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BANJUL, GAMBIA

BRIEFING PAPER ON KENYA

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A. Background

1. Kenya ratified the African Charter on Human and People's Rights on January 23rd, 1992. Since then, it has domesticated most of the provisions of the Charter through various pieces of legislation. Furthermore, the Constitution of Kenya 2010 provides an extensive and elaborate chapter on the Bill of Rights while also emphasizing their specific application to certain groups including: Children; Persons with disabilities; Youth; Minorities and marginalized groups and; older members of society.
2. While 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; we are encouraged by its recent submission of a combined periodic report for the period 2008-14. It is our hope that this will serve as a paradigm shift in Kenya's commitment to its Charter- based obligations and serve as an indicator for its robust engagement when Kenya is eventually scheduled for review by the Commission.
3. Since the last session of the ACHPR, a number of significant events have taken place in Kenya. This brief will focus on the areas that are of contemporary concern and require the attention of the Commission in light of Kenya's impending review.

B. Increased Terror Attacks in Kenya and Related Human Rights Concerns

4. Kenya currently faces a sustained terror threat from the *Al Shabab* group whose actions have resulted in the death of over 400 people since April 2013. The most recent attack took place at the Garissa University College on April 2, 2015 and resulted in a reported 148 fatalities; making it the

worst singular terror incident since the 1998 U.S. Embassy bombing in as far as reported deaths is concerned. This attack was unfortunately preceded by similar episodes in Nairobi where 67 persons were killed in the September 2013 attack on Westgate Mall; in Lamu County where up to 85 persons were killed in the period of June-July, 2014 and in Mandera County where a further 64 persons were killed in the period of November-December 2014. These attacks while notable are only depictive of a wider crisis that also includes several sporadic grenade attacks.

5. Despite having legitimate security concerns, the State responses to these attacks have been in various instances arbitrary, reactionary and misplaced. *Operation Usalama Watch*, a security operation which commenced in early April 2014 saw members of the Somali community subjected to undue profiling, arbitrary arrests, harassment, extortion and ill-treatment. Refugees in urban areas were forcibly relocated to refugee camps and some were deported to Somalia with Kenya likely violating *the Non-refoulement* principle of the 1951 Refugee Convention and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. This has since been compounded by a recent directive from the Deputy President for Kenya to arbitrarily close the Dadaab refugee camp in 3 months and relocate all the refugees from that camp to Somalia. This directive directly contradicts a tripartite agreement that Kenya entered into in 2013 with the United Nations High Commissioner for Refugees (UNHCR) and the Transitional Federation Government of Somalia (TFG) to facilitate the repatriation of Somali refugees on a mutually agreed upon and voluntary basis.
6. Another response by the government was the enactment of the Security Laws (Amendments) Act, 2014 that introduced amendments to 22 pieces of legislation relating to security. The enactment process for the law was in itself acrimonious as it was characterized by violent disruptions during the parliamentary proceedings and was also devoid of sufficient public participation as required by our Constitution. The provisions within the law are a cause for further concern with among other things retrogressive provisions on the rights of arrested and accused persons and access to justice generally; broad and sweeping powers being granted to various State offices without sufficient oversight and; provisions seeking to restrict intake and movement of refugees. While a court case challenging the constitutionality of this law saw several provisions struck out by the High Court provisions granting the security organs enhanced powers for surveillance were unfortunately upheld. It should also be noted that in the aftermath of the Garissa attack, the President issued but later rescinded a directive ordering the commencement of training for 10,000 police recruits whose enlistment had previously been suspended by the High Court as it was marred by irregularities and corruption.

