission to Kenya,
<http://www.pambazuka.org/aumonitor/AUMONITOR/comments/996/>

European Union Election Observation Mission, Doubts about the Credibility of the Presidential Results Hamper Kenya's Democratic Progress: Preliminary Statement (Nairobi, January 2008), available at www.eueomkenya.org/Main/English/Default.html, and Kenya Human Rights Commission, Violating the Vote Nairobi, February 2008) available at www.khrc.or.ke.

2 The president of ECK himself declared that « *external pressure was being brought to bear on his commission to act in a certain way* ». See the Article of the East African Standard, 11 January 2008,

III - VIOLENCE AND MASSIVE HUMAN RIGHTS VIOLATIONS

Different Types of Violence

The subversion of democracy in the presidential election has triggered serious political and civil strife in Kenya. Following these events, Kenya has witnessed a wave of violence and serious human rights violations. The types of violence are as follows:

- Spontaneous, disorganised uprisings of mobs protesting the flaws in the presidential elections. These mobs looted, raped and burnt down buildings in an anarchical manner.
- Organized violence by militia in the Rift Valley that was aimed at perceived political opponents. The initial militia action attracted retributive, largely organized counter-violence especially in Nakuru, Naivasha areas of the Rift Valley, and Nairobi.
- Disproportionate and excessive use of force by the Police against unarmed protesters mainly in opposition strongholds including Kisumu, Kakamega, Migori, and the low income settlements of Nairobi. Policing has been uneven in its implementation. In some strong opposition areas, the police have been shooting to kill, while when confronted with some militia, they have opted to negotiate with the groups. However, in the Eldoret area, the Police were bystanders as perceived opponents of the opposition were killed and their houses burnt.
- Local militia in pro-government areas, on receiving internally displaced persons (IDPs) from the Rift Valley, have mobilized in sympathy and turned on perceived opposition supporters, killing them, and burning their houses.

The violence has so far claimed over 1000 lives and displaced over 300,000 Kenyans, some across the Kenyan borders, and some displaced for the second time.³ UNICEF also indicated that cases of rape are increasing notably in the

³ Kenya has had a history of internal displacement, the most recent being between 1992 and 1997. During that period, more than 250,000 people were internally displaced, most of whom have not returned to their farms and homes. See FIDH and KHRC « *Massive Internal Displacements due to Politically Instigated Ethnic Clashes*, » FIDH Report n°471/2, available at

informal internally displaced persons' camps. According to the African Union (AU) mediator, Kofi Annan, Kenya faces «*gross and systematic human rights abuses* ». And, the United Nations Special Adviser on the Prevention of Genocide, Francis Deng, called for « *an immediate halt to the destructive cycle of attacks and revenge attacks in Kenya, where post-electoral violence continues to claim lives* »⁴. At the occasion of its 10th Summit, the African Union took a decision on the situation in Kenya strongly « *deploring the loss of lives* » and « *condemning the gross violations of human rights that occurred in the past weeks* »⁵.

The crisis has since mutated from protest over the flawed presidential election, but also deeper issues among them historical injustices and wrongs, inequality (income and geographic), dispossession and corruption. The FIDH, KHRC and KPTJ consider these forms of violence to be venues for serious human rights violations, hence the need for their immediate cessation. While supporting peaceful resolution of the Kenyan situation, the FIDH, KHRC and KPTJ consider that sustainable peace should be founded on truth, justice and respect human rights and the democratic will of the Kenyan people. Further, the solution to the Kenyan situation must aim at preventing any possible future cycles of violence and human rights violations. In this respect, we wish to bring to the attention of the Commission the following :

Gross Human Rights Violations as a Common Occurrence at the Time of General Elections

During past multi-party elections with the exception of 2002, political violence has been a common occurrence. In 1992 and 1997, violence prior to and after elections was largely attributed to the then ruling party, KANU, whose officials organised, fuelled, or otherwise supported violence aimed at suppressing supporters of the opposition.

