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**ON THE OCCASION OF THE 53RD SESSION OF THE AFRICAN COMMISSION ON
HUMAN AND PEOPLE'S RIGHTS (ACHPR) APRIL 4 TO 14, 2013
BANJUL, GAMBIA
BRIEFING PAPER ON KENYA¹**

Introduction

1. Kenya ratified the African Charter on Human and People's Rights on January 23rd, 1992. Kenya has domesticated most of the provisions of the Charter through various pieces of national legislation. The Constitution of Kenya 2010 provides an extensive and elaborate chapter on human rights and recognizes collective rights as well.
2. Kenya has not consistently adhered to its obligations under article 62 of the Charter to prepare periodic State report on measures undertaken to implement the Charter; with its last report to the Commission submitted in 2006. As a result, a significant number of events with a bearing on the enjoyment of the rights and freedoms under the Charter have been absent of the scrutiny provided for by the dialogue process that accompanies the review of a State report by the Commission. Since the last session of the ACHPR, a number of events have taken place in Kenya. This brief will focus on the areas that are of concern to the organizations presenting this brief.

The March 2013 General Elections

3. In 2007/2008 Kenya experienced its worst form of post election violence since the advent of multiparty politics in 1992. While previous election cycles had registered episodes of violence, the displacement of 663,921 persons and 1,300 fatalities following the disputed results of the 2007 Presidential elections was unprecedented in Kenya's history. Following a successful mediation process led by His Excellency Koffi Annan and supported by the African Union, Kenya embarked on a process of national healing that was characterized by a coalition

¹ This paper has been developed jointly by the organizations participating in the 53rd Session of the ACHPR. It is aimed at providing a brief update on the situation in Kenya as pertains to Kenya's obligations under the Charter.

government and institutional and legislative reforms within the framework of the Kenya National Dialogue and Reconciliation (KNDR).

4. Constitutional review formed the core of the reform agenda; after a successful referendum, Kenya promulgated its new Constitution in August 2010. One of the main areas for reform was the conduct of elections in the Country. Various reforms were undertaken including disbanding the then Electoral Commission of Kenya, which was replaced by the Independent Electoral and Boundaries Commission (IEBC) established under Article 88 of the Constitution. In line with this, came the reforms of other key institutions such as the police service and the judiciary.
5. Kenya held its general elections on March 4th 2013. The elections were conducted in a peaceful and calm manner. However, the electoral process was not without flaws. The IEBC had been trusted with delivering its constitutional mandate but failed to do so in the strict manner required by the Constitution. From the outset of the electoral process, civil society organizations in Kenya were concerned about the preparedness of the IEBC to deliver free, fair, transparent and credible elections and on various occasions unsuccessfully sought audience with the IEBC commissioners to address the concerns. Nevertheless Kenyans for Peace with Truth and Justice (KPTJ) a coalition of civil society organizations sent a detailed memorandum to the IEBC detailing the concerns and requesting that they be addressed satisfactorily before the elections. There were flagrant incidences of timelines being inordinately extended which impacted on such processes such as voter registration, political party membership verification as well as voter education.
6. By and large, the tendering process that led to the acquisition of faulty Biometric Voter Registration (BVR) and Electronic Voter Identification (EVID) kits was flagged early enough for IEBC to rectify the same before the elections. However, the concerns raised were never addressed. The fact that these kits were never tested during the simulation process held ahead of the elections compounded the problem further. In addition to this, the simulation process that was held barely three weeks to the elections revealed that the electronic transmission of results was bound to fail owing to the poor standard of software and hardware that had been procured for the exercise. In the end, on March 5th 2013, the IEBC admitted that these equipment and software including the electronic transmission of results had completely failed and thus the IEBC had to resort to manual voter identification and transmission of results.
7. These failures raised concerns as to the credibility of the whole process and occasioned a number of legal suits in both the High Court and the Supreme Court of Kenya. The case at the High Court was instituted by AfriCOG, a civil society organization that sought to have the court stop the tallying process and direct that the IEBC use the primary declaration of results at the polling stations contained in Form 34 as opposed to using form 36 that was used to declare results at the constituency level. The case was dismissed on account that the High Court lacked jurisdiction to determine matters touching on presidential elections. The subsequent petitions filed by AfriCOG and The Right Honorable Prime Minister Raila Odinga at the Supreme Court challenged the results of the elections and the declaration of Uhuru Kenyatta and William Ruto as the presidentelect and deputy president elect respectively.
8. The Supreme Court, in exercising its judicial authority ordered and carried out a scrutiny of 22 polling stations. The report of that scrutiny highlighted various irregularities, discrepancies and deviations from the law. However, In its unanimous decision, delivered on March 30, 2013, the Supreme Court declared that the elections were free, fair and credible and that Uhuru Kenyatta

and William Ruto had been validly elected as President and Deputy President respectively. The Supreme Court further committed to issue a detailed version of its judgment within 14 days of its declaration as required by law. The President elect and the Deputy President elect are now scheduled to take their oaths of office on April 9, 2013.