The Commission should call on the government to uphold all human rights obligations and abide by the Constitution when undertaking counter-terrorism security operations. Such measures should not profile and further marginalize individuals on the basis of their ethnic descent and religious expression; and must also safeguard against the social and economic isolation of the Northern Kenya region as it bears the brunt of terror attacks. The government must fully commit

to and invest in comprehensive security sector reforms governed by the rule of law. Such reforms include: a clear coordination framework for all security agencies that is respectful of the Constitution and related laws; the proper allocation and use of resources in responding to security threats; and a rapid improvement in the welfare of security personnel. The President must desist from unconstitutional actions such as the recent directive on police recruitment which serves to undermine these reforms by creating a dispute with the Judiciary and other State organs rather than maintaining a focus on the terror threat.

C. Shrinking Space for Civil Society, Human Rights Defenders and Activists in Kenya

7. Closely associated to the State response to insecurity is its equally enhanced focus on civil society organizations. In the aftermath of the Garissa attacks, the government moved to freeze the accounts of two civil society organizations namely, MUHURI and Haki Africa which have been accused of being associated with terror activities. This is an accusation that lacks merit in the face of the facts. MUHURI and Haki Africa have in fact engaged in a variety of activities to counter violent extremism in the Coastal region by collaborating with other organizations and more notably different organs of government including the Kenya Police Service. These activities have even received national acclaim with the Executive Director of Haki Africa, Hussein Khalid being a participant of the White House Summit in Washington DC on Countering Violent Extremism in February 2015. The government continues to seek amendments to the Public Benefits Organizations Act (PBO) of 2013 with a view to placing excessive controls on the operations of civil society and restrict access to funding. While public outcry led to the formation of a multi-stakeholder taskforce to preside over the amendments process, there are still apprehensions that the government will not really consider the outcome and could be using the taskforce to legitimize a pre-determined outcome.
8. Another emergent concern has been the persistent harassment of bloggers, human rights defenders and activists deemed to be critical of the government or government officials. There have been arrests of bloggers who made posting on governance related matters and examples include: Robert Alai who in February 2015 was arrested for posting allegations linking the Deputy President to land grabbing; Abraham Mutai who was briefly detained for a series of postings he made with regard to mismanagement of public funds in Isiolo County and; Nancy Mbindalah, a 24 year old intern in the Embu County government who was arrested for postings that were deemed to be abusing, spreading hate and inciting statements against the Governor Martin Wambora.
9. Human Rights Defenders continue to remain at risk of threats, persecutions, attacks, arbitrary arrests, judicial harassment and extra-judicial killings. One such example is that of Hassan Guyo, who was fatally shot by State security agents in Moyale in 2013; an inquest to his death was inconclusive as the court directed that further investigations be undertaken. John Githongo, a human rights crusader and previous whistle-blower of the Anglo leasing scandal during his tenure as Permanent Secretary for Governance and Ethics in 2005; continues to face incessant threats on his life for speaking strongly against mega-corruption. Leaders of the Mwea Foundation, a not-for-profit organisation working on

land rights, continue to receive innumerable death threats. HRDs monitoring the government's counter-terrorism activities have been exposed to considerable risks and threats as some of the State's recent rhetoric identify them as either terrorists or terrorist sympathizers.

The Commission should call on the government to desist from unconstitutional measures and unfair administrative actions that curtail the operations and existence of civil society organizations. The government must instead ensure a conducive legal environment for HRDs and civil society in Kenya and publicly recognise their legitimate role. The government should repeal provisions within the penal code that criminalize public dissent and undermine freedom of speech. The state should promptly and effectively investigate and ensure accountability for any threats to, attacks against and killings of HRDs.

