



ARTICLE<sup>19</sup>

#FREETOPEST

# Right to protest in Kenya

Report  
September 2019



**#FREETO**PROTEST

# Table of Contents

---

<b>Executive summary</b>	4
Key recommendations	5
<b>Introduction</b>	7
<b>International standards on ‘right to protest’</b>	8
Right to protest	8
Restricting the right to protest	9
<b>Domestic legal framework on the ‘right to protest’</b>	15
Compatibility of domestic law on protest with Constitution and international obligations	15
Public Order Act	16
The National Police Service Act and National Police Service Standing Orders	17
Penal Code	18
Recommendations of reforms by national and international bodies	18
<b>Violations of the right to protest and their impact</b>	20
Perceptions of protests in the population	21
ARTICLE 19 Eastern Africa media monitoring of protests	21
<b>Recommendations</b>	24
<b>#FreeToProtest Campaign Objectives</b>	25
1. Support existing networks dedicated to securing the right to protest in Kenya	25
2. Promote positive stories of protests and protestors in Kenya	25
3. Demand better practice from the Kenyan Police in their responses to protest	26
<b>About ARTICLE 19 Eastern Africa</b>	27

# Executive summary

---

In this report, ARTICLE 19 Eastern Africa examines the laws, policies and practice around the right to protest in Kenya. People in Kenya frequently take to the streets to protest against a wide range of issues, such as lack of access to education, sexual violence, corruption, environmental degradation, police violence and forced evictions. Though people are relatively well informed about their rights and the steps they should take when organising a protest, there is need for sensitization for law enforcement officers on their obligations as per the law in facilitating people's right to protest.

We monitored media reports of protests in Kenya between January 2018 and July 2019, and identified 152 protests. While the vast majority of these occurred without interference by the authorities or third parties, in approximately 20% of cases the police responded to protests in a manner that was not in line with international human rights obligations, frequently using possibly excessive force that resulted in deaths and injury.

In addition to the above, we identified that the security officials used force in 31 cases – including 18 peaceful protests in which no one appeared to engage in violence – mostly by firing tear gas and/or live ammunition. Due to the police's potentially excessive use of force and, in some instances, unlawful killings, at least 21 protesters and/or bystanders were injured and seven killed between January 2018 and July 2019. The majority of these cases were never independently investigated and victims did not receive a remedy. In other cases, peaceful protesters were dispersed with tear gas, and where there were pockets of violence the police focused not on de-escalation or isolation of violence but rather used force against protesters.

As a consequence, many people in Kenya do not participate in protests out of fear of violence from law enforcement, other protesters or third parties. In 2018, ARTICLE 19 Eastern Africa conducted a survey into people's perceptions of the right to protest in Kenya. Seven out of ten respondents said that when they hear about a protest, they are afraid protesters will use violence, and 43% respondents feared this violence could result in injury or death. In addition, nearly three out of ten respondents feared that the police would use violence.

This Right to Protest 2019 report also shows that, while the 2010 Constitution guarantees a broad range of rights involved in protests, the applicable legislation – in particular, the Public Order Act – does not fully comply with international human right standards. For example, the legislation requires advance notification of any protest and criminalises participation in any protest organised without notification.

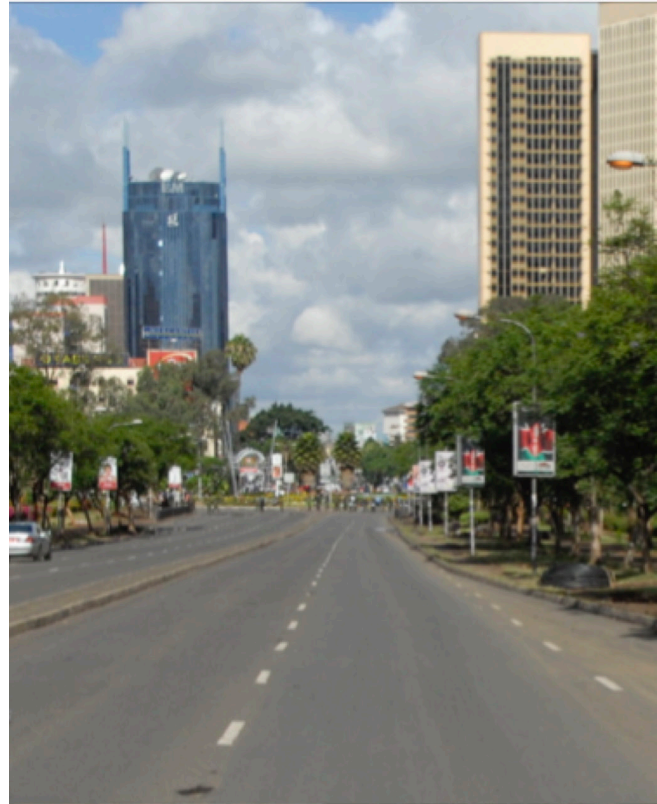
During the 2015 Universal Periodic Review (UPR) of Kenya's human rights record, Kenya agreed to take measures to guarantee freedom of association and assembly. This was also reflected in its 2016 UPR implementation plan, in which the Kenyan Government committed to review the Public Order Act and develop guidelines on peaceful assembly (among other commitments). However, to date, this is yet to happen.

ARTICLE 19 Eastern Africa recommends a full review of domestic laws and practices around the right to protest to ensure they comply with obligations under the Constitution and international human rights law and standards. Further, we put forward a series of recommendations for law enforcement to respect, protect and ensure the right to protest is fully realised in Kenya.



# Key recommendations

- The Kenyan Government should ensure that law enforcement fully complies at all times with international human rights law and standards on policing, in particular the African Commission Guidelines on Policing of Assemblies, the UN Code of Conduct for Law Enforcement Officials, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
- **The Kenyan Government should ensure the police oversight bodies develop expertise and procure equipment to facilitate professional investigations into unlawful use of firearms, including for securing and examining potential crime scenes, ballistics and other forensic tests, and autopsies and medical examinations.**
- The Kenyan Government should implement its commitments to fulfil freedom of association and assembly (as articulated in the 2016 UPR implementation plan) and work closely with the UN Special Rapporteurs, including accepting and supporting their outstanding visit requests.
- **The Kenyan government should ensure that public order management procedures, manuals, training and practice are reviewed and brought to compliance with the Constitution and international human rights law and standards.**
- The Kenyan Government should ensure that domestic law and practices related to the right to protest comply with its obligations under the Constitution and international human rights law and standards. In particular, it should ensure the Public Order Act, the Penal Code and related procedures are brought in line with international human rights law and standards.





In the *Right to Protest in Kenya* report, **ARTICLE 19** Eastern Africa examines the law, policies and practice around the right to protest in Kenya.



**ARTICLE 19**

# Introduction

Kenya has a thriving protest culture. In recent years, tens of thousands of people across the country have taken to the streets to protest against a wide range of issues.<sup>1</sup> At the same time, an insufficient legal and policy framework, combined with frequent violations of human rights by law enforcement, impede the realisation of the right to protest in the country.

