



**ARTICLE 19**

GLOBAL CAMPAIGN FOR FREE EXPRESSION

# Kenya

## Post-election political violence

**ARTICLE 19**

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## 1 INTRODUCTION

In December 1997, Kenyans went to the polls to elect members of parliament and the country's president. The elections were conducted in the glare of international publicity, not least because the international community was seriously concerned about whether the elections would be free and fair. Despite evidence of electoral irregularities, political violence and a legal framework which favoured the incumbent government, observers of the elections endorsed the resulting victory of President Moi and the Kenya African National Union (KANU) as being an expression of the will of the people.

In the wake of the elections, there rapidly followed a waning of international interest in political developments in Kenya. This was despite the fact that within a month of the elections, politically motivated ethnic 'clashes' erupted in Rift Valley Province. The violence left hundreds of people dead or injured, and thousands of others displaced from their homes and living in makeshift shelters. It was clear that this violence was following a pattern similar to that encountered during previous outbreaks of conflict in Kenya between 1991 and 1994 — prior to and after the country's first multi-party elections in 1992 — in which predominantly Kalenjin supporters of KANU attacked members of ostensibly 'pro-opposition' ethnic groups. The important difference between then and now was that for the first time, members of a 'pro-opposition' ethnic group, the Kikuyus, were organizing and actively fighting back.

The violence in Rift Valley Province in Kenya is an important example of an increasingly widespread phenomenon in sub-Saharan Africa. Governments secretly employ surrogate agencies, such as ethnic or religious militias, to attack supporters of opposition political parties or government critics. This perpetuates at a local level the restrictive structures of one-party rule even as governments proclaim their fidelity to democratic principles at a national level. ARTICLE 19 has sought to anatomize this phenomenon and has given it a name: 'informal repression'. If the international community is serious about promoting successful democratic transition in states such as Kenya, it must understand that there has been a major shift on the part of many governments towards strategies of 'informal repression'.<sup>1</sup>

To counteract the apparent apathy of the international community about the latest outbreak of ethnically motivated political violence in Rift Valley Province, ARTICLE 19, Amnesty International and Human Rights Watch decided to send a

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<sup>1</sup> See ARTICLE 19's *Deadly Marionettes. State Sponsored Violence in Africa* (London: October 1997). The report was the product of a workshop held in South Africa in 1996 involving 33 human rights and community activists from seven African countries. It should be noted that while there was agreement about the common characteristics of the phenomenon, there was none about the correct name for it. For the moment, ARTICLE 19 continues to refer to it as 'informal repression' in the absence of a better term.

joint mission to Kenya to carry out research into the roots and repercussions of the violence. The joint mission, which visited Kenya between 29 March and 9 April 1998, had four main objectives: to obtain first-hand information on the post-election violence in Rift Valley Province; to provide support to human rights activists at risk; to explore the human rights dimensions of the ongoing process of constitutional reform; and to seek to persuade government officials, representatives of local non-governmental organizations (NGOs) and representatives of the donor community to place human rights at the heart of that process.<sup>2</sup>

The joint mission met a wide cross-section of individuals and organizations, including victims of the violence, government officials in the areas affected by the violence, representatives of non-governmental organizations working in the area of human rights and governance, journalists, lawyers and local representatives of donor governments. Regrettably, the Attorney-General, Amos Wako, was unable to find the time to meet the joint mission.

This report is based on ARTICLE 19's findings during the joint mission and its continued monitoring of developments in Kenya during the six months that have elapsed since the mission returned. Over the last six months, the levels of violence in Rift Valley Province have markedly reduced. The Kenyan government has announced a commission of inquiry which is mandated to investigate the reasons for the violence in Rift Valley Province since 1991. Furthermore, the bitter dispute between the Kenyan government and civil society organizations about the shape and direction of the constitutional reform process set in motion during the run-up to the December 1997 elections appears at last to have been resolved. So do these hopeful developments mean that the root causes of the violence in Rift Valley Province may finally be addressed? The answer to this question will be 'no' unless there is an end to the culture of impunity and disregard for human rights, which has, prevailed for so long in Kenyan government circles.

As this report shows, the violence in Rift Valley Province has, to a significant extent, been fuelled by people's lack of access to independent and impartial information through the media. This in turn is the result of an archaic and excessively restrictive institutional and legal framework for the protection of the right to freedom of expression in Kenya. ARTICLE 19 believes that the future peace and stability of Kenya depends upon root and branch reforms to provide impartial and effective safeguards for human rights. In the sphere of freedom of expression, this should involve repealing or amending all laws which violate Kenya's international legal obligations in that regard and ending the current regulatory stranglehold of the government over the media.

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<sup>2</sup> See also Amnesty International's report following the joint mission, *Kenya: Political Violence Spirals* (London: 10 June 1998).

## **2 SUMMARY OF RECOMMENDATIONS**

The following is a summary of ARTICLE 19's **recommendations for action** to end the culture of impunity and disregard for human rights, including freedom of expression, in Kenya:

### **The Kenyan government should:**

- End all attacks on media organizations and those who work for them, including through politically motivated de-registration of newspapers.
- Ensure that the current constitutional reform process is open, transparent and inclusive; undertake that any reports and recommendations arising from the process are published in full; and commit itself to responding publicly and promptly to the recommendations which arise from this process.
- Ensure that the new Constitution which emerges from the current constitutional reform process fully complies with Kenya's international treaty obligations to uphold human rights.
- Notwithstanding the constitutional reform process that is now under way, embark immediately upon comprehensive reform of all remaining laws on the statute book which unduly restrict freedom of expression, association and assembly – for example, the laws on publishing 'false reports', defamation and incitement, and the Official Secrets Act.
- Reform the Kenya Broadcasting Corporation Act to make the KBC a statutorily independent public service broadcaster; and establish in law a genuinely independent regulatory authority with powers to allocate licences on a transparent and non-discriminatory basis.
- End all harassment of human rights and pro-democracy organizations, including through the NGO Coordination Act; its requirement for compulsory registration by NGOs should be repealed.
- Ensure that the Commission of Inquiry established to investigate the violence in Rift Valley Province since 1991 is able to operate independently and freely — for example, by ensuring freedom of access to sites of killings and other human rights violations; ensure that the Commission is furnished with the necessary resources and other means to enable it to work quickly, and that the entire report of the Commission is promptly made public; and undertake to respond publicly and promptly to its recommendations.
- Ensure that individuals found responsible for carrying out or ordering human rights violations are brought to justice.

**All parties to the violence in Rift Valley Province should:**

- Commit themselves to peace and reconciliation and avoid statements or actions which may incite violence.

**The international community should:**

- Make it clear that a more positive engagement with the Kenyan government is conditional upon the implementation of a wide-ranging programme of institutional and legal reform with regard to human rights.
- Urge the Kenyan government to recognize that such a programme of reform is essential to prevent further widespread violence of the kind witnessed in Kenya since 1991.
- Closely monitor the progress of the constitutional reform process and the Akiwumi Commission and urge the Kenyan government to ensure that both are allowed to operate freely and without official hindrance.

