



DEFENDDEFENDERS

East and Horn of Africa Human Rights Defenders Project



The Republic of Kenya

Submission to the UN Universal Periodic Review

35th Session of the UPR Working Group

Submitted on 18 July 2019 by:

DefendDefenders

**(East and Horn of Africa Human Rights Defenders Project)
NGO in Special Consultative Status with ECOSOC**

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1. Introduction

- 1.1 DefendDefenders (The East and Horn of Africa Human Rights Defenders Project) is a regional civil society organisation (CSO) established in 2005 and based in Kampala, Uganda. It seeks to strengthen the work of human rights defenders (HRDs) throughout the East and Horn of Africa sub-region by reducing their vulnerability to the risk of persecution and by enhancing their capacity to effectively defend human rights. DefendDefenders focuses its work on Burundi, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia (together with Somaliland), South Sudan, Sudan, Tanzania, and Uganda.
- 1.2 The National Coalition of Human Rights Defenders-Kenya (NCHRD-K), is a Kenyan CSO established in 2007. It works to strengthen the capacity of HRDs to work effectively and reduce their vulnerability to the risk of persecution, including by advocating for a favourable legal and policy environment in Kenya.
- 1.3 In this submission, DefendDefenders and NCHRD-K examine the Government of Kenya's compliance with its international human rights obligations to create and maintain a safe and enabling environment for HRDs, including civil society. Specifically, we analyse the Government of Kenya's fulfilment of the rights to freedom of association, peaceful assembly, and expression, and unwarranted restrictions on HRDs since the second cycle of the Universal Periodic Review (UPR) in 2015. To this end, we assess Kenya's implementation of recommendations received during the second UPR cycle relating to these issues and provide a number of specific, action-orientated follow-up recommendations.
- 1.4 In an unprecedented move in East Africa, Kenya's Supreme Court nullified the 8 August 2017 presidential elections where the Independent Electoral and Boundaries Commission (IEBC) had declared Uhuru Kenyatta the winner. The IEBC scheduled fresh elections for 26 October, which were reported¹ as marred by serious human rights violations committed by Kenyan security forces. According to Human Rights Watch, at least 12 people were killed by police in Kisumu and Siaya, and 33 in Nairobi.² The 2017 pre and post electoral period tested Kenya's commitment to its human rights obligations.
- 1.5 During its second UPR cycle, the Government of Kenya received 11 recommendations related to HRDs, including CSOs, seven on freedom of expression, and one on peaceful assembly.³ An evaluation of legal sources, media reports, and human rights documentation addressed in subsequent sections of this submission demonstrate that the Government of Kenya has only partially implemented the recommendations

¹ Kenya National Human Rights Commission, "Mirage at dusk - A human rights account of the 2017 general elections," October 2017, <https://www.knchr.org/Publications/Thematic-Reports/Civil-and-Political-Rights/Election-Related-Reports>, Accessed 16 July 2019.

² Human Rights Watch, "Kenya elections 2017," 20 February 2018, <https://www.hrw.org/blog/feed/kenya-elections-2017>, Accessed 9 July 2019.

³ OHCHR, "UPR of Kenya - Second Cycle: Thematic list of recommendations," <https://lib.ohchr.org/HRBodies/UPR/Documents/Session21/KE/KenyaMatriceRecommendations.pdf>, Accessed 7 July 2019.

relating to HRDs, protection of the rights to freedom of expression, peaceful assembly, and association. Implementation gaps were noted with regard to ensuring accountability for violations against HRDs, as well as establishing and maintaining a safe and enabling environment for HRDs.

- **Section 2** examines Kenya's implementation of UPR recommendations and compliance with international human rights standards concerning freedom of association.
- **Section 3** examines Kenya's implementation of UPR recommendations and compliance with international human rights standards related to the protection of HRDs, including civil society and journalists.
- **Section 4** examines Kenya's implementation of UPR recommendations and compliance with international human rights standards concerning freedom of expression, media freedom, and access to information.
- **Section 5** examines Kenya's implementation of UPR recommendations and compliance with international human rights standards related to freedom of peaceful assembly.
- **Section 6** contains recommendations to address concerns raised and to advance implementation of recommendations under the second UPR cycle.
- **Annex 1** contains an assessment of accepted recommendations on freedom of association, expression, peaceful assembly, and HRDs under the second cycle of the UPR.

