



KENYA

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**Submission by CIVICUS: World Alliance for Citizen Participation
NGO in General Consultative Status with ECOSOC
and
ARTICLE 19 Eastern Africa, NGO in General Consultative Status with ECOSOC
and
National Coalition of Human Rights Defenders – Kenya
and
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1. Introduction

- 1.1** CIVICUS is a global alliance of civil society organisations (CSOs) and activists dedicated to strengthening citizen action and civil society around the world. Founded in 1993, CIVICUS has members in more than 170 countries throughout the world.
- 1.2** ARTICLE 19 Eastern Africa is a CSO established and registered in Kenya under the NGO Coordination Act in 2007 with a mission to defend the freedom of expression, media freedom and the right to know. ARTICLE 19 Eastern Africa is part of ARTICLE 19, a leading international CSO that advocates for the freedom of expression worldwide.
- 1.3** The National Coalition of Human Rights Defenders–Kenya (NCHRD-K) is a national organisation incorporated in the Republic of Kenya as a trust. Its mission is to strengthen the capacity of human rights defenders (HRDs) to work effectively in Kenya and to reduce their vulnerability to the risk of persecution, through protection, capacity building and advocacy for a favourable legal and policy environment. Established in 2007, NCHRD-K is the only national organisation that works primarily for the protection of HRDs.
- 1.4** The Kenya Human Rights Commission (KHRC) is a CSO that was established and incorporated in 1992 by Kenyans exiled in the USA and registered in Kenya in 1994. KHRC is a leader in the struggle for human rights and democratic reforms in Kenya.
- 1.5** In this submission, the four organisations examine the Government of Kenya’s compliance with its international human rights obligations to create and maintain a safe and enabling environment for civil society. Specifically, we analyse Kenya’s fulfilment of the rights to the freedoms of association, peaceful assembly and expression, access to information and unwarranted restrictions on HRDs since its previous UPR examination in January 2015. To this end, we assess Kenya’s implementation of recommendations received during the 2nd UPR cycle relating to these issues and provide a number of specific, action-orientated follow-up recommendations.
- 1.6** During Kenya’s examination under the 2nd UPR cycle, the government accepted 20 recommendations relating to the space for civil society (civic space). Of these, the government has partially implemented eight recommendations and has not implemented 12.
- 1.7** We are deeply concerned by the continued restriction of peaceful protests, as seen in the unlawful interpretation of existing laws by security agents to restrict the right to peaceful assembly, the attempts to amend laws to further restrict this right, and the

increasingly worrying trend of security agents violently disrupting peaceful protests, including by killing and arbitrary arresting unarmed protesters.

- 1.8** We are further alarmed by the continued deterioration of the freedom of expression, as highlighted by the high number of incidences of harassment, attacks and extrajudicial killings of journalists since the 2nd UPR cycle.
- 1.9** We are also alarmed by the introduction of clauses that are inimical to the freedom of expression in new legislation such as the Computer Misuse and Cybercrimes Act 2018.
- 1.10** As a result of these restrictions, civic space in Kenya is currently rated as ‘obstructed’ by the CIVICUS Monitor, indicating the existence of serious civic space restrictions.¹
- Section 2 of this submission examines Kenya’s implementation of UPR recommendations and compliance with international human rights standards concerning the freedom of association.
 - Section 3 examines Kenya’s implementation of UPR recommendations and compliance with international human rights standards relating to the protection of HRDs, civil society activists and journalists.
 - Section 4 examines Kenya’s implementation of UPR recommendations and compliance with international human rights standards concerning the freedom of expression, media freedom, access to information and the right to privacy.
 - Section 5 examines Kenya’s implementation of UPR recommendations and compliance with international human rights standards relating to the freedom of peaceful assembly.
 - Section 6 makes recommendations to address the concerns raised and advance implementation of recommendations under the 2nd cycle.
 - An annex on the implementation of 2nd cycle UPR recommendations related to civic space can be found in Section 7.

2. Freedom of association

- 2.1** During Kenya’s examination under the 2nd UPR cycle, the government received 11 recommendations on the right to the freedom of association and creating an enabling environment for CSOs. Among other recommendations, the government committed to ensuring that it will “Implement fully the 2013 Public Benefits Organizations Act, and safeguard rights and space for civil society, in line with the Kenyan Constitution.” Of the recommendations received, the government accepted nine and noted two.

