



# KENYA

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## **KENYA'S UNFINISHED DEMOCRACY: A Human Rights Agenda for the New Government**

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## I. SUMMARY

Kenya is at a crucial turning point in its history. On December 27, 2002, Kenyans will go to the polls to elect a new president. The retirement of President Daniel arap Moi after two decades, the upcoming multiparty election, and a new draft constitution awaiting enactment carry many implications for human rights in Kenya.

As power struggles and backroom deals among various political parties dominate Kenyan politics, there is little discussion of human rights, and few of the candidates contesting the current election have presented a detailed agenda for improving rights and governance in the country. Kenya's new draft constitution, released in September 2002, aims to remedy many of the ills of the current system by creating more accountability and a balance of powers. However, the fate of the new constitution is far from secure.

There is a strong likelihood that human rights concerns will be overlooked by the new government. In the aftermath of the election, there will be a pressing need for Kenya's new leaders to act on the following human rights concerns:

- **Personal Security**

Kenyan citizens are vulnerable to police brutality. Despite official commitments to rid the police force and prisons of unlawful conduct, the use of torture, extortion, forced confessions, and extra-judicial killings continues. Underpaid, poorly trained police officers shoot to kill fleeing suspects. Prosecutions of offending police officers are rare, and inquiries by human rights groups meet with little or no government response. In Kenya's prisons, beatings, torture, and inhuman living conditions have led to the deaths of inmates.

Several powerful politicians have exploited the poverty and boredom of slum youths by recruiting them into ad hoc vigilante gangs to terrorize people at political rallies and spread fear and violence in the slums. These gangs have been officially banned, but the ban has not been enforced.

- **Justice**

The foundation of any democracy rests on the right to a fair trial. But in Kenya the justice system is severely compromised by endemic corruption, incompetence, and inefficiency. The president has enormous power over the appointment and discipline of judges, which allows for executive interference in court cases. Long court delays caused by understaffing violate Kenyans' right to due process and a speedy trial. Corrupt judges should be removed and Parliament should be involved in judicial appointments and discipline.

- **Assembly**

Generally, the atmosphere at public meetings is much freer than in the past. For example, the donor sponsored National Civic Education Program workshops proceeded largely without incident. But activists attempting to raise awareness about the grabbing of public land and the rights of farmers claim the police often harass them, and some of them have been arrested on trumped up murder charges. Also, the police and local administrators sometimes selectively enforce the right to assembly by, for example, blocking certain opposition rallies in areas dominated by the ruling Kenya African National Union (KANU) party. As the election approached, several campaign rallies were disrupted, sometimes violently.

- **Free and Fair Elections**

Politically motivated ethnic clashes have occurred in this election season, but they have not been as widespread as they were in 1992 and 1997. Otherwise, the electoral process is considerably more transparent today than in the past. In the run-up to the current election, some voting procedures have been clarified, and voter registration has gone fairly smoothly, although youths in some parts of the country claim that they have been offered money in exchange for their registrations cards. In October 2002, Parliament passed the Presidential and Parliamentary Elections (Amendment) Act, permitting ballots to be counted in polling stations. In past elections, there were allegations that the practice of transporting

ballot boxes to central locations created opportunities for rigging. The president has yet to sign this act into law, but Human Rights Watch urges him to do so before the next election.

Human rights groups are concerned that Kenya's parliamentary constituencies represent vastly unequal populations. While many democratic nations, including the U.S., lack proportional representation, there is concern that the size and distribution of Kenya's constituencies heavily favor the ruling KANU party and encourage tribal animosity.

- **Freedom of Expression**

The Kenyan media regularly presents critical views of the ruling party, but press freedom is still limited in numerous subtle ways. The notorious sedition laws were scrapped in 1997, but since then, many newspapers, magazines, and bookstores have been charged with defamation and libel, often, but not always, by KANU officials. The large awards granted to plaintiffs in defamation cases intimidate the press, and contribute to self-censorship. Because Kenya has no freedom of information laws, journalists are often unable to obtain government documents that could strengthen their cases in court.

Outside of Nairobi, the media is largely government-controlled and opposition voices are seldom heard. For most Kenyans the only source of local news outside of the capital is the Kenya Broadcasting Corporation, whose reporting has tended to favor KANU. Radio and TV stations seeking to obtain licenses to broadcast beyond the capital face bureaucratic obstacles that are, so far, insurmountable. The urban-rural gap in access to information denied millions of rural Kenyans unbiased election information as the election approached. Journalists reporting on political developments also complain that they are sometimes threatened and beaten by the police or by candidates' thugs. A new media law, passed in May 2002, imposed exorbitant fees on all publications, and this could handicap many small news outlets.