The numerous violations that happened during the protests around the August 2017 elections and the Supreme Court decision to annul the results are clear examples of how the authorities failed to protect, respect and fulfil the right to protest. Thousands of people, mostly supporters of both political parties, took to the streets to protest. Instead of protecting the protesters, facilitating the protests and de-escalating any tensions, the security forces violently dispersed the protesters, unlawfully killing scores. In addition, armed groups killed numerous people. In total, the Kenya National Commission on Human Rights documented 92 deaths, more than 100 injured people and more than 200 cases of sexual violence.<sup>2</sup> Human Rights Watch documented at least 67 killings by the police and armed gangs during and after the August 2017 vote, while a further 37 people were killed during and after the second election in October 2017.<sup>3</sup> In October 2017, the authorities even announced a blanket ban on protests.

**The 2017 elections significantly disrupted the enjoyment of freedoms of expression, assembly and association in the country. In this report, ARTICLE 19 Eastern Africa therefore examines how free people feel to exercise their right to protest, and what the obstacles are in law and practice to fulfil this right.**

First, we examined the relevant legislation for their compliance with international freedom of expression standards. Second, we conducted a review of the state of protests, based on daily monitoring of media reports on protests between January 2018 and July 2019. ARTICLE 19 Eastern Africa also commissioned a survey on protests, which was carried out by IPSOS (a market research group) between July and August 2018. In total, 2016 people were interviewed for the research (984 men and 1032 women, living in rural and urban parts of the country). The sample was random, multi-stage stratified (using Proportionate to Population Size (PPS)) and spread across 46 counties. ARTICLE 19 Eastern Africa further carried out interviews with members of civil society and witnesses and monitors of protests, and reviewed videos and photos of protests in 2018 and 2019.

Additionally, ARTICLE 19 Eastern Africa has written to the Independent Police Oversight Authority (IPOA) and the National Police Service Commission (NPSC) to request information on their investigations into the police's excessive use of force during protests. At the time of publication, the IPOA had sent a general response and referred to information published on their website. We also shared the ARTICLE 19 Right to Protest Principles with the office of the Attorney General.

<sup>1</sup> ARTICLE 19 documented 140 protests in 2015, 175 protests in 2016 and 128 in 2018.

<sup>2</sup> Kenya National Commission on Human Rights, Still a Mirage at Dusk - A Human Rights Accounts of the 2017 Fresh Presidential Elections, 20 December 2017: <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1031/Still-a-Mirage-at-Dusk-A-Human-Rights-Accounts-of-the-2017-Fresh-Presidential-Elections>

<sup>3</sup> Human Rights Watch (HRW), Kenya: Fresh Evidence of Election-Period Abuses, 25 February 2018. <https://www.hrw.org/news/2018/02/25/kenya-fresh-evidence-election-period-abuses>

# International standards on 'right to protest'

## Right to protest

The term 'protest' is not defined in international law, despite its frequent use in legal and non-legal settings. ARTICLE 19 has long argued that a protest is the individual or collective expression of oppositional, dissenting, reactive or responsive views, values or interests. Protests play an important role in forming opinions and expressing and defending interests, views and political opinions.

**The 'right to protest', then, is the individual and/or collective exercise of existing and universally recognised human rights, in particular the right to freedom of expression,<sup>4</sup> the right to freedom of peaceful assembly and association,<sup>5</sup> the right to take part in the conduct of political affairs,<sup>6</sup> the right to strike (in the context of labour relations),<sup>7</sup> the right to take part or participate in cultural life,<sup>8</sup> and the rights to life, privacy, liberty and security of a person, and freedom from discrimination.<sup>9</sup>**

The term 'peaceful protest' is frequently used to describe protests that are not violent, mirroring the treaty language that determines the scope of the right to freedom of peaceful assembly. Notably, the term 'peaceful' is absent from the guarantee to 'the right to assemble freely' in the African Charter on Human and Peoples' Rights (Article 11). Importantly, protection of human rights continues to apply during protests whether they are characterised as peaceful or non-peaceful. Sporadic or isolated incidents of violence during an otherwise peaceful protest should not deprive individuals of their right to freedom of peaceful assembly or other human rights.

States are under a positive obligation to enable the exercise of the rights involved in the right to protest, in particular the right to freedom of expression and the right to freedom of peaceful assembly, including the obligation to exercise a presumption in favour of the holding of assemblies.<sup>10</sup> Importantly, peaceful assemblies must be protected by the state, including from private third parties such as counterdemonstrators and agents provocateurs.<sup>11</sup>

4 See e.g. Article 19 of the Universal Declaration of Human Rights (UDHR), Article 19 of the ICCPR, Article 9 of the African Charter on Human and People's Rights ('African Charter').

5 See e.g. Article 20 of the UDHR, Articles 21 and 22 of the ICCPR.

6 See e.g. Article 21 of the UDHR, Article 25 of the ICCPR, Article 13 of the African Charter, Harare Commonwealth Declaration 20 October 1991 (non-binding).

7 See e.g. Article 8 para 1d) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

8 See e.g. Article 27 of the UDHR or Article 15 para 1a) of the ICESCR.

9 See e.g. the right to life: Article 3 of the UDHR, Article 6 of the ICCPR; the right to privacy: Article 12 of the UDHR, Article 17 of the ICCPR; the right to liberty and security of person: Article 9 of the ICCPR; the right to non-discrimination: Article 2 of the ICCPR.

10 See e.g. the Human Rights Committee (HR Committee) *Mecheslav Gryb v. Belarus*, Comm. No. 1316/2004, 2011; *Chebotareva v. Russia*, Comm. No. 1866/2009, 2012; *Belyazeka v. Belarus*, Comm. No. 1772/2008, 2012.

11 M. Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, 2nd revised edition, Article 21, para 11.



## Restricting the right to protest

Some rights involved in the right to protest (such as the right to freedom of expression and the right to freedom of peaceful assembly) may be subject to narrowly tailored limitations, providing they meet the conditions of the so-called ‘three-part test’ under the following terms:<sup>12</sup>

- **Provided by law:** All limitations must ‘be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and the restriction must be made accessible to the public.’<sup>13</sup> It should be noted that limitations on the right to freedom of expression must be ‘*provided by law*’, whereas limitations on the right to freedom of peaceful assembly must be ‘*in accordance with law*’ (emphasis added).<sup>14</sup>
- **Legitimate aim:** All limitations must be in pursuit of a listed ‘legitimate aim’, namely: respect for the rights or reputations of others; the protection of national security or public order; or the protection of public health or morals. Additionally, the right to freedom of peaceful assembly may also be restricted to protect public safety.
  - o Limitations to protect the **rights of others** must be constructed with care and should not be interpreted, *inter alia*, to restrict political debate.<sup>15</sup>

<sup>12</sup> The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, part I.A.2 and I.A.9, UN Commission on Human Rights, 28 September 1984, E/CN.4/1985/4.

<sup>13</sup> See e.g. General Comment No. 34, HR Committee, CCPR/C/GC/34, 12 September 2011; the Siracusa Principles, *op. cit.*

<sup>14</sup> See e.g. M. Nowak, ICCPR Commentary, *op. cit.*, p. 489.

<sup>15</sup> General Comment No. 34, *op. cit.*, para 28.