¹ CIVICUS Monitor: Kenya, <https://monitor.civicus.org/country/kenya>. The CIVICUS Monitor is a research collaboration between CIVICUS and our members and partners that provides regularly updated information and analysis on the space for civil society and citizen activism in every country of the world.

Three of the accepted recommendations have been partially implemented and six have not been. The 2013 Public Benefits Organizations (PBO) Act remains non-operational to date.

- 2.2** Article 36 of the Kenyan Constitution guarantees the right to the freedom of association. Article 22 of the International Covenant on Civil and Political Rights (ICCPR), to which Kenya is a state party, also guarantees the right to the freedom of association. However, despite these commitments, the government has often created legal and administrative barriers to restrict this right.
- 2.3** CSOs in Kenya operate in various forms, each governed by a separate law and regulatory framework. CSOs can be non-governmental organisations (NGOs), companies limited by guarantee, trusts, societies, cooperative societies, unions, or grassroots organisations.
- 2.4** NGOs are governed by the NGO Coordination Act, 1990. This Act, which was enacted 20 years before the new constitution came into force in 2010, contains a regulatory framework for NGOs that does not meet international standards on the freedom of association and administrative justice, and that does not conform with the constitution. For instance, the Act contains:
 - a. Vague grounds for the denial of registration by the NGO Coordination Board (the regulating authority established under the Act);²
 - b. Government discretion in setting terms and conditions on NGO registration: the law is vague and ambiguous on a number of issues where wide discretion is given to the NGO Coordination Board;³
 - c. No fixed time period for registration review and approval of registration applications;
 - d. Discretion in cancellation of registration certificates.⁴
- 2.5** The 2013 PBO Act aims to create a new legal, regulatory and institutional framework for non-profit organisations undertaking public benefit work in Kenya, under a single law, and to improve the regulatory framework for CSOs. The PBO Act establishes a

² Under Section 14 of the NGO Coordination Act, 1990, the NGO Coordination Board may deny the registration of CSOs on vague and ambiguous grounds, which invite arbitrary and subjective decision-making. For example, the Board may refuse registration of an applicant CSO if it is satisfied that its proposed activities or procedures are not “in the national interest.” While the NGO Coordination Board may sometimes furnish an applicant with an explanation for the refusal of a registration, the Board is not legally required to do so under the Act.

³ For example, under Section 12(4) of the NGO Coordination Act, the certificate of registration for NGOs may “contain such terms and conditions as the NGO Coordination Board may prescribe.”

⁴ Section 16 (2) of the NGO Coordination Act allows the NGO Coordination Board to cancel an organisation’s certificate without due regard to fair administrative procedures such as issuing a notice and according a fair hearing to the affected organisation beforehand.

new regulatory body for non-profit organisations engaging in public benefit activities, provides a clear timeline for processing an organisation's application for registration and includes new provisions related to the self-regulation of PBOs, such as the formation of independent, self-regulating PBO forums.⁵

- 2.6** Despite containing a number of progressive provisions, to date the PBO Act has not commenced, and has instead faced five attempts in parliament to introduce draconian amendments to restrict the operations of civil society. On 31 October 2016, the High Court issued a ruling compelling the government to gazette the commencement of the Act by 11 November 2016. Despite this directive and legal order, the Act was never operationalised. CSOs went back to court, and on 23 May 2017, the High Court found the Cabinet Secretary in charge of the Ministry of Interior and Coordination of National Government in contempt of court for failing to heed the October 2016 judgment. To date however, this court ruling has also not been implemented.
- 2.7** In 2018, there were also attempts by parliament to introduce alternative and restrictive legislation to replace the PBO Act. On 22 August 2018, the Office of the Attorney General introduced the Draft Associations Bill 2018, which was articulated as part of the process of reviewing the Societies Act (Cap 108 of the Laws of Kenya).⁶ The Bill proposes a mandatory registration regime for associations, contrary to international human rights norms that protect the right to form informal associations.
- 2.8** Authorities have also undertaken a programme of deregistration of legitimate CSOs. In April 2015, a week after the terrorist attack on Garissa University,⁷ 85 companies and CSOs, including Muslims for Human Rights (MUHURI) and Haki Africa, were designated as 'specified entities' by the Inspector General of the Police in a Gazette notice, a procedural measure that precedes the classification of a CSO as a terrorist organisation under the Prevention of Terrorism Act. On 7 April 2015, the NGO Coordination Board cancelled the licences of three CSOs, MUHURI, Haki Africa and the Agency for Peace and Development, for alleged links to terrorism.⁸ On 20 and 21 April 2015, the Kenya Revenue Authority raided the offices of MUHURI and Haki Africa, disabling their internet servers and confiscating computer hard drives and documents to determine whether the two organisations were tax compliant. The High Court subsequently ruled that the organisations had no links to terrorism, and that