### **3 POST-ELECTION POLITICAL CONTEXT**

#### **3.1 The December 1997 elections**

Although KANU and President Moi emerged victorious from the December 1997 elections, KANU's majority shrank from 82 seats in the 1992 elections to just 4. In total, KANU won 113 seats, followed by the Democratic Party (DP) with 41 seats. The DP won 17 of Central Province's 29 seats and 7 of Rift Valley Province's 48. In Rift Valley Province, the DP won Laikipia East, Laikipia West, Nakuru Town, Molo, Subukia, Kajiado South and Naivasha. By comparison, KANU won no seats in Central Province but 38 in Rift Valley Province. The effect of these results was to make Central Province a DP stronghold and Rift Valley Province predominantly KANU territory.

In the presidential race, President Moi's margin of victory over his nearest rival, Mwai Kibaki of the DP, was less than 10 per cent, with the latter having obtained the majority of votes in two provinces. In Central Province, Mwai Kibaki obtained almost 90 per cent of the votes cast compared to Daniel Arap Moi's 5.6 per cent, while in Nairobi, he obtained slightly over 43 per cent of the votes compared to Daniel Arap Moi's 20 per cent.

After the announcement of the results, Mwai Kibaki lodged a petition at the High Court challenging the election results on the grounds that there had been



irregularities in the electoral process.<sup>3</sup> At the same time, KANU formed parliamentary alliances with most of the other opposition parties, including FORD Kenya, the National Development Party (NDP) and the Kenya Social Congress.<sup>4</sup>

### **3.2 The 'clashes' break out**

Although the 1997 elections passed off with less violence than had been the case in 1992, events in January 1998 put paid to any hopes that political violence might be a thing of the past in Kenya. On the night of 11 January 1998, some members of the Pokot and Samburu ethnic groups raided the home of a Kikuyu widow at a place called Mirgwit in the Laikipia District of the Rift Valley Province. The raiders raped the woman and stole some livestock from the household. A group of Kikuyu men followed the raiders but, having failed to catch up with them, entered a Samburu compound where, in retaliation, they mutilated livestock that they found there. Mutilation of livestock is highly taboo for pastoralists such as the Samburu and Pokot. Accordingly, it was almost inevitable that there would be some kind of response by the owners of the livestock.

On the night of 13 January 1998, some Pokot and Samburu men attacked Kikuyu communities in the Magande, Survey, Motala, Milimani and Mirgwit areas of Ol Moran in Laikipia. It appears that the attackers were armed not only with spears, bows and arrows, but also with guns. It was claimed that some of the attackers were dressed in military-type clothing. It has been estimated that over 50 Kikuyus were killed during these attacks and over 1000 others fled the area and sought refuge at the Roman Catholic church at Kinamba, from where they were later relocated to temporary shelters at Sipili and Ol Moran.

On 21 January, about 70 unidentified people invaded three farms in Njoro including one belonging to the newly elected DP Member of Parliament for Molo Constituency, Kihika Kimani. Three days later, groups of what local residents described as Kalenjins attacked Kikuyus in parts of Njoro in the same constituency. There were varying explanations given for these attacks. One version of events blamed them on the refusal of local Kikuyu traders to supply goods and services to Kalenjins in response to the events in Laikipia. Another suggested that this was simply an unprovoked attack on Kikuyus by local Kalenjin youths. The attack on Kikuyus on 24 January provoked a counter-attack by a group of apparently well-organized Kikuyus, who on 25 January attacked Kalenjin residents of Naishi/Lare in Njoro.

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<sup>3</sup> The case is still pending before the High Court.

<sup>4</sup> See *Economic Review*, 30 March–5 April 1998.

According to police reports, 34 Kikuyus and 48 Kalenjins were killed during these initial attacks and over 200 houses were burnt down. Hundreds of people from both communities were displaced by the fighting, and many of them fled to temporary ‘camps’ at Kigonor, Sururu, Larmudiac mission and Mauche. During its visit to Kenya the joint mission witnessed the very poor conditions in which displaced people in these camps were living. Sporadic fighting continued during February and March 1998. By 11 March, police reports were estimating that at least 127 people had been killed since the ‘clashes’ had begun in January.<sup>5</sup>

### **3.3 The politics behind the ‘clashes’**

Although the authorities and the media often presented the violence as ‘ethnic clashes’ between local Kikuyu and Kalenjin communities<sup>6</sup>, this characterization obscured the links between this apparently local trouble and the political conflict at the national level — in particular, the tension between KANU and DP. The joint mission was struck by the fact that the violence occurred exclusively in Laikipia, Molo and Nakuru Town, all of which were now DP constituencies following the December 1997 elections. It will also be recalled that the results of the parliamentary elections had left KANU and the DP as the dominant parties in Rift Valley and Central Provinces respectively. The Central Province and the Rift Valley constituencies in which the DP had obtained seats are populated mainly by Kikuyus. The rest of the Rift Valley has a Kalenjin population. It is easy to understand why the power struggle between KANU and DP was so commonly conceptualized as one between Kalenjin and Kikuyu interests.

There was also strong evidence that tensions had been fanned by various parliamentary candidates through potentially inflammatory campaign speeches during the run-up to the December elections. These tensions came to a head following the lodging of Mwai Kibaki’s petition challenging the results of the elections. A significant number of KANU supporters regarded the petition as ‘politically wrong’ and responded angrily to it. Given the narrowness of KANU’s and President Moi’s victories, this reaction was hardly surprising.

Suspicion that the violence had a strong political dimension was further heightened by the apparent unwillingness of the police to quell it with the same zeal with which they had dealt with other ‘public disorder’ incidents — particularly those related to activities by anti-government protesters. It was suggested by many observers that the unwillingness of the police to act against the perpetrators of the

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<sup>5</sup> Reported in the *Daily Nation*, 11 March 1998.

<sup>6</sup> The Deputy District Commissioner for Nakuru District even refused to call it ‘violence’, preferring instead to say it was merely ‘disagreements’.

violence in the Rift Valley was because they did not have the requisite orders to do so from their superiors. On one occasion, the police did not even act against raiders who were looting and burning within sight of a police detachment, some local and foreign journalists and members of the clergy .

It was also alleged that the prosecuting authorities appeared to be unwilling to enforce the law even-handedly. It was pointed out to the joint mission that no Kalenjins had been charged with murder since the violence had begun, although many Kikuyus had been killed by Kalenjins, particularly during the fighting which had happened in Njoro on 25 and 26 January 1998. By contrast, a number of Kikuyus were being tried for murder in relation to Kalenjins victims of the same clashes. It was also reported that in the few cases in which Kalenjins had been charged with offences, they were usually released on bail, with less stringent conditions than those applied to Kikuyus in similar situations.

