



**STATEMENT BY THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ KENYA) AT THE 68<sup>TH</sup> ORDINARY SESSION OF THE AFRICAN COMMISSION OF HUMAN AND PEOPLES RIGHTS (ACHPR)**

To the Chairperson of the African Commission of Human and People's Rights (ACHPR), Hon. Solomon Ayele Dersso;

Honourable Chairperson, honourable commissioners, state delegates, representatives of National Human Rights Institutions, members of civil society organisations and distinguished participants.

### About ICJ Kenya

ICJ Kenya is a non-governmental, non-profit and member-based organisation that works towards promoting human rights, democratic governance, justice, and the rule of law in Africa. ICJ Kenya has observer status with the African Commission on Human and Peoples' rights under number 118.

### Introduction

This statement is submitted for the period of 2020/2021. It relates to the status of human rights in Kenya, focusing on Equality and inclusion, Security sector, Economic governance, Constitutional implementation and reforms, Judicial strengthening, Criminal justice and Public Sector Accountability. ICJ Kenya is alarmed by the high incidents of human rights violations emanating from the approach to the global Covid-19 pandemic.

In Kenya, the public health crisis spiralled into an economic, political, social and legal crisis. Since 2020, the Government of Kenya and State agencies have issued seven (7) executive orders, published seven (7) gazette notices, and issued 14 guidelines, directives, and regulations in response to the Covid 19 pandemic<sup>1</sup>. The implementation of some of the orders and regulations has gone unchecked and have resulted in human rights violations. Alarmed by the disproportionate impact of these restrictions on human rights, resulting in adverse consequences on people's livelihoods and well-being, ICJ Kenya hereby submits the statement below as a follow up to the resolutions set out in the 67<sup>th</sup> Ordinary Session of the African Commission session.

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<sup>1</sup> Public Legal Information on Kenya's Response to COVID-19 retrieved from <http://kenyalaw.org/>

## Issues

1. **Honourable Chairperson, since the beginning of the covid pandemic, ICJ Kenya decries the escalating numbers and incidences of extrajudicial killings in the country.** Law enforcement agencies in Kenya have continued to employ execution as a policy to implementing rapid “solutions” to social and political challenges engulfing the country in the name of promoting public order and public safety. More specifically, during the Covid 19 pandemic. In the year 2020, the Missing Voices coalition, where ICJ Kenya is a member, documented that 157 people were reported as killed by the police or said missing making it the highest number registered in the recent past. The coalition verified and published 144 cases of police killings and enforced disappearances in Kenya. Out of the reported cases, only 28 police officers have been charged in court. From the above cases, most of those killed were young men from the informal settlements.<sup>2</sup>
2. Despite several independent constitutional bodies, policy and legal reforms initiatives, institutional and administrative frameworks intended to ensure that the security sector adopts a human rights-based approach to policing, the government has failed to sufficiently address enforced disappearance or extrajudicial killings. The relevant state agencies have demonstrated a callous disregard for its citizens' right to life, particularly those from informal settlements. ICJ Kenya notes with great concern that there have neither been any deliberate efforts to dismantle the organised police networks that work outside the realm of the law nor investigate police actions for purposes of accountability in the security sector
3. **ICJ Kenya further decries the rising reports of violence against women and girls - including rape, domestic violence, female genital mutilation (FGM) and child marriage in the midst of the Covid-19 state restrictions.** On 1<sup>st</sup> April, 2020, the Chief Justice of the Republic of Kenya issued a statement raising concern about the number of Sexual and Gender-Based Violence (SGBV) cases reported. More specifically, he stated that these cases constituted 35.8 % of the criminal cases reported during the subsistence of the curfew period<sup>3</sup>. In June 2020, ICJ Kenya engaged the Office of the Director of Public Prosecutions, the Kenya Police and the Judiciary of Kenya, over how gender-based violence cases were being investigated and prosecuted. Subsequently, ICJ Kenya issued a statement calling on the state

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<sup>2</sup> <https://missingvoices.or.ke/statistics/>

<sup>3</sup>Statement on Justice Sector Operations in the wake of the COVID 19 pandemic accessed from <http://ncaj.go.ke/statement-on-justice-sector-operations-in-the-wake-of-the-covid-19-pandemic>

and relevant agencies to respond to the rising number of gender based violence cases<sup>4</sup>. As of October 2020, 23.6 per cent of Kenyans reported to have witnessed or heard domestic violence cases in their communities since the introduction of COVID-19 containment measures. The national GBV Hotline 1195 reportedly received 810 cases in September compared to 646 cases in August, an increase of 25 per cent. In 2020, at least 2,350 women and girls across the country were reported to require safe houses for protection from GBV and FGM<sup>5</sup>. ICJ Kenya continues to raise concern over the state response to gender-based violence and the lack of prompt and effective mechanisms to encourage reporting, proper investigation and timely prosecution of these cases.