⁵ 'Non Profit Law in Kenya', Council on Foundations, October 2018, <https://www.cof.org/country-notes/nonprofit-lawkenya>.

⁶ Associations Bill 2018, State Law Office, 2018, <https://www.statelaw.go.ke/wp-content/uploads/2018/09/Associations-bill-2018.pdf>.

⁷ On 2 April 2015, an armed group stormed Garissa University College, killing 148 people in one of the deadliest terror attacks in Kenyan history.

⁸ 'Country Rights Report on Human Rights Practices 2015', US Department of State, 2016, <https://www.refworld.org/country,,USDOS,,KEN,,5716124f13,0.html>.

the action by the Inspector General of the Police to freeze their accounts was unconstitutional.⁹ The judge ordered the immediate unfreezing of the accounts.

2.9 Several other arbitrary actions against CSOs were undertaken by the NGO Coordination Board. In October 2015, without due regard to legal and constitutional requirements for fair administrative action, including the requirement to issue sufficient notice and provide a fair hearing to the affected organisations, the NGO Coordination Board issued a press statement that it had with immediate effect initiated the deregistration of 957 CSOs, including the KHRC, and had forwarded the list to several public authorities to effect the deregistration process.¹⁰

2.10 The NGO Coordination Board claimed that the KHRC had failed to account for KSh 1,210,961,093 (approx. US\$12,109,610), a claim that it failed to substantiate when asked to do so by the KHRC or in court when the KHRC filed proceedings against the Board. The High Court allowed a petition by the KHRC and found that the failure by the NGO Coordination Board to give notice to the KHRC and hold a hearing before arriving at the decision to cancel its registration was a violation of its constitutional rights.¹¹

2.11 The above cases speak to the arbitrariness and unlawfulness with which the NGO Coordination Board has exercised its mandate, constantly misapplying the law to frustrate and intimidate CSOs.

2.12 CSOs working around voter registration and election observation were particularly targeted by the state as Kenya approached general elections in 2017. The state actively engaged in a smear campaign and promoted the view that election-related programmes of CSOs were infiltrated by foreign interests, delegitimising the crucial work that CSOs play in elections.

2.13 In his speech during the Jamhuri Day Celebrations held in Nyayo Stadium, Nairobi, on 12 December 2016, President Uhuru Kenyatta condemned the work of international CSOs, targeting those working in the field of civic education ahead of the 2017 elections, accusing them of being agents of foreign powers trying to influence the electoral process, and threatening to forbid them from receiving foreign funding.¹²

⁹ 'Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others [2015] eKLR', Kenya Law, <http://kenyalaw.org/caselaw/cases/view/116382>.

¹⁰ 'Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR', Kenya Law, <http://kenyalaw.org/caselaw/cases/view/121717>.

¹¹ Ibid.

¹² 'Speech by His Excellency Hon. Uhuru Kenyatta, C.G.H., President of the Republic of Kenya and Commander in Chief of the Defence Forces, During the 2016 Jamhuri Day Celebrations at Nyayo National Stadium, Nairobi, on 12th December, 2016', President of the Republic of Kenya, 12 December 2016, <https://tinyurl.com/yxq63kms>.