<http://www.fidh.org/spip.php?article4259>.

4 See UN Center News Press Release, 28 January 2008 : UN genocide adviser urges end to violence in Kenya, sends staffer there

<http://www.un.org/apps/news/story.asp?NewsID=25425&Cr=kenya&Cr1=>

5 Cf, Decisions and Declaration of the 9th ordinary session of the Conference.

<http://www.africa-union.org/root/ua/index/index.htm>

This time, the scheme was slightly different. The magnitude of the violence prior to the election was not gross, neither was there any widespread inter-ethnic clashes that had been the signature of pre-election periods in 1992 and 1997. Only after the elections did gross violence erupt. But as soon as the presidential results were announced, certain members of ethnic groups committed atrocities against innocent individuals (mainly the Kikuyus, Mwai Kibaki's ethnic group) for their perceived support of Mwai Kibaki during the election. And, some members of the Kikuyu community did engage in acts of revenge. Also, we did witness the reactivation of militias across some parts of the Rift Valley, Nyanza and Nairobi, whose activities has led to violence occasioning loss of lives and destruction of property, and serious violation to human dignity and autonomy.

Catastrophic Humanitarian Situation

The violence that erupted in Kenya forced a massive internal displacement of Kenyans. At the end of January, humanitarian organisations reported more than 300,000 IDPs.⁶ Thousands of individuals have also crossed the border as refugees in Uganda. Some of the IDPs were direct victims of the attacks, whereas some are secondary IDPs as a result of insecurity and fear of further violence, with IDP sites reported in areas that were initially not affected by the violence such as Meru in Eastern Province. Some few IDPs' camps were formally established in schools, churches and in some Police stations. In some camps, some IDPs were turned away despite being under well-founded fear of attack and persecution, whereas in some cases, the camps have been closed prematurely and IDPs repatriated or reintegrated without providing them with durable solutions.

The humanitarian situation of IDPs is deplorably indignifying. Moreover UNICEF reported rising cases of rape and defilement in informal IDPs sites. There are cases of IDPs who live without relief assistance, whereas squalor remains a concern in all the camps. Yet another concern that continues to be highlighted

⁶ See The United Nations Office for the Coordination of Humanitarian Affairs in Kenya (Nairobi, 14th - 20th January 2008).

is Inadequate security in IDPs camps. Regrettably some of the proposed relocation sites are not suitable, and many of the IDPs interviewed indicate that they would prefer to return to their homes if security can be guaranteed, instead of being moved to these locations.

Rolling back Fundamental Rights and Freedoms

In reaction to the electoral irregularities, the opposition party, Orange Democratic Movement (ODM), called their supporters to protest against the fraud in the electoral process. The rallies were immediately banned by the Police under the pretext of public order and security. The government also banned Kenyan media from live coverage. The security forces (Police Force and the paramilitary), supported in certain cases by militias, repressed several civilians who attempted to take part in these rallies, in exercise of their rights. Also, the Police absconded its responsibility to protect civilians and their property during the rallies. Several individuals were wounded or killed as a result of excessive use of force and use of live bullets by the Police.

Great Danger to Human Rights Defenders

According to the information received by the Observatory for the Protection of Human Rights Defenders, a joint FIDH and World Organization Against Torture programme, notably from KHRC and KPTJ, the following human rights defenders received warnings and/or intimidation: *Muthoni Wanyeki*, Executive Director of the Kenya Human Rights Commission (KHRC), *Gladwell Otieno*, Director of the Africa Centre for Open Government, *Njeri Kabeberi*, Executive Director of the Centre for Multi-Party Democracy, *Haroun Ndubi*, lawyer and member of the Kenya Domestic Observers Forum, *David Ndii*, co-founder and Director of the Kenya Leadership Institute, a non-profit organization that seeks to raise-awareness on public policy issues, and author of a report on the last elections' irregularities, as well as death threats to Messrs. *Maina Kiai*, former Executive Director of KHRC and now Chairman of the Kenya National Commission on Human Rights, *Ndung'u Wainaina*, member of the National Convention Executive Council, *James Maina*, member of Bunge La Mwananchi (the People's

Parliament).