2. Freedom of association

2.1 During Kenya's examination in the UPR second cycle, the government accepted to implement 12 recommendations relating to freedom of association.⁴ The government committed to fully implementing the Public Benefits Organisations Act (2013) (PBOA), and safeguarding the rights and space for civil society in line with the Kenyan Constitution.⁵ Article 36 of the Constitution provides that every person has the right to freedom of association, which includes the right to form, join, or participate in the activities of an association of any kind. Article 36 further protects associations from unreasonable withdrawal or withholding of registration, and the right to a fair hearing if the registration is cancelled. Additionally, Articles 2(5) and 2(6) of the Constitution provide that general rules of international law, treaties, and conventions

⁴ A/HRC/29/10 para 142.125, (Sweden), para 142.128 (United States of America), para 142.143 (Norway), para 142.142 (Norway), para 142.137 (Ireland), para 142.129 (Uruguay), para 142.127 (United Kingdom of Great Britain and Northern Ireland), para 142.133 (Canada), para 142.140 (Netherlands), para 142.132 (Botswana), para 142.136 (France), para 142.135 (Denmark).

⁵ A/HRC/29/10 para 142.125, (Sweden), para 142.128 (United States of America), para 142.135 (Denmark).

ratified by Kenya shall form part of Kenya's law. Kenya ratified the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights, which protect the right to free association.

- 2.2 However, the PBOA remains unimplemented despite court orders compelling the Cabinet Secretary to commence its implementation. If implemented, the PBOA would repeal the Non-Governmental Organizations Co-ordination Act (1990).
- 2.3 On 13 May 2017, the High Court ordered the Cabinet Secretary for Interior and Coordination of National Government to publish in the Gazette, within 30 days, a date for the commencement of the PBOA. The judge noted that the government was already in contempt for failing to implement a similar ruling eight months earlier.⁶ To date, the Secretary is yet to act on the Court's orders.
- 2.4 France called on Kenya to ensure that non-governmental organisations (NGOs) and HRDs can freely conduct their activities. On the contrary, the government continues to interfere in the operations of NGOs. On 16 August 2017, the Kenya Revenue Authority (KRA), accompanied by Kenyan police officers, attempted to enter the offices of the Africa Centre for Open Governance (AfriCOG) without notice and with a defective search warrant. The attempted raid came two days after AfriCOG, together with the Kenya Human Rights Commission (KHRC), were served with a notice of deregistration by the NGO Coordination Board.⁷

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

- 3.1 Ireland called on Kenya to create and maintain, in law and practice, a safe and enabling environment in which HRDs and civil society can operate free from hindrance and insecurity in accordance with HRC resolutions 22/6 and 27/31.⁸ Additionally, Norway,⁹ Slovakia and Botswana¹⁰ urged Kenya to "ensure that attacks against HRDs are properly investigated and their perpetrators prosecuted."¹¹ There have been efforts by the government to ensure accountability, but HRDs continue to face increased attacks in a climate of impunity.
- 3.2 Following the killing of HRD Willie Kimani and two others in July 2016, the Inspector General of Police confirmed the arrest of three officers charged with murder. The case is still before the Courts. On 22 June 2018, the office of the Director of Public

⁶ Daily Nation, "Why new NGOs law should be implemented," 13 April 2019, <https://www.nation.co.ke/oped/opinion/Why-new-NGOs-law-should-be-implemented/440808-5070334-13px36v/index.html>, Accessed 10 July 2019.

⁷ CIVICUS, "Kenya: Civil society condemns attempted raid and deregistration of human rights organisations," 18 August 2017, <https://www.civicus.org/index.php/media-resources/media-releases/2918-kenya-civil-society-condemns-attempted-raid-and-deregistration-of-human-rights-organisations>, Accessed 10 July 2019.