- 2.14** In December 2016, a few days after President Uhuru’s speech, the NGO Coordination Board directed the Kenyan office of the International Foundation for Electoral Systems (IFES) to cease all operations in Kenya immediately, including the implementation of the Kenya Electoral Assistance Program.
- 2.15** As elections approached in 2017, at least six organisations – KHRC,¹³ Africa Centre for Open Governance (AfriCOG),¹⁴ Katiba Institute,¹⁵ Kalonzo Musyoka Foundation,¹⁶ Key Empowerment Foundation¹⁷ and IFES¹⁸ – experienced threats of deregistration as the government embarked on illegal deregistration exercises because of their vocal advocacy work on governance and accountability in the context of elections.
- 2.16** Because of its work around transparency and accountability in elections, in 2017, the NGO Coordination Board again attempted to deregister the KHRC, this time for alleged tax evasion, illegal bank accounts and illegal hiring of foreign staff.¹⁹ A day after the attempt to deregister KHRC, on 15 August 2017, the NGO Coordination Board made a similar attempt to deregister AfriCOG for allegedly operating illegally, on the grounds that it “is not registered under the NGOs Coordination Act 1990.”²⁰ Similarly, in May 2017, The NGO Coordination Board attempted to freeze the accounts of the Kalonzo Musyoka Foundation, a foundation run by a prominent opposition leader and his wife, for alleged failure to account for KSh 196 million (approx. US\$1,960,000).²¹
- 2.17** In all the above cases, the affected organisations instituted cases in court to challenge the actions of the NGO Coordination Board. In each case, the court ruled in favour of the CSOs, finding that the NGO Coordination Board had acted arbitrarily and outside its mandate.

¹³ ‘Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR’, Kenya Law, <http://kenyalaw.org/caselaw/cases/view/147166>.

¹⁴ ‘Republic v Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 others [2017] eKLR’, Kenya Law, <http://kenyalaw.org/caselaw/cases/view/145604>.

¹⁵ ‘Statement on Intimidation of Civil Society Organisations’, KCHR, 7 November 2017, <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/635-statement-on-intimidation-of-civil-society-organisations.html>.

¹⁶ ‘Republic v Non-Governmental Organizations and Co-ordination Board ex parte Kalonzo Musyoka Foundation [2018] eKLR’, Kenya Law, <http://kenyalaw.org/caselaw/cases/view/147662>.

¹⁷ ‘NGO Associated with Raila’s family deregistered’, Nairobi News, 4 August 2017, <https://nairobi.news.nation.co.ke/news/ngo-associated-with-rosemary-odinga-deregistered>.

¹⁸ ‘Republic v Non-Governmental Organisations Co-ordinations Board Ex Parte Okiya Omtatah Okoiti & 2 others [2017] eKLR’, Kenya Law, <http://kenyalaw.org/caselaw/cases/view/140715>.

¹⁹ ‘Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR’, op. cit.

²⁰ ‘Republic v Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 others [2017] eKLR’, op. cit.

²¹ ‘Republic v Non-Governmental Organizations and Co-ordination Board ex parte Kalonzo Musyoka Foundation [2018] eKLR’, op. cit.

2.18 Examples of other attempts by state agents to delegitimise CSOs in the eyes of the public were seen after the judicial nullification of the results of the 2017 presidential election. Representatives of the government, chiefly President Kenyatta, stated that judicial officials were “wakora” (rogues in Swahili) and the term “Wakora network”²² was used to refer to judicial officials, CSOs and their officials who were perceived by government to have influenced the court’s decision.

3. Harassment, intimidation and attacks against human rights defenders, civil society activists and journalists

3.1 Under Kenya’s previous UPR examination, the government received four recommendations on the protection of HRDs, journalists and civil society representatives. The government accepted all four recommendations, including to “Ensure strong public statements recognizing the legitimate and important role of human rights defenders and that all alleged attacks against human rights defenders are promptly and thoroughly investigated and that perpetrators are held accountable.” Of the recommendations accepted, one has been partially implemented while three have not been implemented. The government has failed to protect the working environment for HRDs and journalists, as security agents continue to arrest and detain HRDs and journalists arbitrarily and unlawfully.

3.2 Article 12 of the UN Declaration on Human Rights Defenders mandates states to take the necessary measures to ensure protection to HRDs. The ICCPR further guarantees the freedoms of association, peaceful assembly and expression. However, in spite of these protections, HRDs and journalists continue to face challenges, threats and killings because of their work.

3.3 ARTICLE 19 Eastern Africa reported that between January 2015 and November 2018, at least 231 incidents occurred of violations against journalists and bloggers, ranging from harassment to physical attacks that included beatings and arbitrary arrests. These violations came mainly from the police, political actors and state officials. Despite receiving formal complaints from journalists, bloggers and HRDs, the police have rarely investigated the attacks or threats. There is no evidence in the past five years that any state actor has been held accountable for threatening, intimidating, or physically attacking a journalist or blogger in Kenya.²³

3.4 The harassment, intimidation and detention of human rights activists has continued. On 30 April 2019, Betty Waithera, a woman HRD, was arrested for participating in a

²² ‘#WakoraNetwork linked State House to top court’s problems’, Daily Nation, 1 October 2017, <https://www.nation.co.ke/news/politics/WakoraNetwork-linked-State-House-to-top-court-s-problems-/1064-4119304-ah8qk7>.

