

## KENYA

# ONE YEAR IN OFFICE FOR UHURU KENYATTA AND WILLIAM RUTO

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,





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# Introduction

April 9<sup>th</sup> 2014 marks the first year in office of Uhuru Kenyatta and William Ruto as President and Deputy President of Kenya. Despite the commitments made by the Jubilee Coalition during its electoral campaign, which were echoed by President Uhuru Kenyatta in his inaugural speech when he reaffirmed his willingness to guarantee the protection of “*the rights of all citizens [...] through legislation that upholds the spirit of [the] Constitution*”, and to “*glorify rather than undermine democracy*”<sup>1</sup>, this first year in office has been marked by worrisome cases of infringements to fundamental rights and freedoms and by rampant impunity.

Democratic principles and the rule of law have been regularly violated under the new regime: freedom of association and freedom of peaceful assembly have been constantly under threat, freedom of expression and of the press have been seriously infringed and fundamental rights of non-discrimination have been jeopardised in various ways. Throughout the year, Kenyan authorities have attempted to clampdown on dissenting voices, either through the adoption of restrictive legislation aimed at further regulating the NGO or media sectors; through the violent police crackdown on demonstrators; or through judicial harassment of protesters and human rights defenders. Under the guise of preserving the country’s peace and security, authorities have conducted anti-terrorism operations which have, in some cases, been marred by serious human rights abuses. Also, attempts to roll back on fundamental rights of women or to further discriminate against LGBTI persons have been noticed.

This first year in office has also been marked by a continuing lack of effective measures to ensure that victims of human rights violations, and in particular victims of the 2007/2008 post-election violence get justice and redress at national and international levels. Instead, and despite commitments to cooperate fully with the International Criminal Court (ICC), the new authorities have embarked on a virulent national, regional and international campaign aimed at undermining the functions of the Court. The motion passed by the Parliament of Kenya to withdraw the country from the Rome Statute or the proposed amendments to the Rome Statute aimed at exempting Head of States from prosecution before the ICC are illustrative of Kenya’s unwillingness to provide and secure justice to victims of post-election violence.

At national level, despite the starting of a judicial reform process, those responsible for the crimes perpetrated during the post-election violence have to a large extent remained unpunished. There have been few prosecutions of mid-level perpetrators of the violence and most of them have ended in acquittals. Similarly, the lack of political will to ensure accountability for the violations perpetrated during the post-election violence has been illustrated with the decision of Parliament to pass the Truth, Justice and Reconciliation Amendment Bill in a way that it would allow Members of Parliament to alter the contents of the TJRC report.

This joint FIDH and KHRC briefing paper outlines the main human rights challenges that have been experienced in Kenya throughout the first year in office of President Uhuru Kenyatta and Deputy President William Ruto and formulates detailed recommendations to the authorities to ensure that they abide by their human rights commitments and obligations and that Kenyans fully enjoy the rights enshrined in the 2010 Constitution.

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1. <http://uhuruto2013.com/president-uhuru-kenyattas-inauguration-speech/> <http://www.the-star.co.ke/news/article-115992/president-uhuru-kenyattas-inauguration-speech>

# PART I – Increasing Infringements to Fundamental Rights and Freedoms

## A. Freedoms of Association and Expression Under Threat

Throughout the first year of the Jubilee government’s mandate, fundamental rights and freedoms have been increasingly jeopardised with the new regime entering into a fierce campaign aimed at clamping down on dissenting voices. In the absence of a strong and well-structured political opposition, human rights defenders and journalists, who are critical watchdogs of the new regime, have become the main targets of intimidation, threats and other forms of harassment, including judicial action against them.

In complete disregard of the 2010 Constitution – which guarantees freedom of association (article 36), freedom of expression (article 33) and of the media (article 34) and right to information (article 35) – Kenyan authorities have attempted to muzzle civil society organisations and the media through supposedly legal channels and have instigated judicial proceedings against human rights defenders.

### ***A.1. Restricting the Action of Civil Society Organisations: The Miscellaneous Amendment Bill, 2013***

The Public Benefits Organisations (PBO) Act, 2013, which was generated after a four year consultative process involving non-governmental organisations (NGOs), PBOs and the Government of Kenya, was assented to by former President Mwai Kibaki on January 13, 2013, prior to the March 2013 general elections. Following this enactment, NGOs and PBOs were expecting the Cabinet Secretary for Planning and Devolution to officially announce the commencement date of the new Act and ensure implementation of its provisions.

However, on October 30, 2013, the office of the Attorney General of Kenya submitted the Miscellaneous Amendment Bill, 2013 for its introduction into the National Assembly. The Bill, which sought to amend some major provisions of the PBO Act, 2013 was adopted by Parliament on November 27, 2013. The Bill posed serious threats on NGOs/PBOs’ ability to carry out their activities independently, and free from being subjected to the State’s interference into the allocation of their funds. Out of the 13 proposed amendments, some specifically aimed at:

- Prohibiting NGOs and PBOs, from receiving more than 15% of their funding from external donors;
- Prohibiting NGOs and PBOs from receiving their funding directly from donors and imposing that all funds be channelled through a new “Public Benefits Organizations (PBO) Federation”;
- Altering the composition of the PBO Regulatory Authority’s governance body in favour of the executive branch;

- Awarding this Authority discretionary powers to “*from time to time, impose terms and conditions for the grant of certificates of registration, permits of operation, and public organizations status*”.

While the Bill was rejected by Parliament at the second reading – following strong national and international pressure – it gives an illustration of the political environment within which civil society organisations are henceforth operating in Kenya. In a context where there is no assurance that a similar bill will not, once again be submitted to Parliament for enactment ; where the political rhetoric consists of publicly stigmatizing the action of NGOs ; and where the PBO Act, 2013 is still not implemented, civil society organisations are in a position of vulnerability.

The human rights organisations or individuals mainly affected by this precarious situation are those working on issues deemed sensitive by the new administration. In a context where both the President and Deputy President of Kenya are facing prosecution before the International Criminal Court (ICC) for their alleged responsibility into the crimes against humanity perpetrated during the 2007/2008 post-election violence, and where the same authorities are making considerable efforts to obtain the suspension of these proceedings, those advocating for accountability and justice appear to be the main targets of stigmatisation and attempts of muzzling.

This situation is reminiscent of the fierce campaign engaged, during the 2013 electoral process, against those who challenged the integrity – considered under the 2010 Constitution as a prerequisite for all those seeking official positions – of Uhuru Kenyatta and William Ruto before the High Court or against those who reported electoral malpractices and questioned the regularity of the elections. Along with public statements from officials portraying these organisations or individuals as “puppets of foreign countries”, cases of threats and other forms of intimidation against them were reported.

