



**Contribution to the Universal Periodic Review Mechanism
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**A Joint UPR Submission on The Republic of Kenya by International PEN, the
International Publishers Association (NGOs in Consultative Status with ECOSOC)
PEN Kenyan Centre and Index on Censorship**

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International PEN, PEN Kenyan Centre, the International Publisher's Association and Index on Censorship welcome the opportunity provided by the Office of the High Commissioner on Human Rights to comment on the human rights situation in the Republic of Kenya, about which it has increasingly serious concerns. This document provides an overview of the current situation for writers and print journalists in the country and examples of specific cases of those whose right to freedom of expression and association has been restricted.

Introduction

In a television interview in Nairobi in August 2009, US Secretary of State Hillary Rodham Clinton highlighted the role that Kenya's "vibrant free press" and civil society play in fighting corruption. The comment has proved controversial. There is no doubt that the press and civil society in the country have grown since the 1991 constitutional reform that brought in multiparty politics. The liberalisation of the media and the easing of government constraints have allowed Kenyans to exercise their right to freedom of opinion and expression¹ more fully, particularly on political matters. Today there is a proliferation of private newspapers and TV and radio stations in English, Swahili and local languages, as well as civil society groups representing a broad range of interests. The days of state-controlled media, government censorship and writers and journalists being locked up for their views are over. However, Kenya this year has seen the brutal murder of a journalist who exposed police corruption and of two human rights defenders who documented and published reports on extrajudicial killings by the police of alleged members of a banned criminal sect. This violence has sent shock waves through civil society, sowing fear among writers and activists who already face the threat of arrest, prosecution, assault and other forms of harassment for expressing their views on the street or on the page.

¹ The right to freedom of expression is enshrined in the Kenyan Constitution of 1963, amended 1996 (Chapter V, Section 79 (1)) as well under the international treaties to which Kenya is party, including the International Covenant on Civil and Political Rights (Article 19) and the African Charter on Human and People's Rights (Article 9).

The need for the an effective ‘watchdog’

When Mwai Kibaki ended nearly 40 years of one-party rule with a landslide victory in the 2002 general elections, he pledged sweeping reforms including an end to endemic corruption and impunity. Yet his government has been plagued by major corruption scandals, with former and current ministers accused of involvement in alleged scams involving vast sums of public money. An estimated US\$1bn was lost to graft in the first three years of the Kibaki administration. Since its inception in 2003 the Kenya Anti Corruption Commission has failed to generate a single prosecution and now faces closure. In 2005, voters rejected a new draft Constitution, one of Kibaki’s key election promises.

The contested 2007 elections led to an explosion of politically motivated ethnic violence with widespread human rights violations by armed groups and police and security forces that left up to 1,500 dead and half a million internally displaced. Despite the formation of a power-sharing government, with Kibaki remaining as President and opposition candidate Raila Odinga appointed Prime Minister, the wounds from the post-election violence are very far from healed. Having accepted the recommendations of the international commission it established to investigate the post election violence (the Waki Commission), the government has yet to implement most of them, in particular setting up a national tribunal to try those responsible for orchestrating the violence. As a result, in July 2009 former UN Secretary General Kofi Annan submitted a list of suspects to the International Criminal Court which is believed to include government ministers and prominent businessmen. Ethnic differences are never far from people’s minds and many fear that a further outbreak of violence is just below the surface.

This state of tension in Kenya is compounded by fear of those who are supposedly mandated to protect its citizens. “*Kenyan police are a law unto themselves. They kill often, with impunity,*” said Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions at a press conference concluding his February 2009 mission to Kenya to investigate the alleged unlawful killing of more than 1,000 Kenyans since 2007. Rather than engaging with Alston’s findings, the Kenyan government sought to discredit him and his sources. Two human rights defenders who had provided Alston with information about the murder of alleged members of the banned criminal sect known as the Mungiki were shot dead in broad daylight just hours after a government spokesperson claimed that their organisation was in fact a front for the Mungiki. The Mungiki (Kikuyu for ‘multitude’), which controls public transport routes, runs extortion rackets and has been accused of involvement in violent crime including murders, is believed to be linked to high-profile politicians. As one activist said: “*you don’t know who is in control.*” Dozens of other human rights defenders reportedly went into hiding or fled the country following the killing of the two activists, which remain unsolved (see below).