- The genuine purpose and demonstrable effect of restrictions on the basis of protecting **national security** must be to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.<sup>16</sup>
- The state must demonstrate that any limitation to protect '**public morals**' is *essential* to the maintenance of respect for fundamental values of the community.<sup>17</sup> States are not permitted to invoke protection of 'public morals' to 'justify discriminatory practices'<sup>18</sup> or 'to perpetuate prejudice or promote intolerance'.<sup>19</sup> International human rights bodies have also noted that concepts of morality are constantly evolving,<sup>20</sup> and that any limitation 'must be based on principles not deriving exclusively from a single tradition'<sup>21</sup> and 'must be understood in the light of the universality of human rights and the principle of non-discrimination'.<sup>22</sup>
- International standards maintain that measures to protect **public health** must be 'both evidence-based and proportionate to ensure respect of human rights'.<sup>23</sup>
- The threshold for prohibiting expression on the basis of protecting **public order** or **public safety** is high and must be evidence-based, rather than premised on speculation.<sup>24</sup> The potential for a public-order disturbance, in particular from counterdemonstrators, should not be the basis for denying the right to freedom of peaceful assembly. Less restrictive measures, such as the deployment of additional law-enforcement officers, should therefore be considered. Any prior restraints of a blanket nature, especially where based on the content of expression, are almost always illegitimate.<sup>25</sup>

- **Necessity and proportionality:** States must demonstrate in a 'specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat'.<sup>26</sup> Moreover, this must be supported by evidence and should not be speculative.<sup>27</sup> The restriction must also not be overly broad and must be the least-restrictive means available for achieving the protective function. The form of expression and the means of its dissemination must also be taken into account.<sup>28</sup>

16 See e.g. the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, ARTICLE 19, London, 1996, Principle 2.a. Also, the HR Committee held that restrictions on publicly supporting a labour dispute, including calling for a national strike, did not constitute a threat to national security; Sohn v. Republic of Korea, Comm. No. 518/1992 (1994).

17 The Siracusa Principles, op. cit.

18 Ibid. See also General Comment No. 34, op. cit., para 32: Morality based limitations on rights 'must be understood in the light of the universality of human rights and the principle of non-discrimination'.

19 HR Committee, Hertzberg et al v. Finland, Comm. No. 61/1979, individual opinion by Committee members Opsahl, Lallah and Tarnopolsky, 2 April 1982.

20 The Siracusa Principles, op. cit.

21 General Comment No. 34, op. cit., para. 32.

22 Ibid.

23 Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 3 August 2011, A/66/254, para. 18.

24 C.f. European Court of Human Rights ('European Court'), Barankevich v. Russia, App. No. 10519/03, 26 July 2007, para. 33.

25 C.f. European Court, Stankov & UMO Ilinden v. Bulgaria, App. Nos. 29221/95 and 29225/95, 2001, para 97.

26 General Comment No. 34, op. cit., para 35; HR Committee, Shin v. Republic of Korea, Comm. No. 926/2000, 16 March 2004, para 7.3.

27 C.f. European Court, Alekseyev v. Russia, App. Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, para 86.

28 General Comment No. 34, op. cit., para 34.



International and regional standards elaborate state obligations in this respect in greater detail. For example:

- The 2016 joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the **proper management of assemblies** provides a summary of applicable international legal standards and practical recommendations on the proper management of assemblies.<sup>29</sup>
- In May 2017, the African Commission on Human and Peoples' Rights adopted the **Guidelines on Freedom of Association and Assembly in Africa**.<sup>30</sup> These guidelines clarify how freedom of association and peaceful assembly should be interpreted, and strengthen the obligations under articles 10 and 11 of the African Charter.
- The African Commission **Guidelines for the Policing of Assemblies by Law Enforcement Officials** in Africa<sup>31</sup> set out the principles security forces should follow during protests. They define the primary role of law-enforcement officials during protests: 'to ensure the safety of the public and to safeguard the human rights of all persons'. This role should be reflected in national laws, principles and guidelines that govern the policing of protests.<sup>32</sup>
- Similarly, the **UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** ('the UN Basic Principles')<sup>33</sup> and the **UN Code of Conduct for Law Enforcement Officials** ('the UN Code of Conduct')<sup>34</sup> include principles around the policing of assemblies, including those considered unlawful.

29 Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 4 February 2016: [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66\\_E.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.66_E.docx)

30 African Commission on Human and Peoples Rights, Guidelines on Freedom of Association and Assembly in Africa, 2017. [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwixZC\\_\\_PDjAhVFolwKHUPhCl4QFjABegQIAhAB&url=http%3A%2F%2Fwww.achpr.org%2Finstruments%2Ffreedom-association-assembly%2F%3Fprn%3D1&usg=AOvVaw1blz038JK23gqvHfPMKYtt](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwixZC__PDjAhVFolwKHUPhCl4QFjABegQIAhAB&url=http%3A%2F%2Fwww.achpr.org%2Finstruments%2Ffreedom-association-assembly%2F%3Fprn%3D1&usg=AOvVaw1blz038JK23gqvHfPMKYtt)

31 African Commission on Human and Peoples' Rights, Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, adopted in March 2017 in Banjul, Gambia. The guidelines were drafted following resolution 363 in 2016 on the Need to Develop Guidelines on Policing and Assemblies in Africa. <https://www.saferspaces.org.za/resources/entry/guidelines-for-the-policing-of-assemblies-by-law-enforc>

32 Ibid., General Principles, 3.3.

33 UN, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>

34 Adopted by the UN General Assembly in resolution 34/169 of 17 December 1979.



Civil society organisations have also published guidelines on the interpretation of international human rights treaties and standards governing protests. For example, **ARTICLE 19's Right to Protest Principles**<sup>35</sup> examine minimum standards for the respect, protection and fulfilment of the right to protest, while promoting a clear recognition of the limited scope of permissible restrictions.

The aforementioned international and regional standards elaborate recommendations on specific aspects of protests. In particular:

- **Notification requirements:** Prior-notification procedures are compatible with the right to freedom of peaceful assembly to the extent that they allow states to plan to adequately facilitate the assembly.<sup>36</sup> The Special Rapporteur on the rights to freedom of peaceful assembly and of association has stressed<sup>37</sup> that states should not impose prior-authorisation requirements and should, at most, only require notice of assemblies. The notification procedure should be subject to a proportionality assessment, should not be unduly bureaucratic and should require a maximum of 48 hours' notice prior to the day the assembly is planned to take place. The need for notification only exists where there are a large number of demonstrators; in some countries, notification is only required for marches and parades, not for static assemblies. Moreover, absence of a notification should not be the basis for dispersing a peaceful assembly. In particular, spontaneous assemblies should be exempt from prior-notification requirements. The African Commission Guidelines on Freedom of Association and Assembly in Africa also stress that protest is a right, for which no prior authorisation should be needed.<sup>38</sup> Lack of prior notification does not make an assembly unlawful and should not be the sole reason for dispersal<sup>39</sup>

35 ARTICLE 19, Right to Protest Principles, 2016. [https://www.article19.org/data/files/medialibrary/38581/Right\\_to\\_protest\\_principles\\_final.pdf](https://www.article19.org/data/files/medialibrary/38581/Right_to_protest_principles_final.pdf)

36 See e.g. Kivenmaa v. Finland, op. cit.

37 The 2012 Annual Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, para 28.

38 African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly in Africa, 71 a and b. [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKewiexZC\\_PDjAhVFolwKHUPhCi4QFjABegQIAhAB&url=http%3A%2F%2Fwww.achpr.org%2Finstruments%2Ffreedom-association-assembly%2F%3Fprn%3D1&usq=AOvVaw1blz038JK23gqvHfPMKYtt](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKewiexZC_PDjAhVFolwKHUPhCi4QFjABegQIAhAB&url=http%3A%2F%2Fwww.achpr.org%2Finstruments%2Ffreedom-association-assembly%2F%3Fprn%3D1&usq=AOvVaw1blz038JK23gqvHfPMKYtt)