This context has led to increasing tensions in the relationships between Kenyan authorities and human rights and good governance NGOs and concerns exist over the sustainability of these organisations’ actions. This risk was already reflected in the Jubilee Coalition Electoral Manifesto where the Coalition proposed to “*introduce a Charities Act to regulate political campaigning by NGOs, to ensure that they only campaign on issues that promote their core remit and do not engage in party politics. This will also establish full transparency in funding both for NGOs and individual projects*”. This manifesto wrongly seemed to imply that NGOs were involved in politics and that their sources of funding and management were a matter of concern.

Denouncing Kenya’s attempt to curtail freedom of association, a group of United Nations Special Rapporteurs urged the Government of Kenya to reject the Miscellaneous Amendment Bill, 2013, considering that it represented “*an evidence of a growing trend [...] whereby governments are trying to exert more control over independent groups using so-called ‘NGO laws’*”. The Special Rapporteurs considered that “*the amendments to the regulations of associations contained in the draft law could have profound consequences for civil society organisations in Kenya, including for those involved in human rights work, and could deter individuals from expressing dissenting views*”. Stressing the gravity of the provisions related to funding restrictions, the Special Rapporteurs considered that those provisions compromised “*associations’ independence and run[ed] counter to international law and best practices*”<sup>2</sup>.

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2. Kenya: Statute Law Bill poses grave threat to civil society and must be rejected – UN rights experts, 3 December 2013, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14055&>

### **Restricting NGOs' access to funding violates their right to freedom of association<sup>3</sup>**

Access to funds and resources is essential for NGOs, and is an integral component of the right to freedom of association. Without funding, NGOs, in particular human rights NGOs, obviously cannot effectively engage in the defence and promotion of human rights. Many human rights bodies and special procedures have emphasized this principle and confirmed that States should promote and guarantee the right of NGOs to access funding – including foreign funding – as an integral part of their obligation to respect and promote the right to freedom of association.

Following the adoption of the Charities and Societies Proclamation (No. 621/2009) in **Ethiopia**, several United Nations Committees (CAT, CEDAW, CERD, CESCR) have voiced their concern regarding the 10% ceiling on funding from abroad and unanimously called on Ethiopia to abolish such restriction. In August 2011, CCPR noted: *“This legislation impedes the realization of the freedom of association and assembly as illustrated by the fact that many NGOs and professional associations were not authorized to register under the new Proclamation or had to change their area of activity”* (Arts. 21 and 22). It recommended that Ethiopia in particular “[...] should reconsider the funding restrictions on local NGOs in the light of the Covenant and it should authorize all NGOs to work in the field of human rights”<sup>4</sup>. In 2012, CESCR noted with concern that *“certain provisions of the Charities and Societies Proclamation (No. 621/2009) have had a profound obstructive effect on the operation of human rights organizations”*. It recommended that the State party *“amend [that] Proclamation [...], with a view to omitting provisions restricting the work of human rights organizations and lifting the funding restrictions”*<sup>5</sup>.

After **Algeria** presented its report to CEDAW in March 2012, the latter expressed its concern regarding *“[...]the provisions of the Law on Associations, adopted in January 2012, stipulating a requirement of specific authorization for an association so that it can receive funding from international donors, which may negatively impact the activities of those associations working on gender equality and empowerment in a developmental context”*<sup>6</sup>.

In its Communication No. 1274/2004, the United Nations Human Rights Committee (CCPR) observed: *“The right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by article 22 extends to all activities of an association [...]”* of an association [...].”<sup>7</sup> This means that fundraising activities are also protected by Article 22 of the ICCPR.

The Declaration on the right and responsibility of individuals, groups and organs of society to promote and defend universally recognized human rights and fundamental freedoms (hereafter Declaration on Human Rights Defenders) adopted by the United Nations General Assembly in 1998 explicitly grants human rights defenders the right to access funding. Article 13 of this Declaration states: *“Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means, in accordance with article 3 of the present Declaration”*.

3. This analysis in this subsection emanates from the 2013 Annual Report of the Observatory for the Protection of Human Rights Defenders (FIDH-OMCT), available on FIDH and OMCT websites.

4. See CCPR, Concluding observations of the Human Rights Committee - Ethiopia, United Nations Document CCPR/C/ETH/CO/1, August 19, 2011, paragraph 25.

5. See CESCR, Concluding observations of the Committee on Economic, Social and Cultural Rights – Ethiopia, UN Document E/C.12/ETH/CO/1-3, May 31, 2012, paragraph 7.

6. See CEDAW, Concluding observations of the Committee on the Elimination of Discrimination against Women - Algeria, United Nations Document CEDAW/C/DZA/CO/3-4, March 23, 2012, paragraph 19.

7. See CCPR, Communication No. 1274/2004 - Belarus, United Nations (UN) Document CCPR/C/88/D/1274/2004, November 10, 2006, paragraph 7.2.

The United Nations Special Rapporteur on the situation of human rights defenders, Ms. Margaret Sekaggya, emphasized that the Declaration on Human Rights Defenders protects the right to “*receive funding from different sources, including foreign ones*”. The Special Rapporteur considered that “*Governments should allow access by human rights defenders, in particular non-governmental organizations, to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments*”. The Special Rapporteur further stressed that access to funding “*is an inherent element of the right to freedom of association*”, and that “*in order for human rights organizations to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediments, including funding restrictions*”<sup>8</sup>.

The Special Rapporteur on the rights to freedom of peaceful assembly and of association, Mr. Maina Kiai, took up these recommendations in his first report to the United Nations Human Rights Council, and added that “[*a*]ny associations, both registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, civil society organizations, Governments and international organizations”. He also emphasized that States should not resort to “*fiscal pressures to discourage association from receiving funds, in particular foreign funding*”<sup>9</sup>.

On March 15, 2013, the UN Human Rights Council adopted a Resolution (A/HRC/22/L.13) calling upon States, to ensure that reporting requirements placed on individuals, groups and organs of society do not inhibit functional autonomy, and furthermore to ensure that they do not discriminatorily impose restrictions on potential sources of funding aimed at supporting the work of human rights defenders in accordance with the Declaration [on human rights defenders], and that no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto.

The African Commission on Human and Peoples’ Rights (ACHPR) also expressed concern on the issue of funding for NGOs. The Special Rapporteur on the situation of Human Rights Defenders in Africa, Ms. Reine Alapini Gansou, notably recommended that States “[...] *continue providing both “financial and material support to Human Rights Defenders to facilitate the realization of their mandate of human rights promotion and protection in Africa*”<sup>10</sup>. More generally, the ACHPR called upon States parties to guarantee the right to freedom of association and to guarantee that they do not “*override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards; [and not to] enact provisions which would limit the exercise of this freedom*” (Resolution 5, 1992).

8. See UN General Assembly, Report of the Special Rapporteur on the situation of human rights defenders, UN Document A/66/203, July 28, 2011, paragraph 70.