Returning to Hillary Clinton’s remarks, the need for a “vibrant free press” and civil society to act as watchdog and to speak out against corruption, impunity and other abuses in Kenya is overwhelming. Yet accounts received by PEN indicate that the space for

independent and critical analysis within the mainstream and ‘alternative’ press and publishing as well by civil society groups and activists is in fact being steadily squeezed.

The Media: a watchdog muzzled?

Many journalists in Kenya will initially state that they feel free to write about what they please. However, dig a little deeper and they will generally concede that certain subjects are considered no-go due to fear of retaliation, be it from the authorities, media house owners, editors, big businesses or criminal groups. Examples of these subjects include: the President and his family; police operations, malpractice and corruption; security issues; intelligence; the military; organised crime, particularly the Mungiki and drug trafficking; large corporations and their links to politicians; the alleged rearmament of non state groups in the run up to the 2012 general elections; etc. While journalists may gather information about these subjects, they will generally not use it in articles for fear of prosecution, dismissal, their stories being dropped, threats and physical attack. “*If you publish [on such subjects] you become isolated, victimised,*” comments one journalist. Many complain that more stories are ‘killed’ than printed. Rather an alarming situation considering the extent to which this list of subjects that are seen as ‘too hot to handle’ corresponds with the country’s biggest problems.

This wariness can be explained by a series of events and legal proceedings in recent years which have been read as direct warnings to the media in general and certain journalists in particular:

- **Standard Group raid (2006)**

On 2 March 2006, armed police raided the offices and press of the Standard Group, Kenya’s oldest media outlet which owns *The Standard* newspaper and KTN TV, set fire to that day’s edition of *The Standard*, damaged equipment and confiscated computers. The next day it emerged that the raid, which reportedly took place without the prior knowledge of the police commissioner, had been ordered by John Michuki, then minister of internal security and a close ally of President Kibaki, on the grounds of state security. There are also allegations that the operation was led by international mercenaries.

The raid prompted widespread protests in Kenya and internationally. The Standard group filed a complaint against the internal security ministry and police commissioner and a parliamentary committee began investigating the raid. The investigation got as far as establishing that the raid had been a “government operation” before being quietly suppressed: it faced obstruction within parliament and its interim report was never debated. The former MP who headed up the investigation and who continues to call for explanations says he has been followed and threatened with death.

The raid appears to have been part of a coordinated crackdown on the Standard Group. Two days before the operation, on 28 February 2006, a *Standard* editor and two journalists were arrested and charged with “publishing alarming statements” and released on bail on the day of the raid (the charges were eventually dropped without reason in September 2006). The day before the raid, the government spokesperson warned a

Standard editor that the government might raid the group. In April 2007, the government withdrew all state advertising - a key source of income - from the Standard Group.

Although the government's reasons for the raid remain unknown, it has been read as a deliberate attempt to rein in the media after months of criticism, from its defeat in the constitutional referendum in November 2005, to the Anglo Leasing corruption scandal and the highly publicized tantrums of the First Lady. The Standard group was not the only media outlet criticizing the government, but the fact that it is owned by former President Moi meant that its criticism came across as highly politically charged. At the time of the raid, internal security minister Michuki reportedly said: "*If you rattle a snake, you must be prepared to be bitten*". And indeed, the raid has had a chilling effect on the Kenyan media, sending the message that it can effectively be censored at any time.