39 African Commission on Human and Peoples' Rights, Policing Assemblies in Africa, Guideline 9.1.

- **Arrest or detention of protesters:** Arbitrary arrest and detention of protesters is prohibited. An arrest or detention without a basis in law is arbitrary. In addition, an arrest or detention that is permitted under domestic law may be arbitrary under international law if the law is vague, overbroad or incompatible with other human rights, such as the rights to freedom of expression, assembly or belief or the right to be free from discrimination. Likewise, arrest or detention is arbitrary if it is a response to the exercise of the rights to freedom of expression, association and peaceful assembly. Anyone who is arrested must be told the reasons for arrest, informed of any charges, have access to a lawyer and the outside world, and be brought to court within a reasonable time. Anyone charged with a criminal offence has the right to a fair trial before a civilian court within a reasonable time, or should be released.<sup>40</sup>
- **Liability and sanctions against protesters:** Organisers and protesters should not be asked to cover the costs of the provision of security and safety measures, policing and first-aid services, or cleaning up after protests.<sup>41</sup> In addition, organisers should never be held responsible for the unlawful behaviour of others; liability should be personal.<sup>42</sup>
- **Policing protests:** The dispersal of any assembly should only ever be used as a measure of last resort and in exceptional circumstances; force should never be used against a peaceful assembly. It has been noted that, where the right to freedom of peaceful assembly is suppressed, those demonstrations that do occur are more likely to become violent.<sup>43</sup> The police should prioritise facilitation and avoid the need to resort to force, even if the assembly is considered unlawful.<sup>44</sup> Any use of force by authorities against an assembly, whether peaceful or violent, must comply with the UN Basic Principles, the UN Code of Conduct and the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa. To prevent sporadic violence, the police should adopt measures necessary to prevent violations by third parties.<sup>45</sup> If a group of protesters are not acting peacefully, the police should focus on de-escalation and ensure the right to protest is upheld. De-escalation tactics include communication, negotiations and dialogue. Police should differentiate between individual and group behaviour and identify persons who act unlawfully.<sup>46</sup> The UN Basic Principles on the use of force also provide recommendations around policing unlawful protests. When an unlawful but peaceful protest is dispersed, police should avoid the use of force, or, when that is impossible, restrict it to the minimum.<sup>47</sup> Firearms should never be used to disperse;<sup>48</sup> even if protesters are violent, law-enforcement officials can only use firearms to disperse when strictly necessary to protect life.<sup>49</sup> Firing into a protesting crowd is a violation of the right to life.<sup>50</sup> In any case, the use of firearms should be regarded as potentially lethal in all circumstances. Automatic weapons are not suitable for normal law-enforcement situations, considering their inaccuracy and the impossibility of being able to account for each and every shot. They should not be used in the policing of crowds under any circumstances.<sup>51</sup> Tear gas may only be used to disperse a crowd when there is more generalised violence, due to its indiscriminate effects and high potential for harm.

40 See e.g. Articles 9 and 14 of the ICCPR or Article 7 of the African Charter.

41 Guidelines on Freedom of Association and Assembly in Africa, op. cit., para 96.

42 Ibid., Guideline 101.

43 Annual Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/17/28, 23 May 2011, para. 13.

44 ACHPR, Policing Assemblies in Africa, Guideline 9.1.

45 Guidelines on Freedom of Association and Assembly in Africa, op. cit., Guideline 94.

46 ACHPR, Policing Assemblies in Africa, Guideline 20.

47 UN Basic Principles, Principle 13.

48 ACHPR, Policing Assemblies in Africa, 22.6.

49 Ibid., Principle 14.

50 ACHPR, Policing Assemblies in Africa, Guideline 21.2.4.

51 ACHPR, Policing Assemblies in Africa, Guideline 21.2.5; Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Chapter 5.5; The joint special rapporteur report, A/HRC/31/66, para 67(e).

- **Accountability:** The authorities are obliged to investigate any deaths or injuries resulting from the use of force by law enforcement. Such investigations must be prompt, independent, impartial and effective. If an investigation reveals evidence that a killing was unlawful, the authorities must ensure those suspected of criminal responsibility are prosecuted through a fair judicial process. Governments should make arbitrary use of firearms a criminal offence<sup>52</sup> and establish procedures to report on incidents.<sup>53</sup> Superior officers are responsible if they knew (or should have known) that their subordinates used (or planned to use) unlawful use of force and firearms and did not take all steps to prevent, suppress or report it.<sup>54</sup> All victims of human rights violations in protest should have a right to a remedy.<sup>55</sup>

---

52 UN Basic Principles, op. cit., Principle 7.

53 Ibid., Principle 22.

54 Ibid., Principle 24.

55 See e.g. Article 2(3) of the ICCPR.

# Domestic legal framework on the ‘right to protest’

The rights encompassed in the ‘right to protest’ are guaranteed in the Constitution of Kenya 2010 in the comprehensive Bill of Rights (Chapter 4 of the Constitution). These include the rights to life, liberty and security of person; privacy; non-discrimination; freedom of conscience, religion, belief and opinion; freedom of expression and association; freedom from torture; and the rights to food, housing, sanitation, water, health, education and social security. The Constitution also obliges the state to ‘observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights’ and to enact its obligations under international human rights law.<sup>56</sup>

The rights guaranteed in the Bill of Rights can only be limited by law, if it is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,’ proportional and shall not totally derogate from essence of the rights.<sup>57</sup> Some rights, such as freedom from torture and the right to a fair trial are absolute rights and cannot be limited.<sup>58</sup>

Article 244 of the Constitution obliges the police to ‘comply with constitutional standards of human rights and fundamental freedoms’ and Article 21 of the Constitution binds the state, including the police, to observe, respect, protect, promote and fulfil rights and fundamental freedoms. In practice however, the police continue to use the national legislation governing public-order situations which are yet to be amended to comply with the Constitution.

In addition, Kenya has explicitly accepted human rights obligations through the international and regional human rights treaties which it has signed and ratified. Under Article 21(4), these treaties are legally binding on Kenya, imposing obligations to respect, protect and fulfil human rights.

## Compatibility of domestic law on protest with Constitution and international obligations

Despite the constitutional guarantees, a number of laws applicable to the right to protest do not comply with human rights guaranteed in the Constitution and Kenya’s international human rights obligations. In this section, ARTICLE 19 highlights key provisions that must be amended.

<sup>56</sup> Constitution of Kenya (‘The Constitution’), Article 24. <https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke019en.pdf>  
<sup>57</sup> The Constitution, Articles 24(1) and 24(2).  
<sup>58</sup> The Constitution, Article 25.