⁸ A/HRC/29/10, para. 142. 137 (Ireland)

⁹ A/HRC/29/10, para. 142. 142 (Ireland)

¹⁰ A/HRC/29/10, para. 142. 132 (Botswana)

¹¹ A/HRC/29/10, para. 142.123 (Slovakia)

Prosecutions, through a letter to the Director of Criminal Investigations and Witness Protection Agency, requested the protection of HRDs advocating against lead poisoning in the Owino Uhuru slums (Mombasa). Additionally, state offices participated in a community dialogue in Kayole where they committed to working with grassroots organisations to investigate extrajudicial killings.

- 3.3 NCHRD-K documented over 50 cases of harassment and intimidation against HRDs.¹² Between January and December 2016, 12 fatalities were recorded when police officers used live ammunition to violently disperse protesters and HRDs.¹³ From January 2016 to April 2019, NCHRD-K received over 30¹⁴ cases of threats and harassment of HRDs, including over 36 cases of arbitrary arrests, one killing,¹⁵ and 10 cases of forced evictions of lesbian, gay, bisexual, and transgender (LGBT) HRDs.
- 3.4 In February 2019, Caroline Mwatha, a woman human rights defender (WHRD) was found dead, allegedly from a botched abortion. However, rights activists in Kenya believe that Mwatha, a founding member of Dandora Community Justice Centre, might have been killed as a result of her work.¹⁶ The investigations into her death are still inconclusive.
- 3.5 HRDs experienced attacks during the 2017 electoral periods. Human Rights Watch reported that from August 2017-March 2018, police targeted at least 15 activists in Nairobi and Kisumu. Intimidation tactics ranged from threats of arrests and restrictions on freedom of expression, to confiscation of equipment.¹⁷ According to a 15 October 2017 joint report by Amnesty International and Human Rights Watch, police killed at least 33 people, possibly as many as 50, and injured hundreds during repressions of protests that followed the 8 August elections in some opposition strongholds in parts of Nairobi.¹⁸ The report "Mirage at Dusk" by the Kenya National Human Rights Commission documented 37 deaths due to police use of excessive force at opposition protests.¹⁹

¹² NCHRD-K, "Election Monitoring Report on the Situation of HRDs, Election Monitors and Journalists During the 2017 Elections in Kenya," <http://nchrdk.org/nchrd-ks-summarised-elections-findings/>, Accessed 7 July 2019.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Amnesty International, "Excessive force and evictions leads to killings of the Sengwer community in Embobut Forest," 17 January 2018, <https://www.amnestykenya.org/excessive-force-evictions-leads-killings-sengwer-community-embotut-forest/>, Accessed 10 July 2019.

¹⁶ Human Rights Watch, "Ensure justice in death of Kenyan activist," 22 February 2019, <https://www.hrw.org/news/2019/02/23/ensure-justice-death-kenyan-activist>, Accessed 10 July 2019.

¹⁷ Human Rights Watch, "Kenya: Police threaten activists reporting abuse," 4 June 2018, <https://www.hrw.org/news/2018/06/04/kenya-police-threaten-activists-reporting-abuse>, Accessed 10 July 2019.

¹⁸ Human Rights Watch, "Kill Those Criminals: Security Forces Violations in Kenya's August 2017 Elections," 15 October 2017, <https://www.hrw.org/report/2017/10/15/kill-those-criminals/security-forces-violations-kenyas-august-2017-elections>, Accessed 15 July 2019.

¹⁹ Kenya National Human Rights Commission, "Mirage at Dusk," October 2017, <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/MIRAGE%20AT%20DUSK%20-%20A%20Human%20Rights%20Account%20of%20The%202017%20General%20Election.pdf.pdf?ver=2017-10-09-130024-457>, Accessed 15 July 2019.