- **Post-election violence – broadcast ban and attacks on journalists (2007/08)**

Following the results of the disputed December 2007 general elections, which are widely thought to have been rigged, nationwide unrest led the Kenyan government to impose a month-long ban on live news broadcasts in the interests of security and public order. The fear was that the media could help fan the violence into a Rwanda-type crisis. And indeed, a number of local radio stations, particularly vernacular ones were later accused of stoking tensions through the use of ethnically loaded language. Despite protests by some media groups, others were apparently happy to go along with the ban.

However, some journalists reportedly now feel that they failed in their duty to inform the public objectively: it is still not known who won the elections. By self-censoring, the media ended up being complicit in covering up the truth. The media black-out – which the authorities later admitted had been unlawful - may also have legitimized attacks on journalists covering post-election violence, particularly violence by the police, including arrests, shots fired and death threats. Journalists and human rights defenders were also subjected to threats by armed groups accusing them of "betraying the tribal cause" for commenting on elections and speaking out against post-election violence.

- **Legal harassment**

A number of laws from the Colonial era or the early days of Independence are still routinely used to restrict and silence journalists and their publications. These include laws governing civil and criminal defamation, the Official Secrets Act and the Books and Newspapers Act.

Although Kenya eliminated its insult and sedition provisions in 1996-7, it continues to prosecute journalists for **criminal libel**. Although the law was not used at all under Moi, since Kibaki came into power in 2002 journalists have been charged or threatened with criminal libel on a number of occasions. Kamau Ngotho of *The Standard* was charged with criminal defamation in January 2005 for an article on the connections between high-level business and political circles in Kenya. Following an international outcry the charges were dropped a few days later and the Attorney General reportedly promised to revoke the law. However, in March 2007 the same law was used to sentence Mburu Muchoki, editor of *The Independent* newspaper, to one year in prison for allegedly

libelling the Justice and Constitutional Affairs Minister. Muchoki lodged an appeal but was released before it was heard as a result of a general presidential pardon, having served three months of his sentence.

A major obstacle to investigative journalism is the **Official Secrets Act**, which is used as a catch-all pretext for civil servants to refuse to provide information which they say impinges on national security. As a result, journalists have to resort to leaked information, thereby risking prosecution by the authorities, which seem more interested in identifying the source of the leak than whether or not the revelations are true. For example, in August 2009, four journalists for *The Star* newspaper were harassed by police to reveal sources for a story on Kenyan antiterrorism police having lost files on an alleged al-Qaeda member.

A private members bill on the right to freedom of information has been tabled for discussion for years but there appears to be little political will to enact it. Among the myriad reforms required in the country, it is apparently not seen as a priority. However, without a freedom of information law, the special tribunal to try those responsible for crimes relating to the 2007 general elections will prove toothless, a fact recognised by the Waki Commission in its recommendations.

(Civil defamation and the Books and Newspaper Act are discussed below.)

- **Other forms of intimidation and attack**

The threat of prosecution is often used by the authorities to pressurize media houses into dismissing journalists who fall foul of those in power. Sometimes, however, laws are bypassed in favour of a more direct approach. For example, a senior crime reporter for *The Nation* newspaper who wrote exposés of police corruption was allegedly warned by the former police commissioner to refrain from criticising the police but refused to comply. The commissioner then pressurised the newspaper management until the reporter was forced to resign in February 2007; he is reportedly now unable to find work in the mainstream media.

Another journalist who exposed police corruption, **Francis Nyaruri** of the independent newspaper *Weekly Citizen*, was abducted and brutally murdered in January 2009. Prior to his disappearance, Nyaruri had written a series of articles exposing financial and other malpractice by the local police department, including their alleged involvement in a public transport racket. He had reportedly received threats from police officers in the area and had told friends and colleagues that he feared for his life. Nyaruri's family lawyer has reportedly been subjected to anonymous death threats and police harassment, while a policeman involved in the investigation has reportedly been threatened by fellow police officers. The murder remains unsolved.