²³ ‘Ending Impunity for crimes against Journalists’, ARTICLE 19 Eastern Africa, 2 November 2018, <https://www.article19.org/resources/ending-impunity-for-crimes-against-journalists>.

peaceful protest dubbed #BeyondZeroCorruption. Following the interventions of the NCHRD-K and the Kenya National Commission on Human Rights (KNCHR), and public outcry from the community, she was released after spending close to 10 hours in police custody.²⁴

- 3.5** On 6 May 2019, well-known HRD and activist Boniface Mwangi was arrested at his home for what the police claimed was “organising a revolution likely to cause civil unrest” in Kenya.²⁵ Boniface was arrested and detained at Nairobi’s Central Police Station, where the police attempted to interrogate him for more information, but he declined. Boniface was released following intervention from the NCHRD-K and KNCHR.

4. Freedom of expression, access to information, media freedom and the right to privacy

- 4.1** Under the 2nd UPR cycle, the government accepted seven recommendations relating to the freedom of expression, access to information, media freedom and the right to privacy. The government pledged to “review and adopt laws and policies to enhance access to information and freedom of expression in line with international human rights standards including Access to Information Bill, Data Protection Bill, Kenya information and Communications Act, and the Media Council Act 2013.” Of the seven recommendations, the government has partially implemented four and not implemented three. The government has only enacted the Access to Information Bill and has not enacted the Data Protection Bill. Further, the Media Council Act 2013 and the Kenya Information and Communications Act 1998 have not been amended to bring them into line with international norms regarding the freedom of expression, access to information and privacy.
- 4.2** Article 19 of the ICCPR guarantees the right to the freedoms of expression and opinion. Article 33 of the Constitution of Kenya 2010 also guarantees this right.
- 4.3** The Computer Misuse and Cybercrime Act, signed into law by President Kenyatta on 16 May 2018, is yet to be reviewed to bring it into line with international standards on the freedom of expression. The Act has been criticised by CSOs for containing vague provisions that are unconstitutional and unduly gag media professionals. While the stated objective of the law was to address issues such as cybercrime, cyber bullying, phishing, false news and cybersquatting, it also contains provisions that deny, infringe and threaten the freedoms of expression, opinion and the media, the security of the

²⁴ Facebook post by Boniface Mwangi, 30 April 2019,

<https://www.facebook.com/BonifaceMwangiBM/posts/2454454941241056>.

²⁵ ‘Boniface Mwangi arrested, charged with plotting revolution’, Nairobi News, 6 May 2019,

<https://nairobi.news.nation.co.ke/news/boniface-mwangi-arrested-plotting-revolution>.

person and the rights to property, privacy and a fair hearing. Many CSOs argue that the Act reintroduces, among other things, provisions of the Kenya Information and Communications Act, which had previously been condemned by the High Court for being unconstitutional. On 29 May 2018, the High Court temporarily suspended 26 sections of the Act.²⁶ The case however remains in court, as the government appealed against the temporary suspension.

- 4.4** While Kenya passed the Access to Information Act in 2016, it has failed to take adequate measures to ensure its robust and effective implementation. Among other concerns, the government has not developed regulations to aid in the implementation of the law on issues such as costs and the format of requests and disclosures. This severely inhibits access to information requests.²⁷
- 4.5** While the Access to Information Act provides for proactive disclosure, most state agencies continue to decline the disclosure of critical contracts and other procurement documents they have generated in the course of delivering services to Kenyan citizens. For example, the government has continually avoided disclosing the Kenya-China contract for the loan used to develop the railway line from Mombasa to Naivasha.²⁸
- 4.6** On 30 January, 2018, the Ministry of Interior and Coordination of National Government switched off free-to-air transmission on national television channels owned by Nation Television, Kenya Television Network and Citizen. This action by the government followed an announcement by the official opposition that they would swear in the opposition leader, Raila Odinga, as the 'People's President'.²⁹ During this period, journalists were targeted and threatened with arrest for criticising the shutdown.³⁰

5. Freedom of peaceful assembly

²⁶ 'High Court Suspends portions of Kenya Cyber Crime Law,' The East African, 29 May 2018, <https://www.theeastafrican.co.ke/news/ea/Court-suspends-portions-of-Kenya-cybercrime-law/4552908-4586250-1kaa55/index.html>.