Some of the people whom the joint mission met sought to explain why more Kikuyus than Kalenjins had been arrested and tried. One view expressed was that the initial attacks by Kalenjins had caught the local police unawares. Consequently, the police had not been able to arrest the attackers because of lack of organization and numbers. By the time of the counterattack by the Kikuyus a few days later, the police were better prepared to take action against them. Another explanation which the joint mission heard was that Kikuyus were easier to arrest because their settlements were adjacent to the main road which made them accessible to the police, while Kalenjins were located further away in forest areas to which the police did not have easy access. The violence was also connected to the issue of land. As indicated earlier, virtually all the attacks took place in Molo, Laikipia and Nakuru Town. These were not only constituencies which had been won by the DP at the elections, but also the sites of controversial land allocation schemes initiated by the government. These schemes involved the resettlement of Kikuyus and Kalenjins who had been displaced from their original lands during the violence that had occurred during the 1992 elections. Among the people resettled in these areas under this scheme were some Kalenjins who had moved from Barigo, Bomet and Kericho and who were allocated land in Rikia Forest adjacent to Kikuyu settlements on the Mau Narok road. It was claimed by some sources that some Kikuyus had earlier been evicted from this forest by the government on the ground that the settlement was not conducive to protection of the environment. The sensitivity of the allocation of land in this particular area is borne out by the fact that during the post-election violence, it was here that the most serious fighting occurred. The area was also the scene of the further 'clashes' in late April 1998, soon after the departure of the joint mission.<sup>7</sup>

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<sup>7</sup> See *Daily Nation*, 28 April 1998. Since then, the violence has again died down. However, the atmosphere in Rift Valley Province remains tense.

## **4 FREEDOM OF EXPRESSION AND THE 'CLASHES'**

The post-election violence in Rift Valley Province highlighted a number of important issues with regard to the right to freedom of expression in Kenya, which the joint mission sought to address during its visit.

### **4.1 Incitement**

Evidence from a wide range of sources showed that the violence in Rift Valley Province had been preceded by inflammatory speeches by politicians in which they had urged members of particular ethnic groups to take action against other groups which had not supported them during the elections. It was also reported that during the clashes themselves, some local community leaders had incited specific acts of violence. Some of these community leaders had been arrested and charged with criminal offences. Examples of such leaders included Daniel Kiptoo Yego, a Kalenjin chief who was charged with inciting attacks on Kikuyus in Baruti and Sammy Kibutu Kimani, a Kikuyu chief charged with inciting attacks on Kalenjins in Naishi/Lare and arson.<sup>8</sup>

However, there are a number of serious deficiencies in Kenya's law of incitement to violence and disobedience of the law, as set out in Section 96 of the Kenyan Penal Code. The offence of incitement is defined so broadly that it is open to abusive application which may stifle freedom of expression. Political opponents are vulnerable to malicious prosecution on the basis of inflammatory speeches or publications whose likelihood of inciting violence is negligible or non-existent. The law also places the burden of proof of innocence upon the defendant, thus establishing a presumption of guilt. ARTICLE 19 calls upon the Kenyan government to undertake a review of the law on incitement as it currently stands in order to bring it into line with international standards. With regard to incitement to violence, international jurisprudence has established that the offence requires that a direct and immediate connection be proven between an act, statement or publication and the violence itself.

Even in cases in which it may be arguable that a particular speech had directly incited violence, the even-handedness of prosecuting authorities in their reaction to speeches made by opposition and ruling party functionaries is open to doubt. The lack

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<sup>8</sup> Case Number 763/23/98, Chief Magistrate's Court, Nakuru.

of even-handedness in the application of ‘hate speech’ laws is one reason why ARTICLE 19 generally opposes such laws. Since the start of the political violence in January 1998, the only MP to have been charged with incitement is a member of the opposition. Stephen Ndichu, the Social Democratic Party MP for Juja, was arrested in March 1998 and charged with having incited Kenyans to arm themselves in preparation for fighting. This is despite the fact that some government and KANU supporters and politicians have reportedly made equally, if not more, inflammatory speeches. Ndichu’s trial began in September 1998

## **4.2 Freedom of movement**

The ethnic hostilities generated by the ‘clashes’ were such that most people did not feel safe enough to go to areas occupied by ethnic groups to which they did not belong. This placed a serious constraint on the ability of journalists to gather first-hand information from some areas affected by the violence and had negative consequences for the quality of reporting — especially by media organizations which did not have sufficient ethnic diversity among their staff. A good example was the *Nation*, which did not have any Kalenjin reporters in its local office.

In some instances, entire media organizations were prevented from sending any reporters to particular areas because the organizations had — rightly or wrongly — acquired the reputation of being mouthpieces for the interests of particular ethnic groups or political parties. For example, KANU politicians prohibited reporters of some news organizations from attending the mass funeral of the Kalenjins who had been killed in the Kikuyu attack on Naishi/Lare. The reporters were barred from the occasion because their organizations were felt to be biased against Kalenjins and had so far created the impression that only Kikuyus had suffered casualties in the conflict.

## **4.3 Rumour and misinformation**

Virtually all the ‘clashes’ in the Rift Valley formed part of a vicious circle of attack and retaliation. Information about attacks spread mainly by word of mouth through those who had fled them and had sought refuge among sympathetic communities. The information brought by these displaced people was often exaggerated and strongly shaped by their political allegiances. The effect of this was to heighten tensions and deepen mistrust between the different ethnic communities to the point where any slight spark could easily ignite new bouts of violence. A classic example of this appears to be what happened in Baruti, where a Kalenjin community attacked local

Kikuyus who had lived among them for a long time after having been inflamed by rumours spread by fellow Kalenjins displaced from Naishi/Lare.

These rumours and pieces of misinformation were only able to thrive because there was so little independent and impartial information available to act as a reliable counterbalance. Most people, particularly those allied to the opposition, did not trust reports by the Kenya Broadcasting Corporation (KBC), which they perceived to be biased in favour of government. Most people in the affected areas also had no access to newspapers, either because they were too expensive or were not available. In any case, virtually all newspapers were also perceived to be biased and therefore not entirely reliable as sources of accurate information about the violence .

Some journalists sought to offer explanations for their inability to always present balanced stories. One was that because of the polarization of the society, it was difficult for individual reporters to be trusted by people on both sides. This meant reporters were able to get sources only from one side of the ethnic divide, thereby skewing their reports in favour of that side. Another explanation given was that some media organizations were so short of resources that they could not avoid accepting favours from politicians, thereby compromising their ability to be impartial. One example was that of a newspaper which could not afford to transport its reporters to the scene of an event. The reporters eventually ended up asking a politician for a lift — with predictable results for the extent of its criticism of the politician’s party in subsequent reporting.

Apart from the mainstream newspapers, some shorter, more occasional newsletters were being published which, at around 10 Kenyan Shillings per copy, were more affordable than their rivals. Among the most regular of these pamphlets were *Dispatches*, *Kenya Confidential*, and *Exposure*, each of which began publication during the run-up to the December 1997 elections. These publications were polemical in tone and did not shy away from making serious allegations against individuals and institutions. *Kenya Confidential* is widely believed to have been sponsored by the DP.