9. See UN Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Document A/HRC/20/27, May 21, 2012, paragraphs 67-72.

10. See ACHPR, Intersession Report, November 2011 - April 2012, paragraph 50



## ***A.2 Controlling and Repressing the Media : the Information and Communication (Amendment) Bill and the Media Council Bill, 2013***

In December 2013, the Parliament of Kenya adopted two bills aimed at regulating the media sector: the Information and Communication (Amendment) Bill and the Media Council Bill 2013. The two bills, which provide for discretionary powers of the authorities over media houses and journalists, have both been signed into law by Uhuru Kenyatta.

The Information and Communication Act, 2013, creates a government-appointed Communications and Multimedia Appeals Tribunal with unfettered powers to impose penalties on media practitioners, including revocation of accreditation, seizure of property, and heavy fines of up to 500,000 Kenyan Shillings (US\$6,000) on journalists, and up to 20 million Kenyan shillings (US\$235,000) on media companies. These fines are too high for individual journalists most of whom are correspondents who do not have a steady income. The Act provides that such fines could be imposed on the basis of anonymous complaints that are prone to abuse. The Multimedia Complaints Tribunal is mandated to hear complaints across all media platforms including social media which further limits freedom of expression online, and for bloggers in particular. The Act also restricts advertising revenues, a provision which could force some media houses to close down. The Media Council Act, 2013, establishes a Media Council of Kenya and a Media Council's Complaints Commission with powers to ban any media content that is "*prejudicial to public or national interest*" and impose penalties against the publishers of such content, while failing to clearly define "*national or public interest*".



*KENYA, Nairobi : Kenyan journalists, some covering their mouths with tape, hold signs during a protest in Nairobi on December 3, 2013. AFP PHOTO/ SIMON MAINA*

The adoption of these two laws was preceded by instances of open and fierce criticisms from some State officials about the alleged partisanship or non-professionalism of journalists and media houses. In September 2013, following the denunciation by some journalists of the looting that was allegedly committed by the army forces during the siege of the Westgate Mall, the Inspector General of Police David Kimaiyo, threatened to bring those journalists to justice for having incited Kenyans against the authorities<sup>11</sup>.

If implemented, the Information and Communication Act, 2013 and the Media Council Act, 2013 will seriously jeopardise freedom of expression and right to information in Kenya as they will institutionalise State interference within the media sector, instigate intimidation of journalists reporting on issues deemed sensitive by the authorities such as governance, corruption or justice, and result in inevitable self-censorship for fear of arbitrary penalties.

In 2 separate petitions filed before the High Court in Nairobi, the Kenya Editors Guild, the Kenya Union of Journalists and the Kenya Correspondents Association and the Standard Group, the National Media Group and the Royal Media Services, challenged the constitutionality of the new laws. The journalists argued that the laws contravene some major provisions of the 2010 Constitution, in particular its article 34 which guarantees freedom and independence of the media, including from the State and prohibits the penalisation of any person for the content of any broadcast, publication or dissemination.

On January 31, 2014, the High Court, which had decided to consolidate both cases, decided to halt the implementation of the two laws pending its decision on the merits of the case. To date, the Court has not rendered its decision on the merits.

11. See, Committee to Protect Journalists, Kenyan police threaten press - Press fights back ! <http://www.cpj.org/blog/2013/10/kenyan-police-threaten-press----press-fights-back.php>

## B. Infringements to Freedom of Assembly

AFP PHOTO/SIMON MAINA



This year has been marked by a series of demonstrations organised by civil society groups with an aim to protest against bad governance, endemic corruption, impunity, poverty, unemployment or insecurity. To this, the authorities mainly responded with the use of violent repression against demonstrators and with a political rhetoric portraying demonstrators as “agitators planning to destabilise the country with the financial support of foreign agencies”.

On May 14 2013, police forces used tear gas to disperse the “Occupy Parliament” demonstration organised by a group of

civil society activists who wanted to denounce the increases in salaries for Members of Parliament. 17 protesters were arrested.

On February 13, 2014, police forces also used tear gas to disperse the “State of the Nation” demonstration organised by a group of civil society activists led by the organisation *Kenya ni Kwetu* (“Kenya is Ours”). The organisers informed the authorities of their intention to hold the said demonstration since January 28. While authorities did not raise any objections prior to the date set for the march, on the morning of February 13, police decided to prohibit the event on the ground that it posed security threats and that it carried the risk of facing a terrorist attack.

Along with violently dispersing protesters, police officers also arrested 4 human rights defenders, namely Wilfred Olal, Gacheke Gachichi, John Koome and Nelsom Mandela, for *incitement, refusing to obey and breach of other city bylaws*. The same day, the 4 human rights defenders were admitted to police bail of 10,000 Kes and required to appear in Court on February 18. When they appeared before the Chief Magistrate at Milimani, Nairobi, they were formally charged with different offences (*resisting arrest and behaving in disorderly manner in a police building*) and admitted to exorbitant bail of 200,000 Kes or police bond of 500,000 Kes. In face with the numerous irregularities of the procedure and with the infringements of the accused’s constitutional rights, on March 26, 2014, the 4 defenders, together with the Kenya National Commission on Human Rights (KNCHR) and the Independent Medico-Legal Unit (IMLU), filed a petition before the High Court. A hearing is set to take place on April 16, 2014.

The excessive use of force to disperse demonstrators and the judicial harassment against human rights defenders have been part of the authorities’ manoeuvres to curtail any form of criticism, in complete disregard for guarantees under article 37 of the 2010 Constitution which provides for freedom of assembly and demonstration.

## C. Perpetrating Human Rights Violations While Countering Terrorism

Over the past few years, Kenya has been the target of a series of terrorists attacks perpetrated on its territory and which culminated with the September 2013 attack on the Westgate Mall in Nairobi. The attack which was carried out by the group Harakat al-Shabaab al-Mujaahidiin (Al Shabaab), led to the death of at least 67 persons. Since then, the country has been facing with other attacks, the most recent one having taken place in Nairobi’s Eastleigh neighbourhood, on March 31st, 2014, when an explosion killed six people and injured at least 25 more.



*KENYA, Mombasa : Alleged jihadist youths are detained by police outside the Masjid Mussa mosque following a raid, in the Majengo area of Mombasa, on February 2, 2014.*  
AFP PHOTO / IVAN LIEMAN

In such a context, the Anti-Terrorism Police Unit (ATPU), which has been granted with extensive powers to conduct counter-terrorism operations, would have been responsible for the perpetration of serious human rights abuses during its operations, including extra-judicial, summary or arbitrary killings, enforced disappearances, arbitrary arrests and detention of terrorists suspects, or acts of torture and ill-treatment against detainees<sup>12</sup>. These violations have been perpetrated in complete disregard for article 238 of the 2010 Constitution which provides that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. So far, and while Kenya is undergoing substantial police reforms aimed at fostering greater accountability within this sector, no effective measures have been taken to ensure that those responsible for such violations are being held accountable and victims have remained without any form of redress.