4. Following the aftermath of Kenya's contested 2007/2008 general elections, there was widespread violence. Several women, men and children were targeted and subjected to forms of SGBV, including *rape, gang rape, sodomy, defilement, forced pregnancy, forced circumcision and mutilation or forced amputation of their penises*. It was against this backdrop that ICJ-Kenya filed a Constitutional Petition 122 of 2013 on behalf of the SGBV victims of the 2007/08 post-election violence before the High Court of Kenya. The Constitutional Petition sought effective remedies for the SGBV victims on the basis that the state and its agencies failed to anticipate and prepare adequate and lawful policing responses to the anticipated civil unrest that contributed to the SGBV. Further, the failure to provide effective remedies to the victims of SGBV violated the fundamental rights of the 5th to 12th petitioners and other victims. On 10 December 2020, the High Court of Kenya delivered a landmark decision in which four of the eight petitioners were awarded damages. The Court ruled that the state's failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence violated their rights to life; prohibition of torture, inhuman and degrading treatment; and the security of the person of the four petitioners. In this regard, ICJ Kenya lauds the Judiciary of Kenya for pronouncing itself on the matter and urges the Government of Kenya to obey the orders therein.
5. ICJ Kenya recalls that in 2014, the Supreme Court of Kenya issued a landmark ruling, finding that the mandatory death penalty contained in section 204 of the Penal Code was unconstitutional in *Francis Karioko Muruatetu & Another v Republic of Kenya*.<sup>6</sup> Subsequently, a task force was established to set out a guiding framework for implementing the court's decision. Some of the key recommendations

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<sup>4</sup>ICJ Kenya Communique on , "Interrogating the Prosecution and Investigation of Gender Based Violence cases.. " retrieved from <https://icj-kenya.org>

<sup>5</sup> <https://reports.unocha.org/en/country/kenya/card/2rC8ktJetx/>

<sup>6</sup> Petition 15 & 16 of 2015 Criminal case 93 of 2015

set out in the report include re-sentencing of the following categories of offenders: all offenders on death row as at the time of the decision; all capital offenders whose sentence had been commuted to life imprisonment; and any offenders sentenced to death after the decision in Muruatetu but without regard to or compliance with the court's declaration and who have exhausted all appeal mechanisms. Despite the issuance of the guiding framework and a report on the same, the High Court of Kenya handed down a death sentence in *Ruth Kamunde v Republic*.<sup>7</sup>

6. **Honourable Chairperson, ICJ Kenya, is deeply concerned with the executive and the legislature's increased interference of judicial independence.** While Kenya has made significant strides toward realising meaningful democracy since the promulgation of the Constitution of Kenya, 2010, the Judiciary remains poorly insulated from external attacks and interference. Despite the Constitutional provisions that guarantee the independence and interdependence of the three arms of government, top government officials in the executive and the legislature continue to disregard court orders, reduce the budgets of the judiciary and delay the appointment of judicial officers as prescribed by the Judicial Service Commission (JSC). These actions have significantly clawed back on the progress made towards enhancing access to justice in the country. In 2020, the Chief Justice, made several statements to express concerns over the increased attempts to control the Judiciary and attacks at both personal and institutional levels.<sup>8</sup> The Chief Justice also condemned the underfunding of the Judiciary, noting that it is contrary to international standards and has resulted in resource constraints in the Judiciary operations.<sup>9</sup> Further, the Building Bridges Initiative (BBI) and ensuing report by the BBI Taskforce<sup>10</sup> and the Constitution of Kenya (Amendment) Bill 2020 includes constitutional, legal, and policy reform proposals that undermine the independence of the Judiciary. The proposals include introducing an

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<sup>7</sup> Criminal case 93 of 2015