²⁷ 'Access to information blocked', The Star, 8 December 2017, https://www.the-star.co.ke/news/2017/12/08/access-to-information-blocked_c1681256.

²⁸ 'Forget it: State House makes U-turn on releasing SGR contract', Nairobi News, 29 April 2019, <https://nairobi.news.nation.co.ke/news/forget-it-state-house-makes-u-turn-on-releasing-sgr-contract>.

²⁹ The Communications Authority proceeded to switch off the signals of TV Networks and various radio stations under the Royal Media Services at 9.10 am on 30 January 2019 ahead of their planned broadcast of the 'swearing in' of opposition leader Raila Odinga as the 'People's President'. See 'Crackdown on Media and opposition around mock inauguration of Odinga', CIVICUS Monitor, 5 April 2018, <https://monitor.civicus.org/newsfeed/2018/04/05/crackdown-media-and-opposition-around-mock-inauguration-odinga>.

³⁰ 'Citizen and Inooro TV stations finally back on air', Capital News, 8 February 2018, <https://www.capitalfm.co.ke/news/2018/02/citizen-inooro-tv-stations-finally-back-air>.

- 5.1** During Kenya's examination under the 2nd UPR cycle, the government received one recommendation on the right to the freedom of peaceful assembly. The government committed to ensuring that it "guarantees freedom of expression, press, associations and peaceful assembly of journalists, activists and participants in demonstrations." The government accepted this recommendation, but as evidenced below, has failed to realise it adequately. The authorities continue to use excessive force unduly to disperse and punish protesters, while attempting to amend the law to restrict peaceful assemblies.
- 5.2** Article 21 of the ICCPR guarantees the freedom of peaceful assembly. Article 37 of the Kenyan Constitution also guarantees this right. However, there have been numerous recent violations.
- 5.3** In March 2019, Member of Parliament Simon King'ara introduced a Public Order Act Amendment Bill 2019 in the Kenyan National Assembly. The Bill includes provisions that would make organisers of public meetings or public processions leading to loss of property, life or earnings take responsibility for the loss and compensate the affected persons.³¹ While there is general consensus among CSOs that the Public Order Act needs to be amended substantially or replaced by a new law, this new Bill seeks to further restrict the right to the freedom of peaceful assembly and unduly punishes convenors of protests instead of calling on the police to carry out their role to facilitate peaceful protests.³²
- 5.4** Section 5 of the Public Order Act states that those who wish to assemble must notify the police three days prior to an assembly. While the Act only requires protest convenors to notify, rather than seek permission of the police to hold a peaceful protest, the police have often misinterpreted this provision to deny permission to groups.³³
- 5.5** Violent disruption of protests, killings and arbitrary arrests of unarmed protesters continue to be a major challenge to the right to peaceful assembly in Kenya. On 26 September 2017, police beat peaceful protesters with batons and used teargas to

³¹ 'Kenya Gazette Supplement, National Assembly Bills 2019', National Assembly, 15 March 2019, <http://www.parliament.go.ke/sites/default/files/2019-05/Public%20Order%20%28Amendment%29%20Bill%2C%202019.pdf>.

³² 'New amendment Bill unfairly targets protest organisers', Brian Kimari, Centre for Human Rights and Policy Studies, 2019, <https://www.chrips.or.ke/commentary/new-amendment-bill-unfairly-targets-protest-organisers>.