## Public Order Act

The 1950 Public Order Act regulates the organisation of protests. It applies restrictions to the right to protest as a rule rather than an exception in particular:

- Section 5(1) prohibits any public meetings<sup>59</sup> or processions that are not in line with provisions in the Act. Sections 5(1) and 5(2) make notification of any planned public meeting or procession mandatory – at least three days in advance and a maximum of two weeks before the protest. It does not specify within how many days a response to such a notification will be given. Further, Section 5(10) states that any ‘public meeting or public procession’ for which no notification has been sent in writing within the required timeframe is considered an ‘unlawful assembly’.
- Section 5(2) stipulates that a protest can be denied or stopped if another event is planned for that day, if no notification has been given or if ‘there is clear, present or imminent danger of a breach of the peace or public order’.
- Section 5(11) criminalises participation in spontaneous protests; anyone who takes part in an ‘unlawful assembly’ will be guilty of an offence and liable to one year’s imprisonment.
- While the Act does not specify a definition of ‘organisers’, Section 5(7) requires organisers of a protest to assist the police in ‘the maintenance of peace and order’. If they fail to do so, they could be guilty of an offence.
- Section 11 criminalises holding offensive weapons (defined as anything ‘causing injury to the person’, including e.g. stone), liable for imprisonment of up to two years.

ARTICLE 19 Eastern Africa believes these provisions do not meet international freedom of expression standards for the following reasons:

- As outlined above, **prior-notification procedures** are compatible with the right to protest to the extent that they allow states to plan facilitating the protests. The Public Order Act establishes a mandatory authorisation process, since non-notified protests are prohibited; this may deter individuals from exercising their right to protest. Moreover, the Act does not provide for authorities to acknowledge a notification. Those who notify the authorities of their assembly will therefore be uncertain whether proceeding with their assembly will result in criminal sanction. This will considerably curtail the exercise of the right to protest.
- Blanket prohibitions of unlawful assemblies prevent **spontaneous protests**, which are protected by international human rights law. Sanctions for participating in spontaneous protests clearly violate the proportionality principle.

<sup>59</sup> Public Order Act, Section 2; a meeting is defined as: ‘any gathering of persons (not being an excluded meeting) convened and held for any purpose, including any political purpose’ and an excluded meeting means: lawful meetings held by public bodies, meetings held by registered organizations for the lawful purposes of that organization; meetings by trade unions, ‘held exclusively for the lawful purposes of that trade union’; any meeting held ‘exclusively for social, cultural, charitable, educational, commercial or industrial purposes’; any meeting of a political party ‘held exclusively to discuss the affairs of the party’; and impromptu meetings by Members of Parliament and councillors



- While the organisers should, where possible, aim to establish a **relationship of cooperation and partnership with the authorities** and law-enforcement officials, this should be without any coercion. Moreover, the primary responsibility of maintaining public order should lie with law-enforcement agencies, not organisers of assemblies.
- There is a lack of clarity regarding the **liability of organisers** of protests, vis-à-vis individual participants or non-participants who engage in prohibited conduct in or around an assembly. Organisers should never be held vicariously liable for the conduct of other participants in assemblies unless they have specifically directed those individuals to act unlawfully. In any case, liability must always be personal, so that neither the organisers nor the protesters are subjected to sanctions of any kind on the basis of acts committed by others. Placing too much or unfair responsibility on the organisers of protests will act to curtail the exercise of that right.<sup>60</sup>

Apart from the problematic provisions listed above, we are concerned that the private members' bill introduced in 2019<sup>61</sup> to amend the Public Order Act plans to introduce further restrictions, as it aims to make organisers of protests liable for any damages caused by the protesters. The amendment does not give a clear definition of 'damage' (it only mentions grievous harm, damage to property or loss of earnings), leaving room for arbitrary interpretation. ARTICLE 19 Eastern Africa believes that, if passed, this bill may discourage people from participating in or organising protests, and may further damage compliance with international freedom of expression standards.

## The National Police Service Act and National Police Service Standing Orders

The 2011 Police Service Act is clear: The police can only use force when there are no non-violent means available to achieve a legitimate objective. The sixth schedule describes the conditions to use force, including 'a police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result'.<sup>62</sup>

While the Police Service Act is clear that firearms can only be used to protect life and when non-violent means are ineffective, it does allow the use of firearms to prevent 'a person charged with a felony' escaping from lawful custody.<sup>63</sup> We note that the seriousness of the crime, or the sentence that the crime may carry, are not permissible considerations to justify the use of firearms.

The 2017 National Police Service Standing Orders guide the police in their duties. Chapter 47 describes the use of force and firearms. As it does not make a clear distinction between use of force and use of firearms,<sup>64</sup> it could be interpreted as providing wider grounds for the use of lethal force than is permissible under international law and standards:

60 Republic of Latvia Constitutional Court, No. 2006-03-0106, 23 November 2006, para 34.4.

61 Public Order (Amendment) Bill, 2019. <http://www.parliament.go.ke/sites/default/files/2019-05/Public%20Order%20%28Amendment%29%2>

62 The Kenya National Police Service Act (Amendment to the Sixth Schedule) No. 11 of 2014. Schedule A(1). [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKewj6i9ex\\_fDjAhUNYcAKHYKXAZsQFjAAegQIAxAC&url=https%3A%2F%2Fwww.policinglaw.info%2Fassets%2Fdownloads%2F2011\\_National\\_Police\\_Service\\_Act\\_\(as\\_amended\\_through\\_2016\).pdf&usq=AOvVaw0J0Wz-d2QiQz1SXhHlpWE3](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKewj6i9ex_fDjAhUNYcAKHYKXAZsQFjAAegQIAxAC&url=https%3A%2F%2Fwww.policinglaw.info%2Fassets%2Fdownloads%2F2011_National_Police_Service_Act_(as_amended_through_2016).pdf&usq=AOvVaw0J0Wz-d2QiQz1SXhHlpWE3)

63 Kenya National Police Service Act, Sixth Schedule (Sect. 61(2)), B.1.

64 C.f. Amnesty International, Guidelines on the use of force, which stipulate that a firearm is a weapon that, by nature of its ammunition, is designed to take life. Force is any physical means deployed against a person in order to achieve a law-enforcement purpose, in particular to obtain compliance with an order. <https://www.amnesty.org/en/latest/news/2015/09/amnesty-international-releases-new-guide-to-curb->

- Chapter 47 Section 1 allows the use of force to disperse a 'riotous mob' that may be destroying property. It further allows the use of warning shots, the use of firearms to prevent a suspect from escaping, and shooting suspects to 'immobilise' them.
- The only limitations on the use of force are that 'firearms shall not be discharged when it is likely to injure an innocent person' (Chapter 47 Section 1(2)) and 'force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result' (Chapter 47 Section 3).

These provisions are very broad and do not require the existence of an imminent or grave threat of death or serious injury. ARTICLE 19 Eastern Africa notes that, under international law and standards, law-enforcement officials may only use firearms to defend themselves or others against the imminent threat of death or serious injury. Moreover, these standing orders are not in line with the Police Service Act or the Constitution.

## Penal Code

Further restrictions on the right to protest are provided in the Penal Code that prohibits unlawful assemblies. Unlawful assembly is defined as three or more people who intend to commit an offence or assemble 'to carry out some common purpose' and behave in such a manner that bystanders fear they will 'commit a breach of the peace'.<sup>65</sup> The unlawful assembly becomes a riot when they actually commit the offence.<sup>66</sup> Participation in an unlawful assembly or riot is liable to one year's imprisonment.