Respect for human rights and the rule of law must be the bedrock of the global fight against terrorism. States must ensure that any measures taken to counter terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law. So far, the effectiveness of a worldwide broad range of policies for countering terrorism has been doubtful. Some of these policies have arguably even helped to reinforce radical movements, or have prepared the ground for the emergence of future terrorists. The stigmatisation of certain categories of persons - including illegal migrants - as well as the use of torture or ill-treatment to obtain confessions; and the fabrication of trumped-up cases of terrorism, all contribute to a growing radicalism. Far from being an obstacle, the demand that counter-terrorism measures are respectful of fundamental rights will result in greater admissibility and efficiency<sup>13</sup>.

12. See Open Society Foundations and Muslims for Human Rights, *We Are Tired of Taking You to Court: Human Rights Abuses by Kenya's Counter-Terrorism Police Unit*, (New York: Open Society Foundations, 2013), <http://www.opensocietyfoundations.org/sites/default/files/tired-taking-you-court-11-19-2013.pdf>.

13. See FIDH Counter-terrorism measures and human rights : key for compatibility. *Human rights violations in sub-saharan African countries in the name of counter-terrorism: a high risks situation*, 2007. <http://www.fidh.org/IMG/pdf/afriqueantiterr483eng2007.pdf> and FIDH/IRCT report on *How to respond to human rights violations committed in the context of the fight against terrorism*, 2010. [http://www.fidh.org/IMG/pdf/workshop\\_terrorism\\_2010en.pdf](http://www.fidh.org/IMG/pdf/workshop_terrorism_2010en.pdf)

## D. Instigating Discrimination and Inequality Before the Law

This year has also witnessed attempts to further instigate discrimination and inequality before the law, in breach of the Kenyan Constitution and the country's obligations under regional and international conventions. Reform of the law on marriage and divorce to increase protection for women's rights and eliminate discrimination resulting from the application of customary laws, has been on the table for many years. The **Matrimonial Property Act**, adopted in 2013, and the **Marriage Bill**, adopted by parliament in March 2014 but yet to be enacted by the President, contain some positive aspects, especially concerning property rights. In particular, marriages are required to be registered under civil law, providing greater protection to women. However, it is of great concern to FIDH and KHRC that these laws authorise polygamy, in contravention of the principle of non-discrimination and the right to equality between men and women, as enshrined in Kenya's Constitution and international and regional obligations. The Marriage Bill places no limit on the number of wives a man can marry, nor is he required to obtain authorisation from his existing wives.

Concerns have also been raised over the increasing risks for **LGBTI persons** and those defending their rights. Inspired by the repressive legislation recently adopted in Nigeria (January 2014) and Uganda (February 2014) against LGBTI persons, some Kenyan parliamentarians have publicly expressed their desire to submit a Bill that would further restrict the rights of sexual minorities. Pursuant to provisions of the Kenyan Penal Code (2009), consensual same sex practices among adults punishable by up to 14 years imprisonment (Sections 162 to 165). While few convictions have been carried out so far, LGBTI persons and those defending their rights routinely face with harassment by state officials (arbitrary arrest and detention, extortion, blackmail), physical violence and threats, stigma, exclusion and other forms of discrimination<sup>14</sup>. Obstacles to the effective registration, by the NGO Board, of some LGBTI rights organisations is another illustration of the difficulties encountered. The adoption of a restrictive legislation against LGBTI persons and those defending their rights would result in further discrimination against sexual minorities and would increase the risks posed to their security.

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14. See KHRC Report, *The Outlawed amongst us*, 2011.  
[http://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDMQFjAA&url=http%3A%2F%2Fwww.khrc.or.ke%2Fresources%2Fpublications%2Fdoc\\_download%2F14-the-outlawed-amongst-us.html&ei=vKFCU\\_zyJaqS0AWSiH4CA&usg=AFQjCNG\\_IHt3I6MwyCqIqQK5KII\\_EuaryQ&bvm=bv.64125504,d.d2k](http://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDMQFjAA&url=http%3A%2F%2Fwww.khrc.or.ke%2Fresources%2Fpublications%2Fdoc_download%2F14-the-outlawed-amongst-us.html&ei=vKFCU_zyJaqS0AWSiH4CA&usg=AFQjCNG_IHt3I6MwyCqIqQK5KII_EuaryQ&bvm=bv.64125504,d.d2k)

# Part II – Lack of Political Will to Deliver Justice for the Victims of the 2007/2008 Post-Election Violence

One year into the “Jubilee” government in Kenya is significant in many respects. One of the most notable features of this government is the fact that both President Uhuru Kenyatta and his Deputy William Ruto have had charges of crimes against humanity confirmed against them by the International Criminal Court (ICC)<sup>15</sup>. The second most significant aspect is the fact that the victims of the violence mark their sixth year in the pursuit of justice since the cessation of violence in February 2008, with the signing of the National Accord (reached during the Kenya National Dialogue and Reconciliation (KNDR) talks of 2008). The third important thing to note, is that it is during this regime that the only hope for justice for victims – the ICC – has been threatened, attacked and undermined at national, regional and international levels.

On 28<sup>th</sup> February 2008, Kenya commenced the process that would have seen the setting up of institutional and legal reform necessary for the realization of justice and accountability for the human rights violations that occurred after the general election of 2007. In this regard, the KNDR process identified the establishment of a commission of enquiry into the post-election violence (the Commission of Inquiry into the Post- Election Violence, CIPEV, commonly referred to as the Waki Commission. This commission recommended the establishment of a special tribunal for Kenya to investigate and prosecute persons who bore responsibility for the violence within a specified time, failure to which the commission would forward a secret list of individuals to the ICC for investigation and possible prosecution for international crimes under the Rome Statute.

## A. Establishment of Local Judicial Process

The attempts by Kenya to set up a local tribunal were defeated when Parliament failed to debate and pass legislation for the establishment of the tribunal. The Waki Commission then forwarded the secret list to the Prosecutor of the ICC who begun investigations and subsequently announced that he was pursuing prosecution of six individuals<sup>16</sup>. On 23<sup>rd</sup> January 2012, the Pre-Trial Chamber II of the ICC, by a majority decision, confirmed charges of crimes against humanity against four of the six suspects: William Samoei Ruto, Joshua arap Sang, Uhuru Muigai Kenyatta and Francis Muthaura<sup>17</sup>. The charges against Francis Muthaura were later withdrawn following the withdrawal of a critical witness in 2013<sup>18</sup>.

15. <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> and <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>

16. <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf> and <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf>

17. Supra ICC decision of 23<sup>rd</sup> January 2012

18. [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx)

In the last one year, there have been almost no efforts by the government to establish a credible process effective for investigating and prosecuting the crimes or for securing meaningful justice for victims. Due to the lack of credible local processes, the ICC has continued to receive notable support by Kenyans as the only accountability process that can effectively deliver justice for victims<sup>19</sup>.