- 3.6 Finland urged Kenya to pay particular attention to safeguarding the rights and safety of members of minorities and marginalised groups, as well as HRDs, refugees, and stateless persons.²⁰ Marginalised HRDs, WHRDs, defenders working on sexual orientation and gender identity (SOGI) issues, and defenders protecting indigenous peoples are the most vulnerable, facing heightened and intersectional risks.²¹
- 3.7 On 24 May 2019, Kenya’s High Court upheld Articles 162 and 165 of the Penal Code, which criminalise consensual same-sex relations.²² The provisions, though rarely enforced, have been applied to prosecute four people over the past decade.²³ Additionally, the provisions propagate discrimination and violence against LGBT people.
- 3.8 On 20 June 2019, members of the Ogiek Peoples’ Development Program (OPDP), who work to protect the land rights of the Ogiek people living in the Mau Forest Complex, received death threats, and threats of closure of the organisation aimed at distracting them from continuing their work.²⁴ Since 2012, when the African Court on Human and Peoples’ Rights²⁵ was seized with the case of the Ogiek community, members of OPDP continue to suffer harassment and attacks.²⁶
- 3.9 On 6 January 2018, Kenya Forest Service (KFS) officers shot and killed Robert Kiroch and seriously injured David Kosgei Kiptilkesi, members of the Sengwer indigenous group, in Embobut Forest. Since 29 December 2017, the KFS has been carrying out forced evictions of members of the Sengwer community. KFS fired live ammunition repeatedly throughout these operations, and community leader Paul Kiptuka was shot at while leaving his home on 9 January 2018, but escaped unhurt.²⁷

4. Freedom of expression and access to information

²⁰ A/HRC/29/10, para. 142.17 (Finland)

²¹ DefendDefenders, “To them, we’re not even human: Marginalised human rights defenders in Uganda, Kenya, and Tanzania,” December 2018, https://www.defenddefenders.org/wp-content/uploads/2018/12/Marginalised-HRDs_FINAL-REPORT.pdf, Accessed 17 July 2019.

²² Human Rights Watch, “Kenya: Court upholds archaic anti-homosexuality laws,” 24 May 2019, <https://www.hrw.org/news/2019/05/24/kenya-court-upholds-archaic-anti-homosexuality-laws-0>, Accessed 10 July 2019.

²³ Ibid.

²⁴ NCHRD-K, “Press statement on the unwarranted targeting of human rights defenders working with the Ogiek community,” 20 June 2019, <https://hrdcoalition.org/press-statement-on-unwarranted-targeting-of-human-rights-defenders-working-with-the-ogiek-community/>, Accessed 10 July 2019.

²⁵ African Union, “African Commission on Human and Peoples’ Rights V. Republic of Kenya,” 26 May 2017, <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>, Accessed 10 July 2019.

²⁶ Ibid

²⁷ See footnote 10, Amnesty International, “Excessive Force and evictions leads to killings of the Sengwer community in Embobut forest,” 17 January 2018, <https://www.amnestykenya.org/excessive-force-evictions-leads-killings-sengwer-community-embobut-forest/>, Accessed 10 July 2019.

- 4.1 In the second cycle of the UPR, Kenya received seven recommendations relating to the right to freedom of expression. It accepted to implement three²⁸ and noted four. Kenya committed to “ensure in both legislation and implementation freedom of expression and press freedom, as guaranteed by its Constitution.”²⁹
- 4.2 Article 19 of the ICCPR guarantees the right to freedom of opinion and expression. Article 33 of the Kenyan Constitution also guarantees citizens’ right to freedom of expression, which includes freedom to seek, receive, or impart information or ideas.
- 4.3 However, Kenyan journalists and bloggers face serious challenges, including state directives that undermine press freedom and condone physical attacks on journalists.³⁰ In May 2018, the Kenya Film Classification Board (KFCB) banned posting of videos by individual bloggers unless allowed by the Board. In April 2018, KFCB banned the screening of *Rafiki*, a film depicting a lesbian relationship. The ban was temporarily lifted on 21 September 2018 for one week.³¹
- 4.4 On 25 January 2018, a group of journalists were assaulted and their equipment including cameras and recorders, were destroyed during a meeting of the Kenya African National Union (KANU) Party in Lodwar. Some of the journalists sustained injuries.³²
- 4.5 Three television stations and several local radio stations were taken off the air by the authorities during the unofficial swearing-in of opposition leader Raila Odinga on 30 January 2018. Nation Media Group's NTV, Royal Media's Citizen TV, and Standard Group's KTN News, all independent broadcasters, were switched off mid-morning for airing live pre-coverage of the event, but their live YouTube streams were unaffected.³³ On 1 February, a High Court in Nairobi issued temporary orders to the Communications Authority to restore signal transmissions, which were nonetheless ignored for several days.³⁴