On January 25, 2008, Mr. James Maina reported that he received a series of death threats from the *Mungiki*,⁷ who promised that they would kill him even if he went into hiding. These death threats follow similar acts of harassment that occurred on January 10 and 15, 2008. On January 15, a Mungiki member who was waiting for Mr. Maina in town reportedly threatened him directly as he saw him. This was followed by a phone call from his neighbour a few hours later, who informed Mr. Maina that about ten people were looking for him. At the end of January, Mr. Maina was forced to change his phone number and the place where he was staying, and subsequently fled the country.

The FIDH and KHRC were further informed of death threats against Messrs. Kiai and Ndubi, who received phone calls from anonymous people who told them that they would cut off their heads if they went on criticising the outcome of the elections. In addition, Mr. Wainaina asserted that a former Councillor from Nyahururu, where he comes from, told him that he risked to be killed if he carried on criticising the presidential elections, saying that he was betraying the community and that he would never see Nyahururu again if he continued to do so.

According to further information, the above named have been termed as traitors (with attendant threats) by a criminal group calling itself the Thagicu Renaissance Movement. These threats and sentiments are obviously linked with their denunciation of the irregularities that marred the process and outcome of the latest presidential elections, and with the submission⁸ to Kilimani Police Station of a private complaint against the Electoral Commission of Kenya (ECK) with regard to criminal offenses (making of false certificates; neglect of duty; disobedience of statutory duty; forgery of judicial or official documents, etc.) by its officers committed in the processing, management and control of the general elections. This submission was made on behalf of the KPTJ, of which some of the above-mentioned defenders are members.

⁷ Mungiki is a politico-religious group and a banned criminal organization in Kenya.

⁸ The submission was filed on January 10.

The FIDH, KHRC and KPTJ express their deep concern about these threats, and fears that they might be aimed at intimidating human rights defenders and striking down their activities in support of the principle of free and fair elections,⁹ in a context of increasing political tension.

We recall that according to Article 12.2 of the United Nations Declaration on Human Rights Defenders, adopted by the UN General Assembly on December 9, 1998, “the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.”

IV – VIOLATIONS OF THE RIGHTS PROVIDED IN THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

With regard to the above mentioned facts, FIDH, KHRC and KPTJ condemn the violations by state and non-state actors of various human rights provisions of the African Charter on Human and Peoples' Rights, notably *Article 4* (Right to life and integrity of the person), *Article 5* (Right to dignity), *Article 6* (Right to liberty and security of the person), *Article 7* (Free and Fair Administration of Justice) *Article 9* (Right to Information), *Article 10/11* (Freedom of assembly/ association), *Article 13* (Right to democratic governance and public participation), *Article 14* (Right to Property), *Article 16* (Right to enjoy the best attainable state of physical and mental health) and *Article 18* (Right to protection from discrimination/violence on the basis of sex).

Kenya ratified the African Charter on Human and Peoples' Rights on 23 January 1992, and is under an obligation to ensure that the rights guaranteed thereunder are respected, protected and promoted. Also, as a signatory to the Protocol

⁹ On January 10, 2008, a peaceful march was organized by the KPTJ to Kilimani Police Station to file a private prosecution against the Electoral Commission of Kenya (ECK) with regard to criminal offenses (making of false certificates; neglect of duty; disobedience of statutory duty; forgery of judicial or official documents, etc.) committed in the processing, management and control of the general elections.

to the Charter on the Rights of Women in Africa, Kenya is obligated to ensure the rights entrenched therein, including measures to ensure the prevention, punishment and eradication of all forms of violence against women, in peacetime and during conflict.