In October 2012, a sub-committee of the Judicial Service Commission, set up to advise on the best mode of accountability process submitted its report on the establishment of an International Crimes Division of the High Court to try post-election violence crimes as well as other transnational crimes<sup>20</sup>. The report of the Judicial Service Commission was recently subjected to a stakeholder consultation process in February 2014 at which the Director of Public Prosecutions (DPP) reported that the files that his office had been scrutinizing for purposes of prosecution were impossible to prosecute on account of lack of supportive evidence and documents<sup>21</sup>. The process of establishing the International Crimes Division awaits further stakeholder consultation.

A multi-agency task force established to review, re-evaluate and re-examine all pending investigations, pending trials and concluded cases reported that out of 6,081 cases reviewed, only 24 post-election violence suspects had been convicted. The Office of the Director of Public Prosecutions (ODPP) has issued inconsistent information on the actual prosecution of PEV cases. In February 2014, the DPP declared that it was impossible to prosecute any of the over 4000 cases that had been reviewed by a task force.

While judicial reforms have progressed at a commendable rate, the reforms of other sectors along the justice chain, are either totally lacking or have considerably lagged behind. The Judiciary itself was recently mired in an embarrassing internecine controversy on cases of corruption and other scandals, that puts at risk the progress made in reforming that institution. More recently there have been attempts by Parliament to interfere with the independence of the judiciary. It is worth noting that the National Assembly is comprised of a majority of members of the Jubilee coalition led by the President. The opposition is outnumbered and the majority does not exercise effective oversight over the Executive.

Reforms within crucial support processes and institutions such as investigations, prosecutions and penal institutions that are necessary for the delivery of justice have been lagging behind. The Witness Protection Agency is, according to its own documents, unable to take on the protection of any new witnesses, due to a lack of funding. There have been increased reports of witness intimidation and tampering with respect to the ICC proceedings. In October 2013, the ICC unsealed the warrants of arrest against Walter Barasa, a journalist suspected of witness tampering and intimidation<sup>22</sup>. Whereas Walter Barasa has moved to the High Court to challenge the constitutionality and jurisdiction of Kenya to extradite him to face charges at the ICC, it remains to be seen whether the government will in the end render him to the ICC to face charges in line with its obligations under the Rome Statute and Article 2(6) of the Constitution of Kenya<sup>23</sup>. The assertion that the Government of Kenya has been “fighting impunity” is incorrect. Through the total non-prosecution of those most responsible, the Government has in fact reinforced impunity. The cumulative effect of these factors has a direct impact on the delivery of justice for the victims of the post-election violence.

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19. Ipsos synovate survey on ICC support available on [http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Ipsos%20Synovate%20Polls\\_SPEC\\_Barometer\\_July\\_2013.pdf](http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Ipsos%20Synovate%20Polls_SPEC_Barometer_July_2013.pdf)

20. <http://www.nation.co.ke/blob/view/-/2197994/data/682598/-/io86uj/-/JSC+Report.pdf>

21. [http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0CGYQFjAH&url=http%3A%2F%2Fwww.thepeople.co.ke%2F52960%2Fotbiko-gives-delayed-pev-cases%2F&ei=gP1BU\\_KtFaS3sATY1IH4CQ&usq=AFQjCNHa3IK\\_U61dFdKxCfEPzudvjQciVw](http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=0CGYQFjAH&url=http%3A%2F%2Fwww.thepeople.co.ke%2F52960%2Fotbiko-gives-delayed-pev-cases%2F&ei=gP1BU_KtFaS3sATY1IH4CQ&usq=AFQjCNHa3IK_U61dFdKxCfEPzudvjQciVw)

22. [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr948.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr948.aspx)

23. <http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFIQFjAFOAo&url=http%3A%2F%2Fwww.thepeople.co.ke%2F52180%2Fbarasa-faces-icc-arrest-court-rejects-plea%2F&ei=HPtBU4aGGqmqSQRp4HoAw&usq=AFQjCNF5yiU7mRBSEB0MPH2gp7YvgVnJg&bvm=bv.64125504.d.cWc>



Despite these glaring gaps in the establishment of the International Crimes Division, the Kenya government under the Jubilee Coalition, filed a submission at the International Criminal Court indicating that the government had set up the division for purposes of accountability for the 2007/2008 crimes<sup>24</sup>. During this period, the government consistently intimated that the ICC cases against the three Kenyans should be tried in the Kenyan Courts, in light of the successful judicial reforms. Kenya lobbied its counterparts in Africa to call for the referral of the cases to Arusha or Nairobi from the ICC in The Hague.

In August 2013, both chambers of the Kenyan Parliament passed a motion for Kenya to withdraw from the Rome Statute system and intimated a further motion calling for a repeal of the International Crimes Act, the domesticating legislation of the Rome Statute of the ICC.

## **B. The Truth Justice and Reconciliation Process**

The Truth Justice and Reconciliation Commission (TJRC) was established in 2008 as part of the Kenya National Dialogue and Reconciliation Process with a mandate to address the issue of post-election violence among other violations that span close to fifty years post-independence. The TJRC submitted its final report to Uhuru Kenyatta on the 21<sup>st</sup> of May 2013, from which three of the commissioners differed averring that the chapter on land and conflict had been altered in the absence of collective agreement of all the commissioners<sup>25</sup>. The report was tabled before Parliament on 24<sup>th</sup> July 2013 during which the Attorney-General proposed amendments to the Truth Justice and Reconciliation Act of 2008, the effects of which were that the National Assembly could consider the TJRC report which portends the possibility that Parliament could essentially amend the report, expunge or add some names to the report<sup>26</sup>. More significantly, there have been no momentous efforts at instituting the mechanisms for the implementation of the TJRC's recommendations.

The TJRC report can be regarded as the most concerted State-sponsored effort to consolidate and document Kenya's history in as far as human rights violations are concerned. The TJRC report was prepared on the basis of more than 40,000 statements and memoranda in addition to the evidence and reports from previous commissions of inquiry that had either not been released publicly or acted upon by the State. The report is also classified into various themes and time periods that allow for an appropriate focus and more targeted recommendations towards different victim groups. The TJRC report also recommends and outlines a comprehensive reparations framework to be implemented by the State. Some recommendations will however require further elaboration at the implementation stage due to their generic nature and absence of definitive timelines or State agencies responsible for their implementation.