D. The Kenya's Pending Transitional Justice Agenda

10. The case against President Uhuru Kenyatta before the International Criminal Court (ICC) was terminated by the Court in March 2015. This action was in response to decision by the office of the Chief Prosecutor to withdraw charges against President Kenyatta in December 2014 as they did not have sufficient evidence to prove their case beyond reasonable doubt. The withdrawal of charges by the prosecutor was however accompanied by allegations interference and intimidation of witnesses along with the non-cooperation of the Kenya government in supplying crucial documentary evidence regarding the 2007-08 post-election violence. To this end the prosecutor filed an application seeking to refer Kenya to the Assembly of State Parties to the Rome Statute (ASP) on non-cooperation. The court initially declined this application but has since allowed an appeal of its decision by the prosecutor. The case against the Deputy President William Ruto continues to progress albeit with similar allegations of witness intimidation and interference. The circumstances under which the case against President Uhuru Kenyatta was withdrawn raises grave concerns for the victims of the crimes for which Kenyatta was charged and diminishes the prospects for the fight against impunity.
11. We are further dismayed by a recent report from Kenya's Office of the Director of Public Prosecutions (DPP) on the 2007-08 Post Election Violence Related Cases. In this report, the DPP suggests that there can be no successful prosecutions from the 4,575 case files opened from the 6,000 reported cases on record. This effectively shuts the door to any prospects for criminal accountability with respect to the Post Election Violence.
12. We however acknowledge the pledge on restorative justice that was issued by the President Kenyatta in his third State of the Nation Address in March 2015. In this address, the President called for Parliament to process the Truth, Justice and Reconciliation Commission (TJRC) report; instructed the Treasury to establish a fund of Kenya Shillings 10 billion for restorative justice and; took the unprecedented step of making an apology on his own behalf, that of his government and on behalf of all past governments for historical violations.

13. Institutional reforms within the judiciary and police service are increasingly being jeopardized by actions of the Executive that are seemingly geared towards undermining the independence of constitutional and statutory bodies at the apex of these reforms. The current Cabinet Secretary for Interior upon his appointment in December 2014 stated that disbanding the National Police Service Commission (NPSC) and the Independent Policing Oversight Authority (IPOA) was top of his agenda. Recent appointments to the Judicial Service Commission (JSC) have been met with allegations of political bias as the appointees have direct political ties to the Presidency and this could undermine the future independence of this body.

The Commission should call on the government to reaffirm its commitment to genuinely and meaningfully cooperate with the ICC noting that the termination of the case against President Kenyatta does not preclude a revisiting of the charges against him should new evidence materialize. The Commission should encourage the President to translate his pledge on restorative justice in a manner that results in a comprehensive implementation framework for the TJRC report that ensures the full participation and consultation of victims, maintains transparency in its operations and has accountability to the public on the progress made in implementing the report. The Commission should also call on the government to adopt a reparations policy identifies restoring the dignity of victims as a key objective, outlines the types of reparation and provides a categorization of victims that allows for a systematic and realistic approach to processing claims. We call on the Commission to closely monitor the status of institutional reforms in Kenya with due consideration to the independence of Statutory and Constitutional bodies.

E. Women's Rights

14. Kenya has endeavoured to have in place robust and progressive constitutional provisions that would enhance the enjoyment of women's rights. These range from sexual and reproductive health rights to political representation and participation. The Constitution encapsulates progressive affirmative action that would formatively enhance women's participation and representation within governance and electoral process.
15. Articles 27, 81, 100 among others are monumental achievements in the campaign for gender equality and parity. Article 27(8) requires that those elected or appointed in public office should constitute no more than 2/3rd of either gender. While this provision has been fairly respected with regards to public appointments, the reality remains a mirage for elective positions with women occupying barely 21% of these positions. One of the primary challenges remains the absence of a legislative, policy and normative framework that would give effect to this constitutional aspiration. The Constitution requires Parliament to enact legislation that would give effect to this.
16. The Supreme Court advised that this constitutional principle could only be realized progressively. The advisory opinion issued by the Court in 2012 directed that there be a framework in place by

August 27, 2015. While there have been stakeholder consultations and proposals on the viable options, it is worrying that with 4 months to the judicial deadline, the process is yet to be concluded. Most of the recommendations that have been made would require legislative reform in the form of amendments to the elections laws or constitutional amendments. This paints a grim picture that further makes the realization of gender parity in electoral and political process a mirage in light of the legislative calendar.