In March 1998, the rumour and misinformation mill took a further turn with the publication of anonymous leaflets in some parts of the country. Their general import was to tell Kikuyus to leave the Rift Valley and other provinces and return to ‘their home’ in the Central Province. One of the leaflets threatened to turn Kenya into a Yugoslavia if the Kikuyus defied the order to go back to Central Province. Another purported to have been written (and signed) by a group of Kikuyus and called on them to prepare themselves for armed conflict against their ethnic rivals.

Up until the time the joint mission left Kenya, the origins and authors of these leaflets remained unknown — by contrast, distributors of literature urging people to heed the call by the National Constitutional Executive Council (NCEC)<sup>9</sup> to go on

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<sup>9</sup> A coalition of several non-governmental organizations, churches and other civil society organizations.

strike had been swiftly identified and arrested. Nevertheless, a number of indicators may shed some light upon the provenance of the leaflets. Firstly, the apparent objective of the authors of the leaflets — to assign particular ethnic groups to particular provincial ‘homes’ — coincided with the views of advocates of *majimboism*, who advocate the establishment of ethnic regions. Secondly, on the basis of the distribution of parliamentary seats following the December 1997 elections, KANU clearly regarded Rift Valley Province as its stronghold. Thirdly, the leaflets were written not in the local languages, which most people understand, but in English, suggesting that the intended audience was not the local population so much as their ‘educated’ political leaders.

Whatever the source of the rumour and misinformation, the sense of uncertainty and insecurity to which it contributed so much might have been reduced if the public broadcaster, the KBC, which has by far the largest audience in Rift Valley Province, had genuinely sought to provide reliable information and impartial analysis of the social, economic and political situation in the country. Foreign radio stations such as the British Broadcasting Corporation World Service (BBC), Radio Deutsche Welle and the South African Broadcasting Corporation Channel Africa (SABC) did counterbalance KBC to some extent. However, the local correspondents of these stations were predominantly Kikuyus, who in Kenya’s polarized society could easily be suspected of bias by non-Kikuyu listeners. In addition, the limited time that these stations could dedicate to coverage of events in Kenya was insufficient to have a major impact on listeners.

A wide range of factors have been shown here to have contributed to the poor access on the part of the people of the Rift Valley and the rest of Kenya to independent and impartial information through the media about what was happening in Rift Valley Province. But, for a fuller understanding, these factors must be placed squarely in the context of the deep-rooted legal and institutional impediments to freedom of expression that still exist in Kenya. The next section of this report briefly addresses these impediments.

## **5 LEGAL AND INSTITUTIONAL IMPEDIMENTS TO FREEDOM OF EXPRESSION**

During the run-up to the December 1997 elections, the NCEC found itself at the head of mounting popular pressure for the reform of laws that compromised the democratic process. The Kenyan government sought to defuse that pressure by agreeing to the formation of the Inter-Party Parliamentary Group (IPPG), a group comprising

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members from both KANU and the political opposition. Among the issues considered by the IPPG were those inhibiting freedom of expression and assembly. This led in November 1997 to the amendment or repeal of several laws. The requirement in the Public Order Act that a permit be obtained from the police before a public meeting is held was replaced by a requirement that organizers of meetings notify the police in advance. It also stipulated that a public meeting could only be stopped where the police could show that there was a 'clear and present danger' to public order if it went ahead. New restrictions were also placed upon the right of the government to ban publications deemed prejudicial to the interests of the state. Henceforth, the government was required to have grounds for a ban which were 'reasonably justifiable in a democratic society'. A Prohibited Publications Review Board was also established to make binding recommendations to the government about whether publications previously prohibited should now be unbanned. Finally, the law of sedition was repealed.

These reforms marked an important step forward in the protection of human rights in Kenya. The urgency with which the IPPG moved contrasted starkly with the long-standing inertia of the Task Force on Media Law, which was set up by the government as long ago as 1995 and which has still not reported. However, there remain a significant number of surviving laws which unduly restrict human rights, as is demonstrated if we look at those affecting freedom of expression.

**Section 66 of the Penal Code** makes it illegal for anyone to publish any 'false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace'. The only defence is if the person is able to prove that he took measures before publication to verify the statement's accuracy and that in light of those measures he reasonably believed the statement to be true. Journalists are also guilty of a misdemeanour if they publish anything that tends to 'degrade, revile or expose to hatred or contempt' any foreign dignitaries with the intent to disturb relations between Kenya and another country.

**The Defamation Act** and related provisions within the Penal Code give a newspaper absolute privilege where it provides a 'fair and accurate report' of judicial proceedings, so long as the publication does not include any 'blasphemous, seditious or indecent matter'. Newspapers may report on other matters, including legislative proceedings and international multilateral meetings, unless the publication is proven to have been issued with malice. However, the act states that nothing in its provisions 'shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.'

A 1992 amendment to the Defamation Act introduced a minimum amount for damages that must be awarded for certain types of libel. These amounts are excessively high within the context of Kenya and have the potential, in themselves, to force publications to shut down. They are: 1 million Kenyan shillings (approximately



US\$18,182) for libel in cases where the allegation is that someone has committed a capital offence, and 400,000 Kenyan shillings (approximately US\$7,272) for libel in cases where the allegation is that someone has committed a criminal offence. In one case in 1993, the High Court awarded a plaintiff 1.5 million Kenyan shillings (at the time equivalent to approximately US\$33,000) against the *Nation*.<sup>10</sup>

Kenyan common law defamation principles are also very broad. For example, the common law prohibits newspapers from reporting the public contents of filed pleadings that have not yet been the subject of proceedings in open court even though the pleadings are public documents. Another key point is that while public officials and figures should expect to deal with greater criticism than non-public figures, Kenyan law does not take this into account. An increasing number of Commonwealth jurisdictions are recognizing the principle, first established in the landmark decision of the US Supreme Court in 1964 in *New York Times Co. vs. Sullivan*, that a public official cannot recover damages for a defamatory falsehood relating to their official conduct unless they can prove that the statement was made with ‘actual malice’ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>11</sup>

As with many former British colonies, Kenya has retained an **Official Secrets Act**. The act restricts access to government information and records by making it an offence to obtain government documents, sketches, notes, photographs or papers for the purpose of communicating them to a foreign power or for any unauthorized purpose that endangers the security interests of the state.

The *Johannesburg Principles* place the onus on the government to show why information should not be disclosed and starts from the premise of accessibility. These principles were submitted to the 1996 session of the UN Commission on Human Rights in Geneva by Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression. They were originally adopted in October 1995 by a group of experts in international law, national security and human rights convened by ARTICLE 19, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersrand in Johannesburg. Under Principle 15, no one may be punished on national security grounds for the disclosure of information if ‘the disclosure does not actually harm and is not likely to harm a legitimate national interest, or the public interest in knowing the information outweighs the harm from disclosure.’ Furthermore, an individual may not be found guilty of incitement on

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<sup>10</sup> *George Oraro v. Wangethi Mwangi and Nation Newspapers*, High Court at Nairobi Civil Case No. 1205 of 1993, cited in J T Gathii, ‘Freedom of Expression Without a Free Press: An Inquiry into a Kenyan Paradox,’ (April 1995), unpublished paper.