³³ 'Pro expression lobby links violent protests to non-aligned order act', Capital News, 12 September 2018, <https://www.capitalfm.co.ke/news/2018/09/pro-expression-lobby-links-violent-protests-to-non-aligned-order-act>.

disperse demonstrators who were peacefully protesting against Electoral Commission officials in Nairobi.³⁴

- 5.6** On 27 February 2018, a student leader, Evans Njoroge, was shot and killed when a protest by students from the Meru University of Science and Technology over an increase in school fees was violently dispersed by police officers.³⁵
- 5.7** ARTICLE 19 Eastern Africa, in its monitoring of protests reported by Kenya's media, reported that between January to December 2016, a total of 175 protests were recorded in Kenya.³⁶ In these, 12 fatalities were recorded resulting from gunshot wounds from police officers as they violently engaged protesters.³⁷ The numbers in 2016 revealed a sharp increase in the number of protests, up from the 140 recorded in 2015. According to the KNCHR, following multiple accounts of police brutality in the management of protests regarding the 2017 elections, 57 fatalities were reported. Amongst the casualties and fatalities were children and young people in Kisumu³⁸ and Nairobi.³⁹ In 2018, ARTICLE 19 Eastern Africa recorded a total of 121 protests, in which six fatalities were recorded, including a university students' leader who was shot dead by anti-riot police.⁴⁰ In 2019, from 1 January to 9 May, ARTICLE 19 Eastern Africa recorded 18 protests reported by the media, in which there were nine arrests: eight while protesting over the lack of garbage collection in Nakuru county and one while addressing the media during an anti-corruption protest in Nairobi.
- 5.8** A further continuing major challenge is the lack of access to justice and accountability for casualties and fatalities encountered during protests. Although the Independent Police Oversight Authority (IPOA) was established by an Act of Parliament in 2011 to investigate serious injuries and deaths caused by police action, since 2011 no case related to protests, whether relating to those killed or injured, has been conclusively investigated by IPOA.
- 5.9** Despite a public inquest into the killing of six-month-old Samantha Pendo as a result of the authorities' excessive use of force in responding to protests in Kisumu in August

³⁴ 'Kenyan police disperse protests against election commission, Reuters, 26 September 2017, <https://www.reuters.com/article/us-kenya-election/kenyan-police-disperse-protests-against-election-commission-idUSKCN1C1164?il=0>.

³⁵ 'Police Shoot, Kill Meru university student leaders as protests turn ugly', Standard Digital, 28 February 2018, <https://www.standardmedia.co.ke/article/2001271379/police-shoot-kill-meru-university-student-leader-as-protests-turn-ugly>.

³⁶ 'Is right to protest guaranteed in Kenya? Dissenters suffer at the hands of Anti Riot Police', ARTICLE 19, 2016.

³⁷ Ibid.

³⁸ 'Police deny killing 7 year old, blame unidentified criminals', Capital News, 30 November 2017, <https://www.capitalfm.co.ke/news/2017/11/police-deny-killing-7-year-old-blame-unidentified-criminals>.

³⁹ Ibid.

⁴⁰ 'Police Shoot, Kill Meru university student leaders as protests turn ugly', op. cit.

2017, five senior police officers found to be culpable for the killing have not been prosecuted, even though files were forwarded to the Director of Public Prosecutions.⁴¹

6. Recommendations to the Government of Kenya

CIVICUS, ARTICLE 19 Eastern Africa, NCHRD-K and KHRC call on the Government of Kenya to create and maintain, in law and in practice, an enabling environment for civil society, in accordance with the rights enshrined in the ICCPR, the UN Declaration on Human Rights Defenders and Human Rights Council resolutions 22/6, 27/5 and 27/31.

At a minimum, the following conditions should be guaranteed: the freedoms of association, peaceful assembly and expression, the right to operate free from unwarranted state interference, the right to communicate and cooperate, the right to seek and secure funding and the state's duty to protect. In the light of this, the following specific recommendations are made:

6.1 Regarding the freedom of association

- Operationalise the 2013 PBO Act as a law facilitating an independent and unhindered civil society, and refrain from enacting restrictive requirements that have a stifling effect on the functioning and funding of CSOs.
- Make strong public statements recognising the legitimate and important role of CSOs and ensure that intimidation, attacks and unwarranted raids against CSOs and their officials are immediately stopped, publicly condemned and thoroughly investigated, and that state agencies involved are held accountable.
- Take measures to foster a safe, respectful and enabling environment for civil society, including by removing legal and policy measures that unwarrantedly limit the right to association.
- Immediately reinstate all CSOs that have been arbitrarily and unduly sanctioned or deregistered.
- Refrain from acts leading to the arbitrary deregistration of CSOs or the suspension of their peaceful activities, and instead promote a meaningful

⁴¹ 'Kenya: Inquest finds police culpable for death of baby in 2017 post-election protests', ARTICLE 19, 18 February 2019, <https://www.article19.org/resources/kenya-inquest-finds-police-culpable-for-death-of-baby-in-2017-post-election-protests>.

political dialogue that allows and embraces diverging views, including those of CSOs, HRDs, journalists, political activists and others.