5. Freedom of peaceful assembly

²⁸ A/HRC/29/10. para 142.129 (Uruguay), para 142, para 142. 131 (Australia), para 142.138 (Japan)

²⁹ A/HRC/29/10. para 142. 138 (Japan)

³⁰ Human Rights Watch, “Kenya backsliding on press freedoms,” 3 May 2019, <https://www.hrw.org/news/2019/05/03/kenya-backsliding-press-freedoms>, Accessed 11 July 2019.

³¹ The East African, “Kenyan ‘Rafiki’ film ban lifted for a week,” 21 September 2018, <http://www.theeastafrican.co.ke/magazine/Kenyan-Rafiki-film-ban-lifted-for-a-week/434746-4770672-rsxepuz/index.html>, Accessed 7 July 2019.

³² Citizen Digital, “Journalists attacked, equipment damaged in Turkana,” 25 January 2018, <https://citizentv.co.ke/news/turkana-journalists-attacked-equipment-destroyed-189133/>, Accessed 11 July 2019.

³³ Committee to Protect Journalists, “Kenya cuts TV transmissions over live coverage of opposition's Odinga,” 30 January 2018, <https://cpj.org/2018/01/kenya-cuts-tv-transmissions-over-live-coverage-of-odinga/>, Accessed 15 July 2019.

³⁴ The East African, “Kenyan court orders government to end televisions shutdown,” 1 February 2018, <http://www.theeastafrican.co.ke/news/Kenya-court-order-government-end-TVs-shutdown/2558-4287664-ken5hw7/index.html>, Accessed 15 July 2019.

- 5.1 During its second UPR review, Kenya accepted one recommendation “to [...] guarantee peaceful assembly of journalists, activists and participants in demonstrations.”³⁵ Article 37 of the Constitution protects the right “peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.” However, as evidenced below, the government has failed to realise this recommendation adequately. Serious violations of the right to freedom of peaceful assembly were witnessed during the 2017 presidential elections.
- 5.2 According to NCHRD-K’s 2016 case digest,³⁶ between January and December 2016, 175 protests were recorded in the country. Out of these, 51 were characterised as (partially) violent, and 12 deaths recorded.³⁷
- 5.3 On 19 June 2019, two HRDs were arrested while taking part in a peaceful demonstration in solidarity with the people of Sudan. The arrests occurred despite the fact that the HRDs had notified the central police station of their intention to protest and requested for security. Two months earlier, woman HRD Beatrice Waithera was arrested while participating in an anti-corruption protest in Nairobi.³⁸
- 5.4 On 30 April 2019, police used tear gas to disperse protestors who had gathered at Uhuru Park in Nairobi to protest against widespread corruption. The security officer in charge of Nairobi central police station cautioned protesters that “there will be no marching outside Uhuru Park.”³⁹
- 5.5 In March 2019, a Bill to amend the Public Order Act (2014) was tabled in the Kenyan National Assembly.⁴⁰ The new Bill has been criticised for imposing undue restrictions on the right to peaceful assembly, and for disproportionately punishing protest organisers. Section 5 of the Public Order Act is often misinterpreted by the police as a request for permission to organise a protest, as opposed to notification of the intention to protest, transforming the legal regime from a notification regime to a *de facto* authorisation regime.
- 5.6 Positively, on 13 February 2019, the Magistrate Court found five top police commanders accountable for the death of a six-month old toddler during the August 2017 post-election violence in Western Kenya.⁴¹

³⁵ A/HRC/29/10 para 149.129 (Uruguay)

³⁶ NCHRD-K, <https://hrdcoalition.org/>, Accessed 11 July 2019.

³⁷ Ibid.

³⁸ NCHRD-K, “Press release on the arrest of human rights defenders holding a peaceful solidarity March with the people of Sudan,” 19 June 2019, <https://hrdcoalition.org/press-release-on-the-arrest-of-human-rights-defenders-holding-a-peaceful-solidarity-march-with-the-people-of-sudan/>, Accessed 12 July 2019.