9. Various civil society organizations that had been accredited as election observers noted the discrepancies in the process and have documented them. Some of the discrepancies included the irregular alteration of the results contained in form 34's and form 36's the effect of this in some of the cases was that the figures announced for a particular constituency at the constituency levels differed from those announced at the national tally centre in Nairobi, thereby increasing and reducing the votes for some of the candidates. There were also reports of party agents being forced to sign blank form 34s and form 36. These instances raise questions as to the credibility of the entire process. These reports could not be published before the delivery of the Supreme Court decision owing to the *sub judice* principle and pursuant to a directive issued by the Chief Justice dissuading the "prosecution of the case outside the Supreme Court". In addition to this, the Law Society of Kenya has commenced a process of auditing the elections.
10. While the Constitution of Kenya, 2010 opened up the democratic and political space to enable better representation of marginalized communities and groups including women, persons with disabilities and ethnic minorities, the 2013 Elections did not actualize this. Indeed the percentage of women candidates elected in the just concluded elections is far less than those elected in previous elections.

While the Supreme Court upheld the election of President-Elect Uhuru Kenyatta, the procedural anomalies cited in various observer reports and within the evidence adduced during the election petition should not be ignored. An independent audit should be carried out to examine the conduct of the electoral process and should make necessary recommendations to ensure that future elections and referenda in Kenya are conducted in a free, fair, transparent and credible manner.

The government of Kenya should be encouraged to adopt necessary affirmative action and to positively work towards immediate realization as opposed to the progressive realization of the constitutional requirement. Kenya should also learn from some of the best practices as demonstrated by other African countries like Rwanda, Senegal and Uganda.

The Kenyan cases at the International Criminal Court (ICC)

11. Kenya became a situation country before the ICC following the 2007/2008 post election violence that resulted in over 1300 deaths and the displacement of 663,921 persons. While Kenya has always maintained and reaffirmed its commitment to cooperate with the ICC, this has not been meaningful or successful. Indeed the Chief Prosecutor, in her speech at the opening of the last Assembly of State Parties expressed her frustrations with the Kenyan government. The Office of the Prosecutor has also faced several challenges in sustaining the cases in light of the unprecedented levels of witness intimidation, harassment, bribery and elimination. Such challenges have culminated in the withdrawal of the charges against one of the four accused persons, Ambassador Francis Muthaura; an outcome that is further being utilized by the president-elect and deputy president-elect as grounds for a similar withdrawal of their case in light of witnesses recanting their evidence.

12. The ICC cases formed the main campaign organizing agenda in the last general elections. Indeed, some segments of public commentary dubbed the 2013 general elections “A referendum on the ICC”. The President-elect and deputy president-elect’s campaign rhetoric was characterized by claims that the ICC process was a violation of the Kenyan citizen’s sovereign will to elect their leaders. With their election, an immediate concern for the ICC process is the degree to which the president elect and deputy-president elect will cooperate with the Court in regard to their cases. In his acceptance speech on March 9, 2013 the president-elect 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).

It must further be noted that Kenya has previously failed to comply with its Rome Statute obligations by declining to enforce the ICC’s standing arrest warrants issued against President Omar Al Bashir of Sudan when he visited Kenya in 2010.

13. The victims of the 2007/8 post election violence continue to yearn for justice; some of them continue to live in deplorable displacement camps while others continue to suffer physical and psychological pain. Efforts by the government to ensure the accountability of perpetrators have been minimal. Very few prosecutions have been instituted with only six convictions. The attempts to establish a credible local judicial mechanism have been politicized and fallen through with time. However, the government has recently embarked on a process of exploring the establishment of an International Crimes Division within the High Court, through the administrative role of the Chief Justice. While this has been welcomed by many, civil society organizations have raised a number of concerns with the initiative including: the applicable law; retrospective application of the International Crimes Act, 2008; funding and staffing; the scope of the jurisdiction of the division which includes crimes outside the ambit of the International Crimes Act such as piracy, money laundering and human trafficking among others.