## **C. Government Efforts at Resettlement and/or Compensation of Victims**

The government committed to addressing the plight of internally displaced persons (IDPs) and specifically to resettle all IDPs during the first year of its rule, by October 2013<sup>27</sup>. However, there are contradictory reports especially with respect to the resettlement of integrated IDPs<sup>28</sup>. While there have been efforts towards the resettlement of most internally displaced

24. Para 39 of filing available at <http://www.icc-cpi.int/iccdocs/doc/doc1577522.pdf>

25. Report of the Truth Justice and Reconciliation Commission available at <http://www.kenyamoja.com/tjrc-report/>

26. The Truth, Justice and Reconciliation (Amendment) Act, 2013.

[http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/TruthJusticeandReconciliation\\_Amendment\\_Act2013.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/TruthJusticeandReconciliation_Amendment_Act2013.pdf)

27. <http://www.citizennews.co.ke/news/2012/local/item/13425-over-8000-idps-to-be-resettled-this-month>

28. <http://reportingkenya.net/reports/kenyas-forgotten-idps/> and [http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.standardmedia.co.ke%2F%3FarticleID%](http://www.google.com.br/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.standardmedia.co.ke%2F%3FarticleID%3F)

persons these efforts have been non-participatory and discriminatory. In the absence of any comprehensive reparations policy to guide these processes, credible profiling of victims and victims' needs, these efforts have failed to establish a comprehensive reparations programme that is consultative, holistic and one that offers durable solutions. The compensation that has been given by the government has largely been non-participatory and discriminatory in terms of the approach and form of reparation or compensation offered. The government has also focused its efforts at resettlement and neglected the diverse needs of victims such as those of psychosocial therapy, access to medical services and other social amenities even in the areas of resettlement.



A camp of internally displaced people in Nakuru, Kenya. © AFP

#### D. Cooperation with the International Criminal Court

The ICC cases formed the main campaign organizing agenda in the 2013 general election. Indeed, some segments of public commentary dubbed the elections “A referendum on the ICC”. The President and deputy president’s campaign rhetoric was characterized by claims that the ICC process was a vitiation of the Kenyan citizens’ sovereign will to elect their leaders. With their election, an immediate concern for the ICC process was and still remains the degree to which the president and deputy-president will cooperate with the Court in regard to their cases.

In his acceptance speech on March 9, 2013 the president stated as follows:

*“...To the nations of the world I give you my assurances that I and my team understand that Kenya is part of the community of nations and while we are, first and foremost, servants of the Kenyan people, we recognize and accept our international obligations and we will continue to co-operate with all nations and international institutions – **in line with those obligations. However we also expect that the international community will respect our sovereignty and the democratic will of the people of Kenya.**”* (Emphasis added).

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3D2000093556%26story\_title%3Dnyeri-idps-claim-they-were-left-out-by-jubilee-in-resettlement-plans&ei=cAFCU-XWHI  
TisATDkYKYBA&usg=AFQjCNGtKmbz3ZO9klwbfIWwgZ-7NHpzA&bvm=bv.64125504.d.cWc





The President and his Deputy have thus far largely appeared to abide by their obligations to the Court but have nevertheless engaged in a series of diplomatic and judicial strategies that have had the effect of undermining the ultimate objective of justice for victims. In the past one year, the Jubilee government has engaged in spirited attempts at questioning the legitimacy of the ICC. These have not been limited to the national level but have been advanced at both the regional and international arenas as well. Strategies<sup>29</sup> included, among others:

- **Non-cooperation** with the investigations carried out by the Office of the Prosecutor, as it has been denounced by the OTP;
- **Use of political bodies** by asking for a deferral of their cases for 12 months by the United Nations Security Council (UNSC). An effort in which, despite its failure at the UNSC, they have enjoyed the support of the African Union;
- **Proposing reforms to the Rome Statute** to provide for immunities for sitting Heads of State, or making changes that would prevent the Court from exercising its jurisdiction over the two accused officials from Kenya;
- **Seeking a political agreement** to modify the rules of Procedure and Evidence of the ICC so the accused receive a special treatment in light of their official capacity and allowing them to be absent from most parts of the trial.

These strategies sought to diminish the legitimacy of ICC proceedings, their efficiency and efficacy and, most of all, block the efforts to fight impunity for crimes against humanity committed in Kenya through independent judicial proceedings. These actions have been perceived as betrayal to the Kenyan victims of the post-election violence as insisted by victims of the case *The Prosecutor v. Uhuru M. Kenyatta*, in a letter sent by their legal representative to the UN Security Council on 3 November 2013<sup>30</sup>. These victims have a right to justice and have found none in Kenya. Many of these proposals contradicted the purpose of the Statute, which is to make sure that genocide, crimes against humanity and war crimes do not go unpunished, no matter the current or past position of the alleged responsible. The ICC was created to prosecute the main perpetrators of international crimes, whose commission generally implies a government policy or its tolerance. The Rome Statute is clear: no immunities can be alleged before its jurisdiction<sup>31</sup>.

29. FIDH Position paper, Recommendations to the 12th Assembly of States Parties to the Statute of the International Criminal Court, <http://www.fidh.org/IMG/pdf/asp12positionpaper620a2013ld.pdf>

30. Letter expressing the opposition of the victims in the Kenyatta case at the International Criminal Court to any resolution by the Security Council to suspend the prosecution of that case, 3 November 2013.

31. Rome Statute, Article 27.

In this context, it is important to remember that the accused persons in the Kenyan cases were indicted by the ICC before being elected in such capacities. The accused knew that they were going to face trial after the charges were confirmed during their term at offices. It should be them, not the ICC and certainly not the victims, to be the ones bearing the political responsibility of their absence in Kenya to face justice in The Hague.

### ***Non Cooperation and Pressure on Victims***

According to the Prosecutor, the investigation in the Kenyan cases faced several challenges including “*the disappointing fact that the Government of Kenya failed to provide my Office with important evidence, and failed to facilitate our access to critical witnesses who may have shed light on the Muthaura case*”<sup>32</sup>. According to the Prosecutor, Fatou Bensouda, the investigation in Kenya faced enormous cooperation challenges. She expressed so at the beginning of the trial against William S. Ruto: “*This trial is the culmination of a long and difficult investigation. It has been fraught with cooperation challenges and obstacles relating to the security of witnesses. Many victims and witnesses have been too scared to come forward, others have given statements, but subsequently sought to withdraw from the process, citing intimidation or fear of harm. Worrying evidence has also emerged of attempts to bribe witnesses to withdraw or recant their evidence. The fact that I stand before you at the opening of the trial today, your Honours, is something of an achievement in itself*”<sup>33</sup>.

### ***Deferral According to Article 16***

Under political pressure from Kenya and other African States, the African Union, following its 12th Extraordinary Summit held in October 2013, called upon the United Nations Security Council to defer the Kenyan cases in accordance with Article 16 of the Rome Statute which provides that the Security Council can request the Court to stop investigations or prosecutions for 12 months if there is a threat to peace and security according to the Charter of the United Nations. No such threat exists in regard to the present Kenyan situation. On the contrary, the absence of justice in the past was one of the main reason of the recurrence of international crimes committed on the occasion of electoral processes in the country.