<sup>11</sup> See ‘Sullivan’s Travels. *New York Times vs. Sullivan* visits the Court of Pakistan’, Vol. 2, No. 1, *Southern Africa Media Law Briefing* (Johannesburg: ARTICLE 19, Freedom of Expression Institute and Media Institute of Southern Africa, April 1997).

grounds of national security unless the prosecuting authority can demonstrate that they intended through their expression to incite imminent violence, that their expression was likely to incite imminent violence and that there was ‘a direct and immediate connection’ between the expression and the likelihood of imminent violence.<sup>12</sup>

Under the **Preservation of Public Security Act**, the president has broad powers to censor, control and prohibit both the communication of information and the means of communication of information. Preservation of security under the Act includes the defence of Kenyan territory; securing fundamental individual rights and freedoms; securing of the safety of people and property; the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempts to overthrow the government or constitution; the maintenance of administration of justice; the provision of sufficient supplies and services essential to communities’ well-being; and the provision of administrative and remedial measures during periods of national danger or calamity or after natural disasters. The Act provides for the arrest and punishment of individuals violating regulations made in response to government declarations of the need to preserve public security. Individuals may be searched and premises entered at authorities’ discretion. The president is the ultimate decider, without any oversight or appeal procedures. In theory, death sentences can be meted out against anyone offending regulations made under the Act. In 1997 the Kenyan government invoked the Preservation of Public Security Act in response to the outbreak of famine in parts of the country.<sup>13</sup> This allowed the government to censor information about the famine.

Between 1993 and 1995, the government invoked regulations for the preservation of public security and established security zones in several areas of the Rift Valley.<sup>14</sup> The 1993 regulations prevented journalists, parliamentarians, human rights activists and church leaders from entering the areas, and prohibited the publication of any information regarding the zones. The regulations made it a criminal offence for any person to publish or communicate any information concerning the restricted area that had been prohibited from publication by the government. Invocation of the Act in the context of security crises and natural disasters has hindered the independent collection of information and has effectively left the

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<sup>12</sup> Media Law and Practice in Southern Africa, The Johannesburg Principles: National Security, Freedom of Expression and Access to Information. (London: ARTICLE 19, Freedom of Expression Institute and Media Institute of Southern Africa, 1996).

<sup>13</sup> Kenya: Government issues statement on disaster declaration, BBC Monitoring Service, 5 Feb. 1997 – transcript of government statement, broadcast by Kenyan Broadcasting Corporation Radio, 3 Feb. 1997.

<sup>14</sup> See, Human Rights Watch/Africa, *Divide and Rule: State-Sponsored Ethnic Violence in Kenya* (New York: Nov. 1993); and Kenya: *Multi-Partyism Betrayed*, (New York: July 1994). See also ARTICLE 19, *Censorship News No. 28*, “Kenya: Shooting the Messenger” (London: Oct. 1993) and

government as the only source of information about such events. ARTICLE 19 believes that, far from helping to improve matters, such excessive restrictions upon the free flow of information tend to make them worse.

Provisions within Kenyan law with regard to contempt of court under the **Contempt of Court Act** have in the past been used unduly to restrict freedom of expression. In June 1994, Bedan Mbugua, chief editor of *The People*, and one of its reporters, David Makali, were imprisoned for contempt of court for several months. They and a prominent human rights lawyer were charged after *The People* published an article critical of the Kenyan judiciary. Reporter David Makali quoted a *Society* magazine article written by lawyer GBM Kariuki in which Kariuki said a Court of Appeal decision regarding the eviction of an unregistered university union resulted from political interference. All three, along with *The People's* publishing company, were found guilty of contempt of court and ordered to pay a heavy fine and publicly apologize or face jail-terms. Kariuki and the publishing company apologized but Mbugua and Makali refused. While the use of contempt charges against journalists is not commonplace in Kenya, its use in the case of *The People* raises real fears that this law may in future be used more often to try to silence critical media voices in a context where other options, such as the imposition of sedition charges or arbitrary banning orders, are no longer available. Such charges would have a debilitating effect on media houses and individual media workers because of the financial pressures of a trial, mounting legal costs and fears on the part of businesses about continuing to place advertisements in an affected publication.

Finally, under the **Chief's Authority Act**, tribal leaders have used their authority periodically to prevent journalists from carrying out their work and to confiscate their equipment, including cameras, film and notes.

To complete this survey, it is also necessary to address the framework for the regulation of the media in Kenya. This is primarily the responsibility of the Ministry of Information and Broadcasting whose portfolio includes information services, broadcasting, the Kenya News Agency and the licensing and censorship of films, videos and all publications. Another important aspect of regulating the media is the compulsory registration of all printed publications.

The government has a stranglehold over the broadcast media. Under the Kenya Broadcasting Corporation Act, the President has the power to appoint the chairman of the governing board of the KBC. The Minister of Information and Broadcasting has the power to appoint the remainder of the board.<sup>15</sup> KBC not only

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ARTICLE 19, *Censorship in Kenya: Government Critics Face the Death Sentence* (London: March 1995).

<sup>15</sup> Kenya Broadcasting Corporation Act, Section 4. For a fuller analysis of the KBC, see ARTICLE 19 and the Kenya Human Rights Commission's joint report, *Media Censorship in a Plural Context: A Report on the Kenya Broadcasting Corporation* (London: 1998).

operates the country's most extensive television and radio network but also has a majority shareholding in the commercial radio station, Radio Metro.

The government's control over KBC extends to control over editorial output. It does not hesitate to take action against journalists whose actions it disapproves of. For example, the managing director of the KBC was redeployed during the run-up to the December 1997 elections after he had allowed an advert by the NCEC to go on air. The government also has monopoly control over the issuing of broadcasting licences. The Kenya Posts and Telecommunications Corporation Act grants the KPTC the power to license radio stations and control the establishment of broadcasting and transmission facilities.<sup>16</sup> The KPTC is wholly controlled by the government. Until recently, the only television licence which had been issued to a local, 'non-governmental' broadcaster was to Kenya Television Network (KTN), which broadcasts to the Greater Nairobi area. However, the ownership of KTN has long been shrouded in mystery. It is believed that it was originally set up by KANU politicians. It is now owned by the pro-government East African Standard media group. The influence of the government is certainly felt by KTN. In 1997, two KTN news editors were dismissed because a news broadcast which they had edited included footage of anti-government demonstrators. After protests, the two editors were reinstated. In May 1998, KTN went into receivership, although transmission has continued.

The Act does not require that an applicant be given reasons for the refusal to grant him or her a licence in any particular case. This lack of transparency explains, for example, why many questions remain about the government's revocation in 1997 of the national licence granted to the East African Television Network (EATN) soon after its majority shareholding was acquired by the Nation media group, which is considered to be less than friendly to KANU and President Moi.<sup>17</sup> The Nation media group has challenged this revocation in the courts. Suspicions were only partially allayed by the subsequent granting in May 1998 to EATN of a licence for the Greater Nairobi area. Suspicion also hangs over the granting in 1997 of a licence to the BBC for FM rebroadcasts. There are reported to be earlier applications, which were not properly considered. The granting of the licence to the BBC also contradicted the government's earlier claim that broadcasting licences would not be issued until the Task Force on Media Laws had completed its work.<sup>18</sup>

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<sup>16</sup> See section 86(2) of the Act.