We call on the Commission to strongly recommend that Kenya takes urgent legislative and administrative steps to ensure that the constitutional aspiration for enhanced participation and representation of women in political processes is realized. This should be fast tracked in light of the Supreme Court advisory against the conscious backdrop of the 2017 elections. In recognizing that legislative and policy processes may be protracted processes, KHRC recommends the employment of administrative actions by the Registrar of Political Parties and the Independent Elections and Boundaries Commission within their respective mandates to give effect to these constitutional provisions.

F. Sexual Orientation, Gender Identity and Expression

17. Since the last session, Kenya has joined the unfortunate ripple within the Continent by proposing an Anti-Homosexuality Bill that proposes stringent penalties for homosexual conduct and for persons perceived to be sympathetic or promoting such conduct. Such a law would contravene constitutionally guaranteed rights and freedoms and has the potential to further marginalize LGBTI persons. The introduction and passage of such a law could potentially fuel violence against persons on account of their perceived sexual orientation or gender identity. This would be in contradiction of the 2013 ACHPR Resolution on Violence and Human Rights Violations against Persons on the Basis of their Imputed or Real Sexual Orientation and Gender Identity.
18. Access to justice and fair administrative action remains a challenge for most LGBTI persons. Malicious prosecutions coupled with judicial insensitivity are the major contributors to this challenge. Recently, a Kwale court denied bail application and set very high and punitive bond terms for two individuals suspected of engaging in same sex practice in Diani, Kenya. Due to these terms, the two have remained in custody for the last 3 months in deplorable state with limited access to health care.
19. Kenya's was recently before the Universal Periodic Review at the UN Human Rights Council in January 2015 where it received a number of recommendations to ensure non-discrimination on the basis of sexual orientation and gender identity and to prevent violence against LGBTI persons. Unfortunately, all such recommendations were rejected save for one to enact a comprehensive anti-discrimination law including on the basis of sexual orientation, was accepted by the State.

The Commission should call on Kenya to urgently enact a comprehensive equality and anti-discrimination legislation on all grounds under Article 27(4) of the Constitution including on the basis on sexual orientation and gender identity. There is need to sensitize the law enforcement and judicial officers on the rights of LGBTI persons and their right to access to justice and fair administrative practices. Kenya should ensure the safety, dignity and freedom of association and expression of LGBTI persons.

G. The Extractive Industry and Corporate Accountability

20. Kenya is currently experiencing a surge in the entry of Multi-National Corporations (MNCs) seeking to exploit natural resources such as coal, oil and gas along with large-scale commercial agriculture. The entry of MNCs and the increased activity of natural resource extraction have however brought with it several human rights concerns. Community land is increasingly being appropriated by the government to facilitate the activities of MNCs without the requisite safeguards in the absence of community land legislation. Large-scale projects such as the Lamu Port South Sudan Ethiopia Transport (LAPSSET) Corridor project pose a threat health, culture and livelihoods of several communities as the project commenced without the necessary environmental and social impact assessments being undertaken. Concerns over equitable benefit sharing of natural resources have also been expressed by various communities who have lost land to the extractive industry.
21. Some MNCs also stand accused of presiding over poor working conditions and other labour related violations such as unfair dismissal of workers, denying workers the opportunity to join or form unions, a disproportionate employment of foreign workers to the detriment of local communities and sexual offences within the work place.

We call on the Commission to remind the Kenyan government of obligation to ensure effective public participation and transparency in any land acquisition process as articulated in article 55 (d) of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights. The government should be compelled to enact legislation on community land, agreements relating to natural resources and equitable benefit sharing of natural resources without further delay. The government should develop a National Action Plan on the United Nations Guiding Principles on Business and Human Rights as well as develop an effect and appropriate non-judicial grievance mechanism as a supplement to Kenya's judicial system in offering remedies for business-related human rights abuses. Lastly we request the Commission to consider undertaking a baseline survey on the impact MNCs on human rights in Kenya.