6.2 Regarding the protection of human rights defenders

- Ensure that strong public statements are made recognising the legitimate and important role of HRDs, and all alleged attacks against HRDs are promptly and thoroughly investigated and perpetrators are held accountable
- Provide civil society members, HRDs and journalists with a safe and secure environment in which to carry out their work.
- Systematically apply legal provisions that promote and protect human rights and establish mechanisms that protect human rights activists by adopting a specific law on the protection of human rights activists, in accordance with resolution 27.31 of the Human Rights Council.

6.3 Regarding the freedom of expression, access to information, media freedom and the right to privacy

- Ensure the freedom of expression and media freedom by all bringing national legislation into line with international standards.
- In particular, review the Media Council Act 2013, the Kenya Information and Communications Act 1998 and the Computer Misuse and Cyber Crimes Act 2018 in order to ensure that they are in line with best practices and international standards in the area of the freedom of expression and right to privacy.
- As part of any review of the Computer Misuse and Cyber Crimes Act 2018, strike out the 26 sections that were temporarily suspended by the High Court on 29 May 2018.
- Develop and implement access to information regulations to enable the full implementation of the Access to Information Act 2016 and establish mechanisms to facilitate public access in line with best practices.
- Develop and enact a law to protect whistle blowers who help to point out corruption and other malpractices within government.
- Cease the practice of arbitrarily shutting down and censoring media.

- Refrain from adopting any laws providing for censorship or undue control over the content of the media.
- Refrain from censoring social and conventional media and ensure that the freedom of expression is safeguarded in all forms, including the arts.
- Ensure that journalists and writers may work freely and without fear of retribution for expressing critical opinions or covering topics that the government may find sensitive.
- Take adequate steps to lift restrictions on the freedom of expression and adopt a framework for the protection of journalists from persecution, intimidation and harassment.
- Guarantee unfettered access for all persons in Kenya to domestic and foreign media information, both offline and online.
- Develop an action plan to ensure that internet laws comply with the government's commitment to guarantee the freedom of expression and information, so as to ensure free access to electronic media, liberalise electronic media ownership rules and allow bloggers, journalists and other internet users to play a full and active role in promoting and protecting human rights.

6.4 Regarding the freedom of peaceful assembly

- Adopt best practices on the freedom of peaceful assembly, as put forward by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association in his 2012 annual report, which calls for procedures in which there is simple notification of assemblies being held, rather than explicit permission being needed to assemble.
- Institute charges and prosecute law enforcement officers found to have acted unlawfully in the course of protests by using disproportionate force and firearms in response to protests.
- Amend the Public Order Act in order to guarantee fully the right to the freedom of peaceful assembly.
- Refrain from passing or amending laws that are intended to restrict the right to the freedom of peaceful assembly.
- Ensure that no protesters, journalists and HRDs are harassed, arrested or detained for exercising their right to the freedom of peaceful assembly.

- Immediately and impartially investigate all instances of extrajudicial killings and excessive force committed by security forces while monitoring protests and demonstrations.
- Ensure human rights training is provided for all police and security forces, with the assistance of independent CSOs, to foster the more consistent application of international human rights standards, including the UN Basic Principles on the Use of Force and Firearms.
- Publicly condemn at the highest levels the use of excessive and brutal force by security forces in the dispersal of protests, launch a formal investigation into such instances and bring the perpetrators to justice.
- Provide recourse for judicial review and effective remedy, including compensation, in cases of unlawful denial of the right to freedom of assembly by state authorities.

6.5 Regarding state engagement with civil society

- Implement transparent and inclusive mechanisms of public consultations with CSOs on all issues mentioned above and enable the more effective involvement of civil society in the preparation of law and policy.
- Include CSOs in the UPR process before finalising and submitting the national report.
- Systematically consult with civil society on the implementation of UPR recommendations, including by holding periodical comprehensive consultations with a diverse range of civil society.
- Incorporate the results of this UPR into action plans for the promotion and protection of all human rights, taking into account the proposals of civil society, and present a midterm evaluation report to the Human Rights Council on the implementation of the recommendations of this session.