<sup>17</sup> At the launch of the BBC World Service FM retransmission in Nairobi, in March 1998, the Minister of Information and Broadcasting justified the revocation on the ground that a reconsideration of the granting of the licence was necessitated by the change of control of EATN. The credibility of this claim seems doubtful given that this logic had not applied when the government-friendly East African Standard group had earlier acquired a majority shareholding in KTN.

<sup>18</sup> At the time of writing, a new Communications Bill is before parliament. This is a revised version of a bill that was scrapped in 1997 following heavy criticism. It proposes, *inter alia*, that a Communications Commission be established whose responsibilities will include the allocation of

We saw earlier how, at the height of the political violence, the print media failed to counterbalance the rumours and misinformation which predominated in the Rift Valley. Part of the reason for this was the political bias that pervaded virtually all newspapers and magazines. This bias influenced their reporting of vital issues such as casualty numbers, and slanted their analyses of the causes of the violence.<sup>19</sup>

In so far as this bias appeared in newspapers and pamphlets which favoured the opposition's interpretation of events, it was partly a reflection of the fact that such publications were published directly or indirectly by opposition politicians or by individuals closely connected to them. Publications in this category included the *Star*, *Dispatches* and *Kenya Confidential*. The fact that some of these publications had no advertisements indicated that their owners or controllers were sufficiently motivated to be willing to sustain them through direct financial support<sup>20</sup>. On the other hand, pro-government bias was apparent in newspapers such as *Kenya Times*, *Dunia*, *Standard* and *East African Standard*, all of them directly or indirectly owned or controlled by the government.

The government exercises control over the private print media through the requirement under the Books and Newspapers Act that newspapers must be registered by the Registrar-General. Although at first sight it may appear that registration is a mere formality under the Act, the Registrar-General has powers of discretion that allow him potentially to refuse to register some publications.<sup>21</sup> In effect, the registration process becomes a licensing process that enables the authorities to find a back-door means of banning newspapers. Four publications were refused registration by the Registrar-General in July 1998 on the grounds that they had failed to execute a publisher's bond. These publications — the *Star*, *Kenya Confidential*, the *Post on Sunday* and *Finance* — were well-known for publishing stories which were critical of the government and the ruling party.<sup>22</sup>

Since April 1998, there have been further outbreaks of official harassment of the independent print media. In addition to four publications being refused registration, there have been physical and verbal threats against journalists and newspaper vendors. A number of journalists have been physically attacked. Members and supporters of the NDP have made threats against the *Nation* media group. The NDP is allied in parliament with KANU. Furthermore, two senior journalists working for the *Star* were charged in June 1998 with publishing 'false reports'. The charges

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broadcast licences. However, the nature of the appointments process means that this Commission is likely to be no more independent of government than the KPTC has been. As matters currently stand, the proposed Communications Commission will not be much of an improvement on the KPTC.

<sup>19</sup> For a detailed discussion of this problem, see the March 1998 issue of *Expression Today*, the journal of the Media Institute, a Nairobi-based freedom of expression organization.

<sup>20</sup> Ibid.

<sup>21</sup> See critique of similarly worded Printed Publications Act (Malawi) in 'Submission on Media Law in Malawi to Law Commissioner', (London: ARTICLE 19 and Civil Liberties Committee, 1998).

<sup>22</sup> See ARTICLE 19 Press Release, 24 July 1998.

were eventually dropped. Finally, there have been a series of temporary injunctions issued by the Kenyan courts restraining publications from publishing defamatory material regarding public figures. Contravention would constitute contempt of court. In September 1998, two journalists working for the *Kenya Despatch* were arrested and charged with producing a publication without having executed the required publisher's bond. It appears that all those publications that have recently been refused registration by the Registrar-General continue to be published. Finally, in October 1998 a cabinet minister warned the independent print media that KANU was no longer willing to tolerate what he called 'insults from the press' and called on KANU supporters "to start attacking instead of waiting to be attacked and then defending themselves". This has led to concerns that some independent newspapers may increasingly feel compelled to resort to self-censorship in order to avoid conflict with the authorities.

## **6 FREEDOM OF EXPRESSION AND THE CONSTITUTIONAL REFORM PROCESS**

### **6.1 Post-election developments**

The statutory framework for the process of reforming the Kenyan Constitution is provided by the Constitution Review Act, which was promulgated in September 1997, under which the president is required to appoint a Constitutional Review Commission which will make non-binding recommendations for constitutional reform following consultations with the public.

This process has been viewed with suspicion by some sections of civil society, including the National Constitutional Executive Council, which embarked on a programme of mass action following the December 1997 elections to protest against its lack of independence and credibility. As part of that programme, the NCEC called on all workers to go on a national strike on 3 April 1998. However, on the eve of the strike, the government announced the setting-up of an Inter-Party Constitutional Committee to undertake the task of consulting the public on constitutional reform. The Committee included a number of opposition MPs who had been sympathetic to the NCEC position. The strike call by the NCEC was largely ignored by the public. These events led the NCEC to change its strategy. It has since opted for greater engagement with the government-led process for constitutional reform, although it has continued to be critical of important elements of that process.<sup>23</sup> In September 1998, following a series of meetings between government officials and

representatives of political parties and civil society organizations, an agreement was finally reached about the modalities of the reform process. Greater provision now exists for consulting with civil society in Kenya. The report and new draft Constitution are to be finalized by the end of 2000. It appears as if the way is at last open for consultations to begin in earnest.

ARTICLE 19, during its visit to Kenya as part of the joint mission, identified a number of flaws in the process which raised serious doubts about how far the present constitutional reform process could be considered genuine or credible. How much has really changed as a result of the agreement reached in September 1998? In our view, the jury is still out.

## **6.2 Governmental control**

While there is now greater provision for consulting with civil society, the outcome of consultations remains subject to a veto by a parliament whose legitimacy remains in question. The elections that brought the current parliament into existence were deeply flawed. The revised arrangements for the constitutional reform process, while an improvement, still cannot guarantee that the views of civil society will be fully heard and taken into account in shaping a new Constitution for Kenya. Continued vigilance will be required on the part of Kenyan NGOs and the international community to ensure that the Kenyan people have a genuine say in both the process and the outcome.

The government also remains able to load the consultation process in its favour through its control over the broadcast media — in particular, the KBC. During the election campaign last year, the KBC's news and current affairs output was carefully monitored by the Kenya Human Rights Commission and ARTICLE 19. Their conclusion was that the KBC was 'clearly incapable of achieving meaningful objectivity'.<sup>24</sup> Nothing has changed since then.

## **6.3 De-registration of NGOs**

The government's initial response to strong criticism of the constitutional reform process by organizations within civil society was to seek to suppress debate and silence those who were expressing dissent. The NCEC was characterized by the government as an 'illegal entity' because it had not been registered as an NGO,

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<sup>23</sup> See *Weekly Review* (Nairobi), 24 April 1998.