Relying on the aforementioned arguments on unlawful assemblies under the Public Order Act, we raises the same concerns: These provisions are broad, and do meet the requirements of international human rights standards. Additionally, the Penal Code gives security forces much wider powers to disperse than is allowed under international human rights standards. Security forces can decide to announce dispersal when 'twelve or more persons are riotously assembled' or about to start a riot,<sup>67</sup> and any person who, after a reasonable amount of time, continues to take part in the 'riot or assembly' is 'guilty of a felony and is liable to imprisonment for life'.<sup>68</sup>

## Recommendations of reforms by national and international bodies

Since its establishment in 2011, the IPOA has monitored scores of public-order operations by the police. Consequently, it has frequently recommended improving public-order management, including by developing a policy on public-order management with a view to repealing the Public Order Act, introducing comprehensive training, and banning live ammunition during public-order management.<sup>69</sup> However, these recommendations are yet to be implemented.<sup>70</sup>

Likewise, both the UN and the African Commission have recommended that Kenya take steps to strengthen the right to protest in its legislation and practice. In the concluding observations

65 Penal Code, 1, Chapter IX 78.

66 Penal Code, Chapter IX 78 (3).

67 Penal Code, Chapter IX 81.

68 Penal Code, Chapter IX 83.

69 See for example IPOA, End of Term Report 2012–2018, 2018; IPOA, Performance Report January–June 2018, 2018. <http://www.ipoa.go.ke/wp-content/uploads/2018/05/IPOA-BOARD-END-TERM-REPORT-2012-2018-for-website.pdf>

70 IPOA, Monitoring Report on Police Conduct during Public Protests and Gatherings, 2017. <http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf>

and recommendations on Kenya's 2008–2014 periodic report for the African Commission, the Commission asked the government to give more information on the right to freedom of assembly, and recommended it take legislative and other measures to guarantee the right to freedom of association and assembly.<sup>71</sup>

During the 2015 UPR, Kenya agreed to take measures to guarantee freedom of association and assembly.<sup>72</sup> This was also reflected in its 2016 UPR implementation plan, in which the government committed to reviewing laws, policies, and guidelines that guarantee freedom of association and assembly; preparing adequately to facilitate peaceful assemblies; investigating allegations of excessive use of force during such assemblies; and training the police in handling of protests. The government also intended to review the Public Order Act and develop guidelines on peaceful assembly.<sup>73</sup>

However, to date, these commitments have not yet materialised. On the contrary, there have been various attempts to restrict the right to protest by proposing legal amendments to prohibit certain service-providing professions from striking<sup>74</sup> and to make organisers of protests liable for damages (see above).

Further, various UN special rapporteurs whose mandates include the right to protest (Special Rapporteur on freedom of assembly;<sup>75</sup> Special Rapporteur on human rights defenders;<sup>76</sup> Special Rapporteur on freedom of expression;<sup>77</sup> Special Rapporteur on extrajudicial, summary and arbitrary executions;<sup>78</sup> and Special Rapporteur on torture)<sup>79</sup> have requested to visit Kenya, but these visits are yet to take place.

ARTICLE 19 Eastern Africa believes these visits are very important to ensure expert independent reporting on human rights issues. All UN member states – and particularly Human Rights Council members, which Kenya was until January 2019 – should cooperate with the Human Rights Council and Special Procedures. By not cooperating, the Kenya Government creates the impression that it wants to avoid scrutiny of its human rights record. More importantly, it is a lost opportunity to fulfil the right to protest, as these experts could make detailed recommendations on how to improve the situation and offer various practical tools and examples from across the world.

71 Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya. [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKewiWjbTf\\_fDjAhVLa\\_sAKHZu9CPIQFjAAegQIARAB&url=https%3A%2F%2Fwww.gi-escr.org%2Fhuman-rights-mechanisms-database%2Fconcluding-observations-on-kenya-by-the-african-commission-on-human-and-peoples-rights&usg=AOvVaw1oN6n02KrwqSL\\_H2cpSXEO](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKewiWjbTf_fDjAhVLa_sAKHZu9CPIQFjAAegQIARAB&url=https%3A%2F%2Fwww.gi-escr.org%2Fhuman-rights-mechanisms-database%2Fconcluding-observations-on-kenya-by-the-african-commission-on-human-and-peoples-rights&usg=AOvVaw1oN6n02KrwqSL_H2cpSXEO)

72 UPR Recommendation No. 142.129.

73 UPR Implementation Plan for Kenya, 2015–2019. [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKewjHro79\\_fDjAhVLZ8AKHTscDzIQFjAAegQIAxAC&url=https%3A%2F%2Fwww.statelaw.go.ke%2Fwp-content%2Fuploads%2F2016%2F08%2FUPR-DRAFT-MATRIX-MAY-2016.pdf&usg=AOvVaw0WNJMo3rDS7KYeLjy9756c](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKewjHro79_fDjAhVLZ8AKHTscDzIQFjAAegQIAxAC&url=https%3A%2F%2Fwww.statelaw.go.ke%2Fwp-content%2Fuploads%2F2016%2F08%2FUPR-DRAFT-MATRIX-MAY-2016.pdf&usg=AOvVaw0WNJMo3rDS7KYeLjy9756c)

74 Proposal to amend the Labour Relations Act in 2018. <https://www.nation.co.ke/news/Trade-unions-reject-proposal-amend-Labour-Relations-Act/1056-4539778-i4xlgzt/index.html>

75 Visit request was accepted in 2014 but did not happen; the Special Rapporteur sent a reminder in 2018 for a 2019 visit.

76 Special Rapporteur requested a visit in 2003; a reminder was sent in 2004 and 2019.

77 Visit was accepted in 2015 but did not happen.

78 Visit was requested in 2017 and a reminder was sent in March and August 2018.

79 Visit was requested in 2013. Reminders were sent in 2015, 2017 and 2018.

# Violations of the right to protest and their impact

---

The delay in reforming laws, policies and practice governing the management of public-order situations to bring them in line with the Constitution and Kenya's international obligations continues to impact on fulfilment of the right to protest. This has resulted in the continuation of various human rights violations, such as unlawful killings, excessive use of force, and unlawful arrests and detention. It has also contributed to a negative perception among the population; people fear protests will be disrupted by violence.

To understand people's perception of the right to protest, we commissioned a survey, which was conducted in 2018. To assess the extent of Kenya's human rights violations, we also monitored media reports on protests between January 2018 and July 2019 and looked at patterns of violations.



# Perceptions of protests in the population

According to ARTICLE 19 Eastern Africa's 2018 survey on people's perceptions of the right to protest in Kenya,<sup>80</sup> people are relatively well informed about their rights and the steps they should take when organising a protest.

However, many respondents said they did not participate in protests out of fear of violence from law enforcement, other protesters or third parties. For example, seven out of ten respondents said that, when they hear about a protest, they are afraid protesters will use violence, while 43% of respondents feared such violence could result in injury or death. In addition, nearly three out of ten respondents feared the police would use violence.

**Further, only 20% of respondents stated they had participated in a protest themselves or knew someone who had. Of these respondents, 40% said that violence had occurred at the protest.**

The main reason given by those who had not participated in a protest was fear of violence. Almost 50% of respondents who had never participated in a protest<sup>81</sup> said they did not want to protest because they feared violence, while 14% said they did not support the cause and 12% said they did not think it would have positive results.

When asked what the police's role is during a protest, most respondents either said to protect protesters from counter-protests (40%) or to protect the security and property of those nearby the protest (45%). The remaining respondents said the police's role is to keep protesters in a designated area (9%) or to maintain law and order (1%).

Six out of ten respondents thought that, to make a protest lawful, organisers should inform the police. Four out of ten respondents thought protests are more likely to be successful if the media reports on them.