<sup>8</sup> The then Chief Justice David Maraga issued statements to condemnation President Kenyatta's administration for undermining the independence of the judiciary by trying to control the Judiciary and disrespecting court orders. In 2019 the Judicial Service Commission (JSC) recommended 41 individuals for appointment as judges by the President. To date, none of the 41 recommended individuals have been appointed. The East African (2020) Judiciary: 'Executive disrespecting court orders, trying to control us', retrieved from <https://www.theeastafrican.co.ke/tea/news/east-africa/judiciary-executive-disrespecting-court-orders-trying-to-control-us--1443176>

<sup>9</sup> See Speech by Hon. Justice David Maraga, retrieved from <https://www.judiciary.go.ke/statement-by-chief-justice-david-maraga-on-judiciary-budget-cuts>

<sup>10</sup> The Building Bridges Initiative (BBI) is a process of partnership spearheaded by President Uhuru Kenyatta and Former Prime Minister Raila Odinga in an attempt to build national discussion and consensus towards uniting Kenya. On 21 October 2020, the BBI Steering Committee launched the BBI taskforce report which contained proposals that sought to amend the constitution in various ways including structure and composition of pertinent organs in the government and commissions. See BBI Taskforce (October 2020) Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya, Taskforce Report Building Bridges to a United Kenya: from a nation of blood ties to a nation of ideals, downloaded from [https://e4abc214-6079-4128-bc62-d6e0d196f772.filesusr.com/ugd/00daf8\\_bedbb584077f4a9586a25c60e4ebd68a.pdf](https://e4abc214-6079-4128-bc62-d6e0d196f772.filesusr.com/ugd/00daf8_bedbb584077f4a9586a25c60e4ebd68a.pdf)

Ombudsman within the JSC who will have the power to institute disciplinary measures against judicial officers and judges of the court, among other recommendations that clawback on the gains of the Constitution 2010.

**ICJ Kenya is deeply concerned with the extensive delay in implementation of the Legal Aid Act, 2016.**

The Constitution of Kenya under Article 48 provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. The Legal Aid Act enacted in 2016 seeks to implement Article 48 of the Constitution and provide a legal and institutional framework for legal aid in Kenya. To date, the Act has not been fully operationalised, and as a result, compromising access to justice for the indigent who cannot afford legal representation. The lockdown and curfew measures have exacerbated the existing justice deficiencies that disproportionately affect the poor, vulnerable and marginalised communities. Kenyans have witnessed an increase in instances of evictions, arbitrary arrests, and dismissal by employers and corruption by public officials for failure to wear protective clothing. The surge in human rights violations has disproportionately affected the vulnerable communities such as persons with psychosocial disabilities living on the streets

7. **Mr. Chairperson, The Commission of jurists, is deeply concerned at the level and increase in fraudulent transactions in public procurement fraud in Kenya.** Over the past few years, the Kenyan public sector has been characterised by procurement-related corruption, leading to significant losses in public resources. Procurement fraud has emerged as one of Kenya's most expensive fraud, accounting for 15% of all economic fraud. According to a 2018 report by the auditor general of Kenya, the government, cannot account for \$400 million in public funds, highlighting its failure to crack down on graft and misuse of state resources. Additionally, out of the \$12.4 billion (10 billion euros) in recurrent and development spending, only 3.45 per cent was spent “lawfully and in an effective way.”<sup>11</sup> With the existing dozens of graft scandals involving public officers stealing from state coffers, only a few public officials have been arrested and charged, but none has been convicted. Between 2018 and June 2020, the cases pending before courts over graft involves amounts of up to Kshs. 224 billion (\$2billion) with 132 cases accounting for amounts that ‘cannot be quantified’. At the height of the COVID-19 pandemic, there are concerns that Kenya might have lost Kshs. 2 billion (\$18million) due to

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<sup>11</sup> <https://www.capitalfm.co.ke/news/2018/03/kenya-cant-account-for-400mn-of-public-money/>

procurement irregularities in the procurement of COVID-19 response supplies at the Kenya Medical Supplies Authority (KEMSA) as detailed in the Auditor General's report.