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Such threats act as a serious disincentive for journalists delving into controversial subjects. "*The level of investigative journalism [in Kenya] has sunk to the lowest ever level,*" comments one journalist and media campaigner. This self-censorship leads to

tremendous frustration among journalists, increasing the risk that they will abandon their position of neutrality altogether and opt for the safer route of avoiding challenging the status quo.

The alternative press under pressure

It might be hoped that Kenya's alternative press, freer from the interests of shareholders, politicians and advertisers, would be better able to maintain a commitment to hard-hitting investigative journalism. Unfortunately, not only does it suffer from many of the same problems listed above, but there is also some evidence to suggest that those who write for publications outside the mainstream press are more likely to be harassed by the authorities. For example, *The Weekly Citizen*, the newspaper which employed murdered journalist Francis Nyaruri (see above), has been subject to regular harassment since 2001, including several police raids, arrests and prosecution. *The Independent* was also raided in 2004 and 2006 before its editor Mburu Muchoki was jailed for criminal libel in 2007 (see above).

Above all, the alternative press is most affected by the **Books and Newspaper Act**, another Colonial-era law which requires publishers to register with the government, pay a libel bond and submit copies of every publication to a government registrar at their own expense. President Moi introduced an amendment to the Act in his final days in power in 2002 which raised the libel bond payable one hundredfold - from 10,000 shillings (US\$133) to 1m shillings (US\$13,280) - and penalised vendor and distributors who fail to establish whether the publishers of every publication they sell have duly registered and paid the bond. Penalties for most offences range from fines of up to 20,000 shillings (US\$265) and/ or imprisonment for up to one year. But publishers who print without having paid the libel bond face a maximum 1m shilling (US\$13,280) fine and/ or up to three years in prison for a first offence and up to five years in prison and a bar from publishing for a second or subsequent offence.

Moi's amendment was presented as a way of eradicating the "gutter press" and was read as a means of silencing public criticism in the run-up to the 2002 general elections when he stepped down after two decades in office. The Act has successfully restricted smaller, alternative publications which are hardest pushed to meet its financial requirements. The difficulty of finding a publisher willing to post the bond prevents new publications from getting off the ground and ties established ones to existing printers who can take advantage of the situation to raise their prices unreasonably. This arguably amounts to prior censorship of those with limited financial means.

Despite the Act's association with the Moi era, the Kibaki administration has kept the law in force. The owners of a number of publications are deliberately not complying with the law and intend to bring a constitutional challenge if prosecuted. However, according to PEN's information, the Act is now under review. A workshop held in October 2009 under the aegis of the Registrar General reportedly agreed on the need to review various provisions of the Act that impact on the operations of publishers.

The internet and blogging offer a way round these restrictions. However, they are not yet a viable alternative to traditional media in Kenya given the high cost and relatively low levels of internet access (an estimated 1m users among a population of approx. 38.5m).

De facto bans on critical books

The readership for books in Kenya is extremely limited, with the largest market by far school textbooks, which greatly restricts the type of texts which are considered commercially viable. Sometimes, however, books are in demand but are not available - not because they are banned but due to fear of litigation. *It's Our Turn to Eat* by British journalist Michela Wrong - which tells the story of Kenya's first anti-corruption czar turned whistle blower John Githongo, who fled Kenya after discovering that his ministerial colleagues were implicated in the US\$1.25bn corruption scam known as Anglo Leasing - stirred up enormous interest in Kenya after being serialised in *The Daily Nation* in early 2009. Many rushed to buy the book only to find that booksellers were refusing to stock it, citing past civil libel cases which had implicated booksellers as well as authors and publishers.