## ARTICLE 19 Eastern Africa media monitoring of protests

We monitored media reports of protests between January 2018 and July 2019 and identified 152 protests covering a wide range of issues – including housing rights, insecurity, corruption, politics, sexual assault, unlawful killings by the police, environmental rights and education – in at least 34 of Kenya's 47 counties. According to the available media reports and video footage, none of these protesters were armed.<sup>82</sup>

The media monitoring revealed the following human rights violations in the protests:

- **Excessive use of force:** While most protests happened without any incidents, in 20% of protests law enforcement used excessive force, resulting in deaths and injury. Due to the police's potentially excessive use of force, at least 21 protesters and/or bystanders were injured. For example, during a protest of members of the Kenya Paralympic team, who asked the government to pay their allowances, in Nairobi on 2 May 2019, the police beat several protesters. Video footage reviewed by ARTICLE 19 Eastern Africa shows a police officer, armed with a pistol in one hand and a baton in the other, beating the protesters.<sup>83</sup>

The police frequently used tear gas to disperse peaceful protests, despite the fact that it should only be used to disperse a crowd when there is more generalised violence, due to its indiscriminate effects and high potential of harm. For example, on 5 February 2018, anti-riot



police officers fired tear gas to disperse peaceful protesters, led by civil society activists, who were demonstrating against the government's shutdown of TV stations. The police blocked them, reportedly because they tried to march to the Ministry of Interior.<sup>84</sup>

The police similarly used excessive force to stop people from striking. On 6 March 2019, for example, striking aviation workers in Nairobi were met with batons and tear gas by General Service Unit police in response to their demonstration over employment conditions and pay.<sup>85</sup>

- **Unlawful killings:** Due to the potentially excessive use of force by the police, seven protesters were killed between January 2018 and July 2019.<sup>86</sup> This included the unlawful killing of Meru University student leader Evans Njoroge following a protest by students against the fee structure and poor management of the university on 27 February 2018. The police, likely deployed because the protesting students had barricaded the road, dispersed the students with tear gas and live ammunition. Evans Njoroge, who led the protest, ran away with some others but was followed by a police officer, who shot him in the back of the head at close range.<sup>87</sup> According to the autopsy report, he died instantly.<sup>88</sup> Video footage taken in the area showed bullet shells that appeared to be fired by automatic weapons. The case was subsequently investigated by the IPOA, which recommended the police officer suspected of killing Njoroge be charged with murder.<sup>89</sup> He was arraigned in July 2018 and released on bail;<sup>90</sup> the trial is ongoing.

In Mwea, Embu County, on 18 April 2018, police shot eight people who demonstrated against the arrival of thousands of settlers. According to newspaper reports, tens of unarmed residents confronted the police officers by throwing stones. The police, who were deployed to protect the settlers from the protesters, shot live ammunition. One young man later died in hospital. According to his father, he was a bystander who was not involved in the protest.<sup>91</sup> Bullets removed from the injured people appear to have been fired by automatic weapons.

During a spontaneous protest in Malakisi on 26 December 2018 against the unlawful killing of a man by the police, the police shot two men after some protesters became rowdy and tried to burn a police station. One man was reportedly killed and one other injured. The protesters were unarmed but lit bonfires and blocked roads as they marched to the police station. The IPOA announced it was investigating the incident but has not yet made the results public.<sup>92</sup>

84 The Star, Activists teargassed during demos against media muzzling, dictatorship, 5 February 2018. <https://www.the-star.co.ke/news/2018-02-05-activists-teargassed-during-demos-against-media-muzzling-dictatorship/>

85 ARTICLE 19, Kenya: Use of force on striking aviation workers violates right to protest, 12 March 2019. <https://www.article19.org/resources/kenya-use-of-force-on-striking-aviation-workers-violates-right-to-protest/>

86 Media monitoring by ARTICLE 19

87 NTV Kenya video; see also Daily Nation, Here is how Evans Njoroge, Meru University Secretary General, was killed, 28 February 2018. <https://www.nation.co.ke/counties/meru/How-Meru-University-student-leader-was-killed-in-demos/1183302-4322574-131ryst/index.html>

88 Daily Nation, Doctor says post-mortem shows student died instantly, 3 March 2018. <https://www.nation.co.ke/news/Meru-University-student-leader-post-mortem/1056-4327236-mtv3diz/index.html>

89 IPOA, The Policing Lenses Quarterly Newsletter, Evans Njoroge Case, July 2018. [http://www.ipoa.go.ke/wp-content/uploads/2017/06/The\\_Policing\\_Len\\_June\\_2017\\_Final.pdf](http://www.ipoa.go.ke/wp-content/uploads/2017/06/The_Policing_Len_June_2017_Final.pdf)

90 The Star, Policeman denies killing Meru University student Evans Njoroge, 15 July 2018; Breaking Kenya News, AP charged with varsity student's murder out on bail. <https://www.breakingkenyanews.com/2018/07/ap-charged-with-varsity-students-murder.html>

91 Education News, Student shot by police in Mwae scheme protest dies, 21 May 2018. <http://educationnews.co.ke/2018/05/21/student-shot-by-police-in-mwae-scheme-protest-dies/>

92 Standard, Man shot dead in clash with police after killing, 28 December 2018. <https://www.standardmedia.co.ke/article/2001307578/man-shot-dead-in-clash-with-police-after-killing>



- **Failure to deploy mitigating tactics:** Our media monitoring showed that, in the 13 cases (less than 10% percent of the total reported protests) in which some protesters did engage in violence, the police dispersed protesters with tear gas and/or live ammunition instead of de-escalating, differentiating between individual and group behaviour, and ensuring the right to protest was upheld.
- **Unlawful arrests:** ARTICLE 19 Eastern Africa's monitoring showed that a total of 69 protesters were arrested at seven protests, six of which were peaceful. At a seventh protest, 14 people were arrested after protesters engaged in throwing stones. It is unclear whether they were charged with any offence. In one of these arrests at a peaceful protest, two environmental activists were arrested in Lamu on 25 May 2018. Their request to protest against the construction of a coal-fired power plant in Kwasasi, Lamu County, was reportedly rejected. A video of the protest shows the police stopping the protesters and the organizers explaining to the police that it is their right to protest.<sup>93</sup> The two men were then arrested for organising an illegal protest,<sup>94</sup> taken to the police station and, after six hours, released without charge.<sup>95</sup>

Other protesters who were arrested were charged in court. On 10 May 2019, 23 lesbian, gay, bisexual, transgender and intersex (LGBTI) refugees were arrested when they protested at the offices of the UN High Commissioner on Refugees (UNHCR). Media reports suggest the UNHCR called the police when protesters blocked the road to their offices. According to the UNHCR, approximately 100 refugees and asylum seekers camped in front of their offices, some of whom threatened staff members. Some protesters were throwing rocks when the police arrived, who used tear gas and excessive force to disperse the protesters.<sup>96</sup> It was the second time the police had violently dispersed LGBTI refugees who protested in front of the UNHCR offices; on 22 February 2019, 20 people were arrested and charged with public nuisance.<sup>97</sup> They were released on bail on 30 March 2019.<sup>98</sup>