8. ICJ Kenya is concerned that the government of Kenya has failed to effectively honour its obligation under the African Union Convention on Preventing and Combatting Corruption. The Government has failed to promote transparency and accountability in the management of public affairs, adopt legislative and other measures to create, maintain and strengthen internal accounting, auditing and follow-up systems in the expenditure and procedures for hiring, procurement, and the public management of goods and services<sup>12</sup>. We are concerned that the Government of Kenya has not taken sufficient measures to prevent incidents of corruption involving public officials. ICJ Kenya is also concerned that the Government of Kenya has not taken adequate measures to support the oversight agencies in ensuring timely detection, investigation and prosecution of corruption-related allegations.
9. **ICJ Kenya is deeply concerned about the continuous arrest of Human Rights Defenders and the abuse of the Computer and Cyber Security Crimes Act in an arbitrary manner to discriminate, arrest and detain actors who are exercising their Freedom of expression as guaranteed under the Constitution of Kenya, 2010.** ICJ Kenya brings to the attention of the African Commission the arrest, harassment and detention of human rights activist Edwin Mutemi Kiama on 6<sup>th</sup> April 2021 for allegedly flouting the Cyber Security Crimes Act by lending his voice to that of Kenyans demanding accountability from the Government of Kenya.<sup>13</sup>.
10. **Mr. Chairperson, ICJ Kenya applauds the ACPHR for adopting the ACHPR Principles on the Decriminalisation of Petty Offences in Africa<sup>14</sup>.** Kenya is obligated under the African Charter on Human Peoples Rights to respect the dignity inherent in a human being. It prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment. Additionally, the Charter mandates Kenya as a State party to prohibit discrimination based on socio-economic status. Targeting poor and vulnerable people for the enforcement of petty offences amounts to discrimination based on, amongst other things, national and social origin and fortune. The continued harassment, abuse and assault of petty offenders is not only degrading and inhumane but offends the very purpose and principles of the African Commission, the African Charter and the Constitution of the Republic of Kenya.
11. ICJ Kenya lauds the African Court of Human Rights for declaring that vagrancy laws as contained in national laws are in breach of the African Charter on Human and Peoples Rights (African Charter),

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<sup>12</sup> <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>

<sup>13</sup> <https://www.standardmedia.co.ke>

<sup>14</sup> <http://www.achpr.org>

Children’s Rights Charter, and Women’s Rights Protocol (Maputo Protocol). While welcoming the decision of the Court, ICJ Kenya calls upon the African Commission to urge Kenya to review its laws and amend them accordingly where applicable.

12. **Similarly, ICJ Kenya is concerned with the continued detention of petty offenders that propagates the criminalisation of poverty in Kenya.** The continued enforcement of petty offences in the enforcement of Covid-19 protocols has disproportionately affected the poor and marginalised, vulnerable and key populations who fall victim to abuse, violence, arbitrary arrest and assault in the hands of the National Police Service and County Government Enforcement Officers. ICJ Kenya wishes to commend the Kenya Prison service who have released numerous petty offenders to reduce the prison population and overcrowding during the pandemic. Notably, more than 10,000 **petty offenders** were **released** from correctional facilities across the country during the Covid-19 pandemic.<sup>15</sup>
13. **ICJ Kenya calls upon the Chairperson of the African Commission to urge the Government of Kenya to:**
  - i. Ensure effective investigation and prosecution of persons accountable for committing extrajudicial killings to provide justice to the families of the victims;
  - ii. Ratify the Convention for the Protection of All Persons from Enforced Disappearance and operationalise the National Coroner Service Act 2017;
  - iii. Integrate gender-based violence and female genital mutilation in Covid-19 preparedness and response plans, including representation from the Ministry of Public Service and Gender as a member of the National Emergency Response Committee on Coronavirus;
  - iv. Decriminalise and reclassify petty offences in Kenya and implement the African Commission on Human and Peoples’ Rights Principles on Decriminalisation of Petty Offences in Africa and the Advisory Opinion No.4 issued by the African Court on Human and Peoples Rights on the unconstitutionality of vagrancy laws;
  - v. Undertake comprehensive, legislative, policy, institutional and administrative reforms in line with the state’s obligations as set out in the African Union Convention on Preventing and Combatting Corruption;
  - vi. Mainstream and integrate anti-corruption and integrity values into the educations systems and government institutions; and
  - vii. Undertake a comprehensive audit of the lockdown and curfew measures issued in the containment of Covid 19 to ensure that they do not discriminate against the poor and the vulnerable.

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<sup>15</sup> [pettyoffences.org](http://pettyoffences.org)