³⁹ CIVICUS Monitor, “Dispersal of protests continues to be a major challenge to peaceful assembly,” 23 May 2019, <https://monitor.civicus.org/newsfeed/2019/05/23/dispersal-protests-continues-be-major-challenge-peaceful-assembly/>, Accessed 11 July 2019.

⁴⁰ The Star, “Amendment to the Public Order Act in bad taste, must be treated with contempt it deserves,” 29 April 2019, <https://www.the-star.co.ke/siasa/2019-04-27-amendment-to-public-order-act-in-bad-taste-must-be-treated-with-contempt-it-deserves/>, Accessed 11 July 2019.

⁴¹ Voice of America, “Kenya police found liable in death of baby during post election violence,” 14 February 2019, <https://www.voanews.com/africa/kenya-police-found-liable-death-baby-during-post-election-violence>, Accessed 12 July 2019.

5.7 On 5 November 2018, students from Maseno University protesting against the detention of their colleagues were harassed following an altercation with the police. The students alleged that the law enforcement officers harassed them as they sought to file a police report.⁴² Later that day, a video and pictures circulated on social media showed protesters posing no immediate threat to public order or the security of persons being beaten and mistreated by security officers.

6. Recommendations to the government of Kenya

6.1 DefendDefenders and NCHRD-K call on the Government of Kenya to create and maintain, in law and in practice, a safe and enabling environment for HRDs including 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.

6.2 In line with Kenya's standing invitation to the Human Rights Council's special procedure mandate-holders to visit the country, swiftly set a date for the visits of the UN Special Rapporteurs on human rights defenders, freedom of peaceful assembly and association, and freedom of opinion and expression, the latter two having been accepted in principle, in 2014 and 2015 respectively.

6.3 The government should guarantee freedoms of association, peaceful assembly, and expression, and the right to operate free from unwarranted state interference. In the light of this, the following specific recommendations are made:

6.4 Regarding freedom of association

- Immediately implement the Public Order Benefits Organisations Act (2013);
- Immediately reinstate all CSOs that have been arbitrarily deregistered; and
- End the practice of unwarranted raids on CSOs and unjustifiable disruptions of their activities. Any search operations should be authorised by a court order, in accordance with due process.

6.5 Regarding protection of human rights defenders

- Provide civil society members, HRDs, and journalists with a safe and enabling environment in which to carry out their work free from hindrance and insecurity. Conduct impartial, thorough, swift, effective, and transparent investigations into all cases of attacks, harassment, and intimidation, and bring the perpetrators to justice in fair trials;
- Adopt a specific law on the protection of HRDs, in accordance with Council resolution 27/31 of the Human Rights Council; and

⁴² Nairobi News, "Police condemned for brutality on varsity students," 5 November 2018, <https://nairobi.news.nation.co.ke/news/police-condemned-for-brutality-on-varsity-students-video>, Accessed 11 July 2019.

- Recognise the important contributions of HRDs and refrain from criminalising their work.

6.6 Regarding freedom of expression and access to information

- Respect the right to freedom of expression and ensure that censorship is limited to exceptional cases, in line with the limitations provided under Article 19(3) of the ICCPR; and
- Cease the targeting and harassment of journalists and other critical voices in the country and publicly desist from any negative discourse on civil society, HRDs, and journalists.

6.7 Regarding freedom of peaceful assembly

- Adopt best practices on the freedom of peaceful assembly set out by the UN Special Rapporteur on the rights to freedom of peaceful assembly and 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;
- Review the cases of all people detained for exercising their right to freedom of peaceful assembly in order to prevent further harassment;
- Engage in a meaningful and inclusive national dialogue with all stakeholders including civil society, in the amendment of the Public Order Act;
- Review and update existing human rights training for police and security forces to foster a more consistent application of international human rights standards, including the UN Basic Principles on the Use of Force and Firearms, and instruct law enforcement and security agents to cease the use of excessive force against peaceful demonstrators; and
- Publicly condemn the use of excessive and brutal force by security forces to disperse protests, launch an effective investigation into such instances, and bring the perpetrators of abuses to justice in fair trials.