- **Lack of effective investigation of violations:** While the IPOA is mandated to investigate complaints against the police, conduct disciplinary and criminal investigations, and make recommendations for disciplinary action or criminal sanctions, many cases of excessive use of force remain uninvestigated, and victims have no access to a remedy.<sup>99</sup> Though Kenya has since transitioned to a devolved system of governance, IPOA is yet to decentralise to the counties and has just eight regional offices serving a population of approximately 48 million people.<sup>100</sup> For example, in the aforementioned case of the demonstration in Mwea, Embu County, as far as ARTICLE 19 Eastern Africa could confirm, no investigation was carried out and victims and their relatives are yet to receive a remedy. In February 2019, elders of the communities asked the government to compensate the victims of the shooting.<sup>101</sup>

93 Video available here. <https://www.youtube.com/watch?v=PpbDQ0icggs>

94 Daily Nation, Police arrest two in Lamu coal plant protest, 25 May 2018. <https://www.nation.co.ke/counties/lamu/Police-arrest-2-anti-Lamu-coal-plant-protester/3444912-4579706-ymfm8l/index.html>

95 HRW, 'They Just Want to Silence Us', 17 December 2018. [https://www.hrw.org/sites/default/files/report\\_pdf/kenya1218\\_web2.pdf](https://www.hrw.org/sites/default/files/report_pdf/kenya1218_web2.pdf)

96 UNHCR, UNHCR expresses concerns; calls for restraint after refugee protest takes violent turn, 10 May 2019. <https://www.unhcr.org/ke/15528-unhcr-expresses-concerns-calls-for-restraint-after-refugee-protest-takes-violent-turn.html>

97 RightsAfrica, 20 gay refugees protest, then are jailed in Kenya, 26 March 2019. <https://rightsafrika.com/2019/03/26/20-gay-refugees-protest-then-are-jailed-in-kenya/>

98 RightsAfrica, Kenyan queer refugees win freedom; hunger strike ends, 30 March 2019. <https://rightsafrika.com/2019/03/30/kenyan-queer-refugees-win-freedom-hunger-strike-ends/#more>

99 ARTICLE 19 interviews with human rights activists, 2019.

100 Information request response by IPOA dated 27 June 2019. Physical Information request letter received from ARTICLE 19 Eastern Africa on 21 May 2019.

101 The Star, Government asked to compensate Mwea-settlement-scheme shot victims, 23 February 2019. <http://www.the-star.co.ke/counties/north-eastern/2019-02-23-government-asked-to-compensate-mwea-settlement-scheme-shot-victims/>

# Recommendations

---

Based on the findings in this report, ARTICLE 19 Eastern Africa proposes that, at a minimum, Kenya should take the following measures to improve the current situation, with the full and effective participation of civil society and other concerned stakeholders at all stages:

- The Kenyan Government should ensure domestic law and practices related to the right to protest comply with obligations under the Constitution and international human rights law and standards. In particular, it should ensure the Public Order Act, the Penal Code and related procedures are brought in line with international human rights law and standards:
  - Abolish mandatory notifications of protests and make notification regimes for protests voluntary. Failure to comply with prior-notification requirements should not lead to an assembly being deemed 'unlawful'. The law should expressly include exemption from any notification requirement for spontaneous protests.
  - Only place restrictions on the right to protest when such restrictions are demonstrably necessary and proportionate for one of the grounds expressly identified in international human rights law and standards.
  - Withdraw or amend the legislative amendments that make organisers liable for damages.
  - Introduce a system of effective remedies for violations of the right to protest, including adequate redress through criminal and civil law processes, as well as precautionary measures and non-judicial remedies, such as compensation, rehabilitation, satisfaction and guarantees of non-repetition.
- The Kenyan Government should ensure that law enforcement fully complies at all times with international human rights law and standards on policing, in particular the African Commission Guidelines on Policing of Assemblies, the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
- The Kenyan Police should ensure the public order management procedures, manuals, training and practice are reviewed and brought to compliance with the Constitution and international human rights law and standards. This can also include a code of conduct for the police to adhere to when policing protests, which should specifically:
  - Establish a clear obligation on law enforcement to attempt de-escalation and resort to non-violent means first, and define clear criteria and thresholds for the different degrees of force and weapons to be used, including the setting of restrictions and prohibitions to ascertain full respect of the principles of necessity and proportionality;
  - Ensure the overall approach to policing protests is never guided by the anticipation of violence and/or the use of force; rather, it should be guided by the principle that the use of force against protesters by law enforcement is restricted;
  - Ensure the police service has a range of less lethal equipment at their disposal that allows for the differentiated use of force in full respect of the principles of necessity and proportionality;

# #FreeToProtest

## Campaign Objectives

---

### 1. Support in existing networks dedicated to securing the right to protest

Under this line of interventions, we will be engaging social justice centres, social movements and CSOs who already work on the right to protest in Kenya.

We will be working with the Social Justice Centers Working Group, Civil Society Reference Group, plus county and intra-county based CSO groupings as key umbrella entities bringing together actors from the subnational to national level to enhance their competencies around messaging on protests and protesters and how to monitor.

### 2. Promote positive stories of protests and protestors in Kenya

We will be working with media, protesters, and community members to promote positive narratives about protests and protesters in Kenya.

According to a survey conducted by ARTICLE 19 Eastern Africa and IPSOS in 2018, 51.52% of 2,016 respondents nationally stated that they get information on protests in the country through televisions. Radio accounts for 41.4% while newspapers and social media serve as sources 1.01% and 2.02% respectively. The same set of statistics shows that 1.01% of those interviewed got to witness the protests themselves, while 3.03% heard about them from friends.

Our engagements with the media will highlight what we have identified as problematic messaging on protests and to provide examples of how protests can be reported on in a more human rights conforming manner from the current sensationalist approach.



### 3. Demand better practice from the Kenyan police in their responses to protest

Together with the networks and communities we have engaged in the previous two objectives, we will be calling on the state to amongst other things enforce better practice from the police with regards to protest and to conform the right to assembly legal framework with international best practice.

We will engage bodies like the Independent Police Oversight Authority (IPOA) to call on investigations on reported cases of police malpractice across the country.

Our engagements at the regional and international level will also highlight our submissions to the Kenyan National Assembly on legislations such as the Public Order Act Amendment Bill 2019 which includes many problematic clauses as juxtaposed against international best practices.

# About ARTICLE 19

## Eastern Africa

ARTICLE 19 Eastern Africa is an NGO founded in 2007 and registered in Kenya under the Non-Governmental Organizations Act 1990 working to defend freedom of expression, access to information, association, and assembly in Kenya and Eastern Africa. It is an affiliate of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19).

ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), is an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and information. It takes its name and mandate from Article 19 of the Universal Declaration of Human Rights which guarantees the right to freedom of expression.



**#FREETOPELTEST**

*The #FreeToProtest campaign is being launched in August 2019 to guarantee the right to peaceful protest in Kenya and challenge negative stereotypes around protests and protesters in the country. The #FreeToProtest coalition, made up of grassroots activists and civil society organisations, has been formed to reclaim our right in a peaceful, respectful and impactful way and will be running a series of digital and offline actions throughout its three - month period*





## **ARTICLE 19 Eastern Africa**

Defending freedom of expression and information

ACS Plaza

2nd Floor

Lenana Road

PO Box 2653-00100

Nairobi

Mobile Office Tel: +254 727862230

Tw: @article19eafric

Fb: facebook.com/article19.org

Website: [www.article19/pages/en/east-africa.html](http://www.article19/pages/en/east-africa.html)