On November 15, 2013, the UN Security Council rejected the resolution on the deferral of the Kenyan cases. The use of Article 16 by the Security Council would have had a devastating effect on victims’ quest for justice in Kenya.

### ***Proposals to Reform the Rome Statute***

The Kenyan Government has proposed a reform to Article 27 of the Rome Statute to exempt incumbent Heads of State and Government officials from prosecution during their term of office, at the ICC. Such proposal contradicts international and regional law treaties, jurisprudence and practice that do not admit immunities for Heads of State at international criminal tribunals<sup>34</sup>. Such proposal also contravenes the Kenyan Constitution that expressly states that the President is not immune to prosecution for international crimes<sup>35</sup>.

In the fight against impunity for genocide, crimes against humanity and war crimes, States cannot justify double standards. It is a well established principle that, before an international criminal tribunal, the official capacity of the accused should be irrelevant in relation to investigations and prosecutions trying to establish the alleged responsibility for international crimes.

32. Statement by the ICC Prosecutor on the Notice to Withdraw the Charges Against Mr. Muthaura, 11 March 2013.

33. Opening Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, 10 September 2013.

34. Article 7 of the Charter of the International Military Tribunal (Nuremberg), Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, and Article 6 of The Statute of the International Criminal Tribunal for Rwanda. See in particular: International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), para. 61.

35. Article 143 (4), Constitution of Kenya, 2010

Kenya must bear in mind that it is offensive and unacceptable to ask victims to renounce their right to justice (a second time since no justice was rendered at the national level) in the name of an alleged reconciliation that sits on the objective to benefit those who face charges for international crimes before the ICC. Kenya should also evaluate the long-term consequences of many of these proposals. To recognise immunities for sitting Heads of State may become a temptation for undemocratic serving Heads of States, who may want to remain in power with the sole purpose of escaping justice.

### ***Amendments to the Rules of Procedure and Evidence***

In November 2013, under political pressure from Kenya and other African Countries, the Assembly of States Parties (ASP) to the Rome Statute of the ICC opened the possibility, under Rule 134 of the ICC Rules of Procedure and Evidence, for high ranking government officials, who “*fulfil extraordinary public duties at the highest national level*”, to be excused from being present in the courtroom during their trials in The Hague.

The Rome Statute requires the accused to be present during trial and does not recognise special treatment for any accused person. However, the amendments approved by the ASP seem to turn exceptions into a rule in order to respond to a political situation created by the election of Uhuru Kenyatta and William Ruto as President and Deputy President of Kenya. These amendments contradict the principle of equality before the law and the spirit of the Rome Statute that intends to send a strong message that all alleged perpetrators of international crimes should be held accountable for their crimes, regardless of their official capacity, as stated in Article 27 of the Statute.

State Parties also decided to adopt a Rule that allows accused to participate in their trial through the use of video technology, stating that this would amount to presence. However, FIDH and KHRC estimate that this video participation does not constitute presence according to the Statute, and should be considered in very limited exceptional circumstances, taking the views of all the parties and participants into account.

On November 26, 2013, the Trial Chamber V (b) of the ICC ruled that the Kenyan President, Uhuru Kenyatta, would only be excused from the courtroom in exceptional circumstances, and that his absences would not become the rule. Moreover, Judges emphasized that any absence of the accused should be limited to what is strictly necessary.

On 31 March 2014, the Trial Chamber V(b) of the ICC confirmed that the trial will start on 7 October 2014. The purpose of the adjournment is to provide the Government of Kenya with a further, time-limited opportunity to provide certain records, which the Prosecution had previously requested on the basis that the records are relevant to a central allegation in the case.

# Recommendations

*In relation to the respect of fundamental rights and freedoms, FIDH and KHRC call upon :*

## **The authorities of Kenya to:**

- Take all necessary measures to ensure that fundamental rights and freedoms, in particular freedom of association, freedom of expression, right to information, freedom of assembly and right to non-discrimination are fully respected and implemented, in light with provisions of the Constitution of Kenya 2010, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights;
- Ensure that human rights defenders are able to carry out their activities free from any hindrances, in line with the UN Declaration on Human Rights Defenders; put an immediate end to all acts of harassment, including judicial harassment against human rights defenders and guarantee, in all circumstances, their physical and psychological integrity;
- Set, through the Cabinet Secretary, the commencement date for the PBO Act, 2013 without further amendment, and start a process of setting the rules and regulations to operationalise the Act; ensure that any further legislation aimed at regulating the work of NGOs fully conforms with Kenya's national and international human rights obligations; and ensure that the adoption of such a legislation is preceded by effective consultation with civil society organisations and consideration of their concerns and recommendations;
- Drop the charges pending against Wilfred Olal, Gacheke Gachichi, John Koome and Nelsom Mandela;
- Repeal provisions of the Information and Communication (Amendment) Bill and the Media Council Bill 2013 infringing fundamental freedom of expression and right to information and ensure that any legislation aimed at regulating the work of the media is fully conforms with Kenya's national and international human rights obligations; and ensure that the adoption of such a legislation is preceded by effective consultation with journalists and media houses and consideration of their concerns and recommendations;
- Abide by the provisions of the ACHPR Resolution 5, 1992 on the right to freedom of association and the UN Human Rights Council resolution A/HRC/22/L.13;
- Take all necessary measures to implement provisions of the ACHPR draft model law on access to information in Africa;
- Take all necessary measures to implement provisions of the ACHPR Guidelines on the right to fair trial and legal assistance in Africa;
- Ensure that counter-terrorism operations are carried out in accordance with article 248 of the Constitution and with Kenya's regional and international human rights obligations relating to the principle of legality, the prohibition of torture, arbitrary arrest and detention, the right to fair trial or the right to privacy;
- Ensure that those responsible for human rights abuses perpetrated during counter-terrorism operations, including police and army forces, are being held accountable and ensure that victims get justice and reparation;
- Ratify the OAU Convention on the Prevention and Combating of Terrorism which affirms the obligation to respect human rights in the context of the fight against

terrorism; and comply with provisions of the ACHPR Resolution 88, 2005 on the Protection of Human Rights and the Rule of Law in the Fight against Terrorism;

- Ensure full implementation of provisions of the Convention on the elimination of all forms of Discrimination Against Women (CEDAW), in particular its articles 1 and 16, and of the Protocol to the African Charter on the rights of women in Africa (Maputo Protocol), in particular its articles 2, 6 and 21;
- Repeal all provisions from the national legal framework that discriminate against LGBTI persons; and guarantee, in all circumstances, their physical and psychological integrity;
- Ratify the African Charter on Democracy, Elections and Governance; make the 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; and ratify the Optional Protocol to the International Covenant on Civil and Political Rights.