H. Labour Rights

22. Labour rights remain a critical concern particularly among workers in the agricultural sector. The minimum wage set by government at Kenya Shillings (Ksh.) 4,854 and 9,780 for unskilled workers in

the agricultural sector and domestic workers respectively is still insufficient in affording workers a decent standard of living that allows them to access other economic, social and cultural rights. In this regard, the government has exhibited complacency in defining and adopting a living wage.

We call on the Commission to encourage Kenya to expediently conduct a study to determine what constitutes a living wage in Kenya and based on the findings from that study, develop a living wage policy.

I. Corruption

23. Kenya continues to experience numerous instances of corruption at the highest levels of government that threatens to undermine the principle of governance based on human rights, equality, freedom, democracy, social justice and the rule of law. The Auditor General recently made an alarming admission that half of the country's annual budget is either misappropriated or "squandered".
24. Corruption has also occasioned a loss of public trust in critical public institutions such as the Independent Electoral Boundaries Commission (IEBC). Several IEBC officials have been implicated in a series of procurement-related scandals dubbed 'chicken-gate' that have seen the conviction of directors of a London-based company by the British courts on account of bribing the said IEBC officials in order to receive tenders for the printing of election materials. The imputation of corruption in such a critical public institution raises considerable concern in the face of the upcoming 2017 general elections and in the light of the 2007-08 post-election violence that was triggered by the lack of public trust in the management of elections by the now defunct Electoral Commission of Kenya (ECK).
25. We however acknowledge the recent re-dedication by the President to combat corruption as stated in his third State of the Nation Address; where he forwarded to Parliament, a confidential report from the Ethics and Anti-Corruption Commission (EACC) indicating the status of pending investigations against public officials and; directed that all officials of the National and County governments adversely mentioned in the report should step aside pending conclusion of the investigations. We however further note with concern, that this re-dedication by the President has seen been plagued with in-fighting among the EACC Commissioners and allegations of interference in the affairs of the EACC being levelled at the Executive where officials in the Office of the President have been accused of trying to compel EACC Commissioners to resign from office.

We call on the Commission to encourage the government to translate the President's pledge on fighting corruption into a comprehensive and transparent process based on the rule of law and our Constitution's standards on leadership and integrity. The government should refrain from any actions that interfere with the independence of the EACC and therefore undermine or taint any ongoing investigations. The fight against corruption must be comprehensive and shielded against any possible accusations of political bias. In light of the centrality of the IEBC in the

management of the upcoming 2017 general elections, we call on the government to speedily conclude the investigation of IEBC officials implicated in the “chicken-gate” scandal.

J. Pending Communications before the ACHPR

26. The recommendations by the Commission with respect to communication 276/03 CEMIRIDE & MRG (ON BEHALF OF ENDOROIS WELFARE COUNCIL) v KENYA largely remain unimplemented. We appreciate that the President in September 2014 gazetted a Task Force for the Implementation of this decision but note with disappointment the slow progress that the Task Force has made; in the six months of its existence, it has only had 4 meetings to prepare a budget and work plan and has failed to prepare a 3 month report as required by the gazette notice that established it. Furthermore preliminary concerns had been raised with regard to the fact that the Terms of Reference for the Task Force appeared preliminary and introspective for Government as opposed to fulfilling the Commission’s requirement for the government to “...***engage in dialogue with the Complainants*** for the effective implementation of these recommendations”.

We call on the Commission to request the government to furnish it with the quarterly reports of the Task Force in line with ACHPR/Res.257 (LIV) 2013: RESOLUTION CALLING ON THE REPUBLIC OF KENYA TO IMPLEMENT THE ENDOROIS DECISION and to consider enhancing its involvement in this matter by availing its good offices to assist the parties in the implementation of these recommendations.