<sup>24</sup> Kenya Human Rights Commission and ARTICLE 19, *Mediawatch: Media Monitoring in Kenya, November 1997 Report* (Nairobi: 1997), 16.

claiming also that it lacked any mandate to engage in politics because it had not been elected by the public. The government also threatened to de-register any NGOs that were members or supporters of the NCEC.<sup>25</sup> Another NGO, the Network for the Defence of the Independent Media (NDIMA), was also refused registration in December 1997. No reasons were given.

Basic human rights such as freedom of expression and association are not privileges dependent upon the benevolence of a public authority or upon having been elected to public office. ARTICLE 19 believes that the use of statutory registration requirements to limit who can participate in public discourse runs directly counter to the tenets of an open and democratic society. Although in recent months the Kenyan government has toned down its harassment and intimidation of NGOs through threats to de-register or not recognize them, it retains the power to revive such tactics should relations once again sour. The requirement for compulsory registration under the 1990 NGO Coordination Act should be repealed as a matter of urgency.

At the time when official harassment and intimidation of NGOs was at its height, The Legal and Human Rights Network of NGOs expressed its disappointment about the failure of donor governments to send a strong signal to the Kenyan government to desist. Should the Kenyan government revive such tactics in the future as the constitutional reform process begins to tackle issues of substance, the international community must be ready to speak out forcefully on behalf of any affected NGOs.

## **6.4 Restrictions on freedom of movement**

During the visit of the joint mission, a number of pro-government politicians made statements in which they warned members of the NCEC against visiting certain parts of the country to campaign against the government's position on constitutional reform. For example, the *East African Standard* on 30 March 1998 reported that some officials of the NDP were warning NCEC representatives against visiting Kisumu and Nyanza Provinces. The same edition reported similar statements by a cabinet minister, 'youth leaders', and the NDP's MP for Bondo constituency in Nyanza.

These threats were not issued as official government statements. However, those who issued them could only have been encouraged by 'delegitimization' of the NCEC by the Kenyan government. By its silence, the government appeared to condone these threats, thereby encouraging those who had issued them. Further, the Kenyan government generated understandable suspicion that it was in fact

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<sup>25</sup> This included the Law Society of Kenya, the Kenya Human Rights Commission, the Citizens' Coalition for Constitutional Change, the NGO Council, Federation of Women Lawyers, and Kituo cha Sheria.



orchestrating these threats behind the scenes to ensure that the terms and scope of debate about the constitutional reform process were restricted.

ARTICLE 19 calls upon the Kenyan government publicly to declare that any such threats violate the rights of its citizens to freedom of movement, association and expression and will be strongly condemned. Further, it should actively ensure that all individuals and organizations are able to move freely anywhere in Kenya in exercise of those rights in the context of the constitutional reform process.

## **7 CONCLUSION**

The political road ahead for Kenya remains a potholed and dangerous one. There are a number of sensitive and intractable issues that must be resolved if the current constitutional reform process is to be successful.

### ***Majimboism***

The main flashpoint as the constitutional reform process continues is likely to be the debate over *majimboism*, or ethnic federalism. This will pit the two main parties, the DP and KANU, against each other. The DP views *majimboism* as a euphemism for the disenfranchisement of Kikuyus living outside the Central Province, which is perceived to be their traditional 'home' by their political and economic rivals. In order to strengthen its hand in the debate, the DP may articulate its opposition to *majimboism* in terms of the interests of other ethnic groups, by arguing that ethnic federalism would disadvantage those ethnic regions, such as North Eastern Province, which are poor in economic resources.<sup>26</sup>

On the other hand, *majimboism* is, and will continue to be, supported by politicians who cultivate most of their support in the smaller ethnic groups, such as the Tugens, Kisiis, Marakwet and Nandis who together make up the Kalenjins, as well as the Pokots, Turkana and Samburu. These small groups fear that the more populous Kikuyus will dominate them within a post-Moi constitutional order if the Kenyan political system remains centralized. Among the current batch of MPs, the advocates of *majimboism* are overwhelmingly KANU members.<sup>27</sup>

### ***The presidential succession***

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<sup>26</sup> For example see address of DP chairman, Mwai Kibaki, to DP leaders from Eastern Province reported in *Sunday Nation*, 26 July 1998.

<sup>27</sup> For example, see *Economic Review*, March 30–April 5, 1998, 27 and *Weekly Review*, March 27 1998, 10, in which a Minister in President Moi's cabinet argues that 'in the next constitutional arrangements, *majimboism* is going to be the central issue'. He concludes that *majimboism* is the way forward.

President Moi is serving his second term of office and, therefore, unless the Constitution is amended in the interim, cannot stand as a candidate in the next elections in 2002. In the absence of an obvious successor, the competition for the leadership of KANU will be intense, particularly as President Moi's term of office draws to a close.

Given the pervasiveness of ethnic politics in Kenya, it is likely that the various contenders to succeed Moi will tend to appeal to ethnic parochialism, and will link their own success in the struggle for leadership with the future prospects of particular ethnic groups and sub-groups. The fault lines within KANU itself are likely to be numerous. In its own right, therefore, the struggle among the KANU elite to find President Moi's successor has the potential to provoke more politically driven ethnic 'clashes'. President Moi himself has done little to soothe mounting political tensions by failing conspicuously since the December 1997 to name a Vice-President.

### ***Land***

The potentially explosive questions of *majimboism* and the succession to President Moi will be debated within the volatile context of the politics of land. In the absence of a systematic programme of land reform to address the problems of the landless, including those displaced by various cycles of political violence, and to resolve conflicting notions of land rights between agricultural and pastoralist communities, land will be the most significant underlying cause of any future conflict. As the population increases at a rate of approximately 3.3 per cent per annum and the cash economy declines, demand for land will continue to rise to the point where it will generate tension which can easily be precipitated into violent confrontation.

It was the view of members of both the Legal and Human Rights Network of NGOs and the government-appointed Kenya Standing Committee that land had been central to the violence in the Rift Valley and that it had to be a priority issue in the constitutional reform process. Whether it will be is an entirely different question.

### ***Impunity***

Although there have been a number of arrests and prosecutions in connection with the post-election violence, some commentators have expressed a lack of faith in the impartiality of the judicial process, alleging that it has tended to be biased against Kikuyus. It was also reported that the Standing Committee on Human Rights had conducted investigations into the post-election political violence. However, since the Committee's findings are not published, it is impossible to establish their credibility or usefulness as a basis for further action. The joint mission also expressed concern during its visit that people against whom there were strong allegations of involvement in similar violence in 1992 had not yet been tried. Similar concerns about impunity were also expressed by some of the representatives of donor governments in meetings

with the joint mission, who identified this as an issue that they would be raising with the Kenyan government.