IV - RECOMMENDATIONS

FIDH, KHRC and KPTJ request the African Commission on Human and Peoples' Rights to:

1. Invite Kenyan, African and International NGOs to present an assessment of the state of human rights in Kenya at the occasion of the 4th extraordinary session.

2. Adopt a resolution at the occasion of the 4th extraordinary session to:
 - a) Condemn the serious violations of the provisions of the African Charter on Human and Peoples' Rights and its Protocol on the Rights of Women;
 - b) Denounce the electoral irregularities that were committed during the presidential ballot of 27 December 2007 as blatant violation of the African Charter on Elections, Democracy and Governance;
 - c) Reaffirm support toward the efforts of the Mediation Team towards effective political solution to the crisis, based on peace, truth and justice ;
 - d) Request the Kenyan authorities and any other duty-bearers to:
 - ensure unobstructed investigations on the alleged breach of the Presidential and National Assembly Elections Act and the Constitution of Kenya by the Electoral Commission of Kenya;
 - ensure the protection of civilians, including human rights defenders;
 - take all necessary measures to ensure the end of impunity of the authors, co-authors and instigators of post electoral inter-ethnic violence;
 - ensure that all individuals responsible for directly inciting ethnic violence be investigated and prosecuted;
 - ensure that all members of security forces responsible for disproportionate repression of peaceful demonstrators and other individuals be investigated and prosecuted;
 - ensure the opening of investigations against militia members

responsible for human rights violations;

- ensure unobstructed investigations on the murder of two opposition Members of Parliament; death threats pronounced against the human rights defenders;
- take all the necessary measures to ensure respect for the United Nations (UN) Guiding Principles on Internal Displacement;
- establish transitional justice mechanisms to address the underlying causes of the violence and provide justice addressing immediate and historical wrongs in Kenya;
- more generally, to take all necessary measures to settle the root causes of the crisis in Kenya, notably the issue of land and internally displaced persons, and to guarantee justice, respect for human rights and democratic governance.

3) Request, together with Kenyan and International NGOs, a meeting with the African Union Peace and Security Council, to present the human rights situation in the country so as to mitigate or prevent further or imminent violations

4) Invoke its inherent jurisdiction to draw the attention of the Assembly of Heads of State and Government to the existence of serious or massive violations of human rights in Kenya, and the trigger, namely the flawed presidential election

5) Urge the Member States to adopt the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

FIDH, KHRC and KPTJ request the Special Rapporteur of the African Commission on Human and Peoples' Rights on the Human Rights Defenders in Africa:

- To adopt a specific resolution condemning intimidation of human rights defenders, and demand respect for the physical and moral integrity of human rights defenders, in conformity with the African Charter on Human

and Peoples' Rights and the Declaration on the protection of Human Rights Defenders adopted in 1998 by the United Nations General Assembly.

Signed:

International Federation for Human Rights

Kenya Human Rights Commission

Kenyans for Peace, Truth and Justice :

- Africa Centre for Open Governance (AfriCOG)
- Awaaz
- Centre for Law and Research International (CLARION)
- Centre for Multiparty Democracy (CMD)
- Centre for Rights, Education and Awareness for Women (CREAW)
- (CRADLE)
- Constitution and Reform Education Consortium (CRECO)
- East African Law Society (EALS)
- Haki Focus
- Hema la Katiba
- Independent Medico-Legal Unit (IMLU)
- Innovative Lawyering
- Institute for Economic Affairs (IEA)
- Institute for Education in Democracy (IED)
- International Commission of Jurists (ICJ-Kenya)
- Kenya Human Rights Commission (KHRC)
- Kenya Leadership Institute (KLI)
- Kenya National Commission on Human Rights (KNCHR)
- Kituo cha Sheria
- Media Institute
- Muslim Human Rights Forum
- National Constitution Executive Council (NCEC)
- Regional Centre for Stability, Security and Peace in Africa
- Sankara Centre
- Society for International Development (SID)
- Urgent Action Fund (UAF)-Africa
- Youth Agenda