The precedents also involve books by British authors. The key one, the 1999 *Dr Iain West's Casebook* by pathologist Dr Iain West and crime reporter Chester Stern, accused Nicholas Biwott, then Kenya's Minister for Tourism, Trade and Industry, of corruption and linked him to the 1990 murder of the former Minister for Foreign Affairs, Dr Robert Ouko. Biwott sued the authors and publishers, Clays Ltd and Little Brown and Company, as well as two of Kenya's biggest booksellers, The Bookpoint Ltd and Bookstop Ltd. The booksellers settled out of court with a payment of 10m shillings (US\$132,802) and were ordered to publish an apology in the media. The publishers chose to go to court and in 2000 were ordered to pay 30m shillings (US\$398,406) - Kenya's largest ever libel payout - as well as being banned from selling the book in Kenya again. In the other main case, relating to Andrew Morton's 1998 biography of Moi, *Making of an African Statesman*, the plaintiff - a judge mentioned in the book who presided over the judicial enquiry into the murder of Dr Robert Ouko - was awarded 2.25m shillings (US\$29,880), increased to 6m (US\$79,681) on appeal.

As a result, Kenyan booksellers have refused point blank to sell Wrong's book and it has been left to the media and civil society to find ways allowing the public access to her exposé of grand corruption in their own country. *The Star* distributed copies of the book for free while Kenyan PEN has organised public readings in Nairobi, Mombasa and Kisumu. "*The fact that] the book is so successful and everyone is talking about it and yet no one can get it tells you a lot about the state of freedom of expression in Kenya,*" comments a well known columnist. The Wrong case shows that certain books are effectively banned in Kenya, not by the government but by the courts - but of course it is the government that decides which laws it keeps on the statute books. Rumours of libel suits against Wrong are already circulating.

Civil society under attack

As with the alternative press, the space for civil society, which has emerged as a strong voice in Kenya since the mid-Nineties, is being squeezed. In particular, the recent murder

of two human rights defenders has shocked civil society. On 5 March 2009, Oscar Kamau Kingara and John Paul Oulu (GPO-Oulo) of the Oscar Foundation Free Legal Aid Clinic were shot dead in their car at rush hour in the middle of Nairobi. Kingara and Oulu had authored a number of reports on human rights violations, in particular illegal police killings and other abuses against alleged members of the Mungiki criminal sect; Oulo also wrote articles on social and political issues for a blog. In February 2009, the two had spoken out against police abuses in Parliament and had acted as a source for the Alston report on extra judicial killings. Just a few hours before the shooting, a government spokesperson had accused Oscar Foundation of being a front and fundraising body for the Mungiki. Prime Minister Odinga issued a statement saying that the police were suspects in the murder of the two activists. However, almost seven months later, the crime remains unsolved.

The death of Kingara and Oulu has had serious repercussions for civil society, generating fear and confusion. A staff member of the state funded Kenyan National Human Rights Commission who was due to meet with the Oscar Foundation on the day they were murdered left the country for fear of reprisals. Dozens of other activists who had met with Alston or worked with the Oscar Foundation have reportedly also gone into hiding. Some writers and activists believe that the killings were a deliberate attempt to weaken civil society and to make people afraid of speaking out against police and other abuses. They point to the fact that the murders took place the same week that the Alston report was published and the same day as mass demonstrations across Nairobi by the families of alleged Mungiki members who have been killed and disappeared. There is fear that this is part of a concerted attempt by the Kenyan authorities to smear human rights defenders by associating them with illegal armed groups and thereby justify retaliation, no matter how brutal, and the suspension of due process.

From the page to the street: attacks on writers exercising freedom of assembly

The muzzling of the media and paralysing of civil society groups leaves it up to solitary individuals to raise difficult issues that would otherwise remain be sidelined. As seen above, journalists who rock the boat are liable to find themselves on the wrong side of the law or subject to other forms of harassment. Some writers, frustrated by the lack of change under Kibaki's administration and particularly by developments since the post-election violence in 2007-08, have taken to voicing their protests about social and political issues on the street as well as on the page.