***In relation to accountability and justice for victims of 2007/2008 post-election violence, FIDH and KHRC call upon:***

**The authorities of Kenya to:**

- Immediately propose, through the office of the Attorney General, legislation for the creation of an implementation mechanism in line with the TJRC recommendations and the constitutional principles of good governance, integrity, transparency, accountability, rule of law, democracy and participation of the people; Ensure in particular that the recommendations contained in the TJRC report are implemented, without political interference ;
- Positively cooperate with the International Criminal Court and specifically respond and honour the pending requests for assistance from the Office of the Prosecutor, in particular, the government should expedite all pending arrest warrants such as those against journalist Walter Barasa for alleged witness tampering and intimidation;
- Establish, as a matter of urgency, processes and measures aimed at establishing credible investigations and prosecutions of the high, mid and low level perpetrators of the post-election violence; support the proposal for the development of a credible and effective International Crimes Division through establishing an independent impartial investigative and prosecutorial team;
- Ensure that the Witness Protection Agency is fully independent, well-funded and resourced in line with international best practices to effectively offer the necessary protection of witnesses of gross human rights violations;
- Adopt and implement a comprehensive reparations policy that will guide their interventions in offering compensation, restoration and other forms of reparations to victims of gross human rights violations;
- Continue with on-going judicial reforms especially in the vetting of Judges and Magistrates.

**FIDH and KHRC further call upon:**

**The African Union to:**

- Publicly reaffirm its support to victims of international crimes and to their right to get justice and reparation before competent courts;
- Publicly reaffirm the obligation of relevant national and international institutions to guarantee the right of victims and witnesses, that are parties to criminal proceedings for international crimes, to effective protection;
- Publicly call upon the fight against impunity of the perpetrators of the 2007/2008 post-election violence in Kenya as an essential pre-condition to long-lasting peace and stability in this country and as a deterrent to further violence. In particular, AU should call on the Kenyan authorities to fully cooperate with the International Criminal Court and other locally established judicial mechanisms to ensure justice for the victims of the 2007/2008 post-election violence;
- Take all necessary measures to strengthen its dialogue and cooperation with the ICC, particularly in facilitating the establishment and work of the ICC liaison office at the African Union;
- Monitor the establishment of an implementation committee of the TJRC report and monitor the implementation of the recommendations as well as offer technical assistance where necessary;
- Call upon Kenya to take all necessary measures to put an end to threats against and harassment of victims, witnesses and members of civil society cooperating or considered to be cooperating with the ICC;
- Call upon Kenya to guarantee the right of human rights defenders, in particular those advocating for the fight against impunity, to conduct their activities without fear of harassment or reprisals, in accordance with relevant international and regional human rights instruments in force in Kenya;
- Review its October 2013 decision affirming that no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government;
- Start a process of political, technical and material support to judicial proceedings allowing the prosecution, at national level, of those responsible for international crimes, in application of the principle of complementarity with the ICC;
- Call upon Kenya to abide by its regional and international human rights obligations in relation to respect of fundamental rights and freedoms.

**The African Commission on Human and Peoples' Rights to:**

- Adopt a Resolution at its 55th Ordinary Session to be held in Luanda, Angola, from April 28 to May 12, 2014, on the human rights situation in Kenya calling upon the authorities to uphold their human rights obligations;

- Publicly call upon the fight against impunity of the perpetrators of the 2007/2008 post-election violence as an essential pre-condition to long-lasting peace and stability in Kenya and as a deterrent to further violence. In particular, ACHPR should call on the Kenyan authorities to fully cooperate with the International Criminal Court and other locally established judicial mechanisms to ensure justice for the victims of the 2007/2008 post-election violence;
- Envisage a promotion mission to Kenya, in particular with the Special Rapporteurs on Human Rights Defenders, on the Rights of Women in Africa, on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons and a member of the Working Group on the Death Penalty and Extra-judicial, Summary or Arbitrary Killings in Africa.

**The International Criminal Court to:**

- Conduct the Kenyan trial process in a fair and expedited manner to prevent disputes over local perception of an alleged politicization of the proceedings and in the best interest of victims;
- Further its engagement in a strong communication and outreach strategy to explain the sense and reality of the ICC proceedings in the actual political context, and to counteract messages of politicization of the proceedings;
- The legal aid system, managed by the Registrar, should provide the CLR teams with the necessary resources to adequately consult with victims and prepare the trial, before and during the trial.

**To the Assembly of States Parties to the Rome Statute to :**

- Ensure that all discussions, including proposals to discuss amendments to the ICC legal framework fully respect the integrity and the object and purpose of the Rome Statute;
- Ensure that discussions on proceedings against sitting Heads of State safeguard the developments of international law and the provisions of the Rome Statute, which do not recognise immunities for international crimes;
- Firmly reject any amendment to modify the Rules of Procedure and Evidence of the Rome Statute that may affect the credibility and legitimacy of proceedings as well as the capacity of the Court to fully fulfil its mandate.

**The United Nations Security Council:**

- Ensure that victims' views and interests to seek justice prevail in any discussion surrounding the use of Article 16 of the Rome Statute.

**To the United Nations OHCHR:**

- Ensure that the OHCHR field presence in Kenya continue to closely monitor and provide analysis and public reporting of the human rights situation in this country;
- Special procedures of the Human Rights Council, in particular the Special Rapporteurs on Extrajudicial, summary or arbitrary executions; on Freedom of opinion and expression; on Freedom of peaceful assembly and freedom of association; on the Situation of human rights defenders; on the Promotion of truth, justice, reparation and guarantees of non-recurrence as well as on the promotion and protection of human rights while countering terrorism, should continue alerting the HRC and international community on the human rights violations committed in Kenya in compliance with their mandate of early warning mechanism.;
- Special procedures of the Human Rights Council which have requested to visit Kenya, in particular the Special Rapporteurs on Human rights defenders, on independence of judges and lawyers and on the promotion of truth, justice, reparation and guarantees of non-recurrence should reiterate their requests.







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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 exchange

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.



### The Kenya Human Rights Commission (KHRC)

was founded in 1992 and registered in Kenya in 1994 as a national level Non-Governmental Organisation (NGO). Throughout its existence, the core agenda of the Commission has been campaigning for the entrenchment of a human rights and democratic culture in Kenya through monitoring, documenting and publicising rights violations.

The KHRC also works at community level with 27 human rights networks (HURINETS) across Kenya. We link community, national and international human rights concerns. KHRC's strategic plan aims to 'Secure civic-driven, accountable and

human rights-centred governance. Its founders and staff are among the foremost leaders and activists in struggles for human rights and democratic reforms in Kenya.

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### FIDH - International Federation for Human Rights

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# FIDH represents 178 human rights organisations on 5 continents



inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

## ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

### **A broad mandate**

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

### **A universal movement**

FIDH was established in 1922, and today unites 178 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

### **An independent organisation**

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

# fidh

Find information concerning FIDH's 178 member organisations on [www.fidh.org](http://www.fidh.org)