The president elect and the deputy president elect should reaffirm their commitment to genuinely and meaningfully cooperate with the ICC and must demonstrate their will to ensure that there is accountability for the post election violence and ensure that the victims get justice.

The African Commission on Human and People’s Rights must as a matter of priority urge the African Union to reaffirm its commitment to and strengthen its support to ensuring that the fight against impunity in the continent remains alive, resilient and effective .Furthermore, the ACHPR should consider recommending that African States adopt necessary resolutions and steps towards ensuring the realization of access to justice and reparations for victims of the 2007/8 post election violence in Kenya.

Pending Transitional Justice Agenda

14. The Truth, Justice and Reconciliation Commission (TJRC), was another creation under the KNDR framework. Having been set up in 2008, the TJRC faced serious credibility issues owing to the conduct of its chairperson, Ambassador Bethwel Kiplagat. The TJRC has had various

sittings around the Country and was expected to release its report initially by May 3, 2012. The TJRC has persistently sought and enjoyed several extensions to its term and is now scheduled to release its report in May 2013. The delay in this process has resulted in a de facto suspension of the transitional justice agenda and has denied Kenyans the opportunity for truth telling as well as the platform for demanding for accountability for historical injustices.

15. While judicial reforms have progressed at a commendable rate, the reforms of other sectors like the police service, has lagged behind. While there are notable steps towards the anticipated security sector reforms like the establishment of the National Police Service Commission (NPSC), the Independent Policing Oversight Authority (IPOA) and the appointment of the Inspector General and Deputy Inspectors General of police, the long anticipated vetting of police officers has not happened. In addition to that the living and working standards of the police and other security officers have not been improved which have in the past resulted in police officers being killed and maimed on duty and further vulnerable to corruption.

There is need for the Kenyan Government to re-emphasize the basis for its commitment to institutional and legal reform and demonstrate the political will to realize these reforms. As such the government should strictly demand that the TJRC makes its report public by May 2013 and anticipate a comprehensive implementation programme for its recommendations and those of other previous inquiries and truth seeking processes.

The government should reaffirm and actualize its commitment to security sector reforms as had been aspired under the KNDR framework. The government should prioritize reforms targeted at improving the security and living standards of state security officers.

The reforms within the judiciary, while being laudable, should ensure that vetting of judges and magistrates is carried out on a regular basis as opposed to a onetime event. This would ensure that the judiciary remains credible and accountable.

Pending Communications before the ACHPR

16. The African Commission on Human and People's Rights issued recommendations to the Government of Kenya in 2010 with respect to communication 276/03 filed by the Endorois community. While the government has stated that it is keen on implementing the recommendations in line with its obligations under the Banjul Charter, the political will to implement seems to be lacking. While noting that there are other communications currently pending before the Commission, we note that the Commission relies on the voluntary implementation of the recommendations by state parties.

The Commission should consider developing a framework for the implementation of recommendations issued. This should be a joint consultative process with the concerned government aimed at ensuring effective and efficient implementation of the recommendations and adherence to the Charter. Such a framework should provide for a schedule of implementation as well as a means of monitoring the progress of implementation.

Human Rights Defenders in Kenya

17. Although there have been incidences of intimidation and loss of lives of human rights defenders

over the last couple of years, human rights defenders in Kenya have enjoyed a relatively conducive working environment. However, the report of the investigations into the death of two human rights defenders (Oscar Kingara and Paul Oulu) in 2008 has never been made public.

18. Within the Jubilee Coalition manifesto on which the President-Elect successfully sought the presidency, is the proposed introduction of a Charities Act that will seek to fund non-governmental organizations and to limit “the level of political campaigning by NGOs.” Civil society organizations are concerned about this proposal in that it portends a situation where NGOs may not be fully independent of the government and may be limited in their engagements in the country.

The Commission should reiterate the importance of human rights defenders and NGOs operating in a free and fearless environment as a strategic partner with the government in ensuring the promotion, protection and defense of human rights in line with the constitutional aspirations contained in the Constitution of Kenya 2010. The Kenyan government should be encouraged to adhere to regional and international instruments and practices relevant to the protection of human rights defenders.

List of Organizations:

1. Kenya Human Rights Commission (KHRC)
2. International Federation for Human Rights (FIDH)
3. Kenyan Section of the International Commission for Jurists (ICJ Kenya)
4. CRADDLE- The Children’s Foundation
5. Independent Medico-Legal Unit (IMLU)
6. National Coalition of Human Rights Defenders- Kenya