Given this culture of impunity, it is difficult to be optimistic about the prospects of the judicial commission of inquiry that has been set up since the visit of the joint mission to investigate the 'clashes'. Such commissions of inquiry have too often in the past been means of official prevarication in Kenya. Its three-person panel, headed by Justice Akilano Akiwumi, is mandated to inquire into all outbreaks of violence since 1991, to establish their origins and causes, to assess the actions taken by the police, and to recommend prosecutions of the perpetrators of the violence. The Akiwumi Commission must in the end be judged by how far it marks a genuine break with the culture of impunity that has prevailed in Kenya until now. For its part, the Kenyan government should ensure that the Akiwumi Commission has the resources it needs to be effective and is able to operate independently and freely. It is vitally important that it should have full and untrammelled access to sites of killings and other human rights violations. The Kenyan government should also ensure that the Commission is able to work quickly and that its report is made public in full soon after it is completed. Finally, the government should undertake to respond publicly and promptly to the recommendations of the Commission.

Although there have been no further major outbreaks of violence in Rift Valley Province since April 1998, tensions there remain high. Should there be a large-scale resumption of violence, there is a very real risk that the proliferation of weapons in neighbouring countries such as Ethiopia, Somalia, Sudan and Uganda will spill over the border into Kenya. The joint mission was informed in April 1998 that guns were readily available on the border with Uganda, where an AK 47 automatic rifle could cost as little as 25,000 Kenyan Shillings. Further, a resumption of violence would increase the likelihood of it becoming more organized and more deeply entrenched. The joint mission received unconfirmed reports in April 1998 that there were a number of ex-Mau Mau fighters helping in the planning of attacks by Kikuyus in Ndeffo. It also received reports that some Kalenjin youths had gone to 'training camps' in preparation for military action.<sup>28</sup>

It may seem a long way from the immediacy of ethnic 'clashes' in the Rift Valley to apparently arcane disputes, centring on Nairobi, about constitutional reform. But, as this report has demonstrated, this is not the case. Human rights will not be adequately safeguarded in future in Kenya unless the current constitutional reform process permits all Kenyans to participate freely and openly in the debate and to genuinely influence its outcome. If the constitutional reform process is seen ultimately to have served only the narrow interests of the ruling elite, the prospects for even

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<sup>28</sup> This was mentioned by various sources although it was dismissed as untrue by the Deputy District Commissioner for Nakuru.

## ***Kenya: Post-Election Political Violence***

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more widespread violence of the kind witnessed since 1991 — including most recently in Rift Valley Province — can only grow.

## **Appendix 1**

### **Text of Press Release**

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#### **KENYA JOINT RESEARCH MISSION**

#### **APRIL 1998**

### **KENYA: Urgent Need for Action on Human Rights**

**NAIROBI, 8 April** — A coalition of three major human rights groups today called Kenya "a powder keg waiting to explode" and warned the government to stop using "divide and rule" tactics that are likely to plunge the country deeper into violence.

The delegation of three groups, Amnesty International, ARTICLE 19 and Human Rights Watch, interviewed more than 200 people from all sections of Kenyan society, including survivors of violent incidents as well as Kenyan government officials. The joint mission was sent in the wake of waning international attention to continuing human rights violations in Kenya, reflecting the seriousness with which the organizations view the situation.

The delegation found the situation particularly serious in the Rift Valley, where killings continue sporadically after the recent mass attacks. More than 100 people have been killed and thousands displaced since the latest violence began in January 1998. **"Kenya is a powder keg waiting to explode, all the signs are there,"** said Edge Kanyongolo, a spokesperson for the delegation, speaking at a press conference today in Nairobi. **"The downward spiral of violence and ethnic hatred is resulting in increasing human rights violations, and will not end until the government stops using divide and rule tactics."**

Survivors of violence in the area describe an ongoing "war" in which members of previously mixed communities attack each other with arrows and pangas (machetes). In the first wave of incidents, in Laikipia, guns were also used.

Many survivors are afraid to return to their homes, citing the lack of security in the area and the apparent unwillingness of the authorities to prevent further attacks. The government has systematically failed to investigate and punish armed aggressors, and to protect frightened, angry and displaced people. The human rights delegation expressed fears that the supporters of the ruling party are instigating political violence, but blaming the incidents on spontaneous outbursts of ethnic hatred.

Statements like the following, from one survivor, were common and emphasize that unless the root causes of violence are addressed, people will not return to their homes. He stated that **"when we try to visit our homes, we receive warnings such as "even if you till, you are just doing useless things. Even after planting, you will not eat""**. Some one else expressed a common sentiment: **"My fear is not even for the past or the present but for the future"**.

This violence follows the pattern established in 1991-94, the delegation said, in which supporters of the ruling party, KANU, attacked members of ethnic groups considered to support the political opposition. In that violence, high-ranking government involvement was proven. This time, compelling evidence suggests that the initial attacks were organized from outside the communities.

Attacks occurred only in areas where the opposition Democratic Party(DP) won seats. Violence began within days of KANU politicians visiting the area and verbally threatening DP supporters, who had recently mounted a legal challenge to the presidential election results.

This violence is not occurring in a vacuum. Demands for a system of political pluralism, specifically an inclusive constitutional process, are answered by calls from members of the ruling party to introduce a system of ethnic federalism (Majimboism). There is concern that the manner in which the system is being proposed could be used to strip certain ethnic groups of their rights.

In 1998, the delegation found some worrying new developments, including an increasing use of more sophisticated weapons, and a new tendency to target women for rape and killing. Old people and children are not spared.

The delegation also noted that 1998 was the first time that members of the Kikuyu community retaliated to attacks in an organized fashion, following the failure of the government to act. Subsequently the wave of violence slowed to a trickle, reinforcing calls within that community for armed retaliation to achieve security.

There is an ongoing problem all over Kenya with access to accurate and affordable information, particularly in rural areas. The delegation concluded that this information void provides a fertile ground for acceptance of rumour as fact, and that, reconciliation in such an atmosphere is impossible. The cheapness and availability of firearms can only exacerbate the cycle of revenge.

## ***Kenya: Post-Election Political Violence***

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The delegation concluded that since 1991, when the government was forced to introduce a multiparty system, it has actively undermined freedom of expression and contributed to and promoted a culture of impunity and growing violence, with the aim of undermining genuine and meaningful reforms. Pressure for reforms is continually met with a combination of sticks and carrots, in the form of brutal state violence tempered by promises of change.

Most recently demands for an open and inclusive process of constitutional reform have provoked government threats to de-register non-governmental organizations, and serious harassment of human rights activists.

Despite interventions by the international community on human rights issues in the lead-up to the elections in December 1997, momentum has not been sustained. Small concessions by the Kenyan government, often not carried through, have been hailed as major steps forward, missing the ongoing pattern of government unwillingness to promote and protect the rights of all its citizens regardless of ethnicity or political affiliation.

Kenya is a party to the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. **Amnesty International, ARTICLE 19 and Human Rights Watch** call on the Kenyan government to prevent future human rights violations, hold perpetrators of such violations accountable and defend freedom of speech, association and assembly. The international community should increase pressure on the Kenyan government to uphold its national and international legal obligations and should closely monitor any promised reforms using clearly articulated benchmarks.

**ENDS**