Being known as a writer or commentator is a double-edged sword: it provides you with status and therefore some protection from attack but it also means you stand out and may be more likely to be targeted by the authorities. A number of writers have been arrested for taking part in peaceful protests since 2007, including several members of Kenyan PEN. Assault in police custody is common. For example:

- In June 2009, the Secretary General of the Kenya Union of Journalists (KUJ) and another journalist, a member of both the KUJ and Kenyan PEN, were reportedly beaten by plainclothes policemen during public Celebrations for Madaraka (Kenya self government) Day before being arrested. They have been denied the right to lodge a complaint against the police while the court case is ongoing.

- The President of Kenyan PEN has been arrested on four separate occasions between July 2007 and September 2009. On 18 February 2009, she and another Kenyan PEN member were detained while protesting against the alleged corrupt sale of maize by government operatives to neighbouring countries at a time of famine in Kenya, and were assaulted and threatened with death while in police custody. Both required hospital treatment following their release on bail and were denied the right to make a complaint about the senior police officer who attacked them.
- In December 2008, the two directors of the web-based anti-graft and pro-transparency campaigning organisation Mars Group were reportedly arrested and illegally detained without charge for three days.
- A member of Kenyan PEN was arrested three times between July 2007 and July 2008 for taking part in peaceful demonstrations against government and police policies and on one occasion was allegedly also assaulted.

The charges brought in these cases are generally “unlawful assembly” or “breach of the peace” (Sections 78 and 94 respectively of the Penal Code); the former carries a maximum penalty of one year in prison if convicted and the latter a fine and/ or six months in prison. Yet the right to freedom of assembly and association is protected under the Kenyan Constitution (section 80). Activists report that since the post-election violence, there has been a lack of clarity about the legality of public demonstrations. In theory the law requires the organiser only to notify the police before the protest takes place. However, in practice the police often deny permission for it to be held – despite not having the power to do so - citing interests of national security, and later pick up activists who go ahead with the protest. Sometimes the charges are dropped but other cases can drag on for years, creating a drain on protesters’ finances and time and restricting their movements due to the need to appear regularly in court.

A number of writers and activists also believe that their communications and movements are the subject of state surveillance: their mobile phone tapped, their emails monitored, their meetings spied on and their public meetings infiltrated. For example, Mars Group has to employ several fulltime staff members and reply on multiple servers both in Kenya and abroad to deal with the constant hacking of its website.

Recommendations

International PEN, Kenyan PEN, the International Publishers Association and Index on Censorship call on the Kenyan state to:

- Carry out a full and impartial investigation into the murders of journalist Francis Nyaruri and human rights defenders Oscar Kamau Kingara and John Paul Oulu in early 2009, and ensure that those responsible are brought to justice;
- Respect the right of writers, journalists and human rights defenders to freedom of expression, assembly and association and other fundamental rights protected under national and international law, and cease all forms of harassment against them, including arrests, detention, assault, and the use of the legal system to impede their work;

- Ensure that any crimes against writers, journalists and human rights defenders by state or non state actors are properly investigated and resolved;
- End the practice of conducting raids on media outlets, and carry out a public enquiry into the raid on The Standard Group in March 2006 in the name of national security;
- Refrain from imposing bans on the media, as occurred following the contested 2007 general elections;
- Repeal legislation used to repress writers, journalists and publishers, including the laws governing criminal and civil libel and the Books and Newspaper Act. In particular, defamation should be decriminalised in line with promises made by the Kenyan State in 2005, the damages that can be awarded in civil libel cases should be capped, and members of the government should be discouraged from bringing such cases. The need for the Books and Newspaper Act should be reviewed, in particular the requirement for publishers to pay a libel bond, and the extremely severe penalties for failing to do so.
- Pass as a matter of urgency a comprehensive Freedom of Information Act as an essential tool in the fight against corruption and impunity, as recommended by the Waki Commission;
- Pending the comprehensive police reforms recommended by the Waki Commission, clarify the procedure for notifying the police ahead of public demonstrations and ensure that both the police and demonstrators are aware of their respective rights and responsibilities.