- **Due Process and Protection of Livelihoods**

The average Kenyan is now poorer than he was twenty years ago, increasingly deprived of health care, education, and an adequate livelihood. Much of Kenya's widespread poverty is a direct consequence of government inaction on key policy issues, including corruption, land adjudication, and workers' rights. It is also the result of politically motivated ethnic clashes and the looting by government officials and their collaborators of public resources, including the treasury, government agencies, parastatals, and public land. None of these offenses have been seriously prosecuted.

Many Kenyan workers are subject to arbitrary harassment by the police and local authorities because the government has failed to establish clear policies to govern the rights of workers in the informal economy. Millions of Kenyans earn their living in the informal sector, as street hawkers, matatu touts, kiosk vendors, prostitutes, and casual laborers. Recently, many hawkers and kiosk owners have been harassed by police and city council *askaris* (guards), who extort bribes, destroy their property, steal their goods, or hold them in prison until they manage to bribe their way out. The new government must curb the abuses of police power and create clear policies to govern the informal economy.

Democracy in Kenya is inconsistent. Many human rights are guaranteed under the law, but the laws are selectively enforced. While diverse political points of view are increasingly tolerated, the nation's fragile institutions are continually undermined by a closed system of patronage and graft. The government has established numerous commissions to investigate major cases of corruption, the political manipulation of ethnic violence, the grabbing of public lands for use as political patronage, and other issues. However, few reports of these investigations have been released to the public, and no one has been held accountable for major crimes. As a result, the international community sees Kenya both as an island of stability in a war-torn region and as a mire of corruption and poverty.

In many respects, Kenya's civil institutions are among the freest in Africa. During the late 1980s and 1990s, activists, lawyers, religious leaders, and foreign donors forced the Moi government to reverse many of its most repressive policies, including detention without trial, the ban on political parties, and the sedition laws that

silenced critical voices in the media. Today, Kenya's fractious Parliament sometimes passes laws the president dislikes. Civil society is vibrant, with many non-governmental organizations (NGOs) engaged in political and social issues. Major Kenyan newspapers are openly critical of the government. Dissidents continue to live relatively freely in the country. Many international NGOs and foreign governments have their regional headquarters in Kenya. Despite the corruption and high crime rates, many observers still see Kenya as a relatively peaceful hub in a troubled part of the world.

However, Kenya's emerging democratic institutions must continually struggle against the country's corrupt political system, largely based on patronage and ethnic alliances. Entrenched corruption has facilitated numerous human rights abuses, including the deprivation of the right to personal security, the right to a fair trial, and the right to a decent standard of living. It has also been used as a political device to manipulate elections and reinforce the power of local and national leaders. The plunder of state resources has helped the government cling to power, while reducing opportunities for health care, education, and employment. Ethnic clashes, election manipulation, police abuse, and judicial corruption have scared foreign donors and investors. One impact of corruption has been increased poverty, which, in turn, has led to greater demand for patronage resources. The result is a vicious cycle of corruption, poverty, and poor governance. In the past, most human rights violations in Kenya were aimed at lawyers, activists, and academics, but most victims today are ordinary poor people, who are not necessarily dissidents.

During the past ten years, some forty political parties have been established in Kenya, most of which are aligned with one or a small number of the country's roughly forty tribes. To date, Moi's Kenya African National Union (KANU) has been the only party able to attract broad support from diverse regions and ethnic groups. In previous elections, opposition candidates split the majority of the votes, and KANU won easily. But in the summer of 2002, thirteen political parties came together to form the National Alliance Party of Kenya (NAK). At around the same time, Moi chose as his preferred successor Uhuru Kenyatta, the politically inexperienced son of Kenya's first president, Jomo Kenyatta, and Moi has been actively campaigning on Uhuru's behalf. Moi's choice angered some KANU ministers and, in protest, they formed a coalition within KANU known as Rainbow. Members of Rainbow had hoped that KANU's presidential candidate would be chosen by secret ballot at the party's nominating convention. When Moi refused to permit this, the Rainbow ministers abandoned KANU and joined the opposition Liberal Democratic Party, which merged with NAK in October 2002 to form a super-opposition alliance known as the National Rainbow Coalition (NARC), with Democratic Party Chairman Mwai Kibaki as its single presidential candidate.

What Kenya needs are stronger governmental and non-governmental institutions that can ensure greater transparency and guarantee basic human rights. While Kenya's foreign donors eagerly look forward to a change of government, many Kenyans recognize that the greater challenge is to create a just and open system of governance based on checks and balances and separation of powers. Kenya's new draft constitution aims to form the basis for such a system. The existing constitution was drawn up with the guidance of British advisors in the early 1960s. In the decades after independence, the constitution was amended to strengthen the powers of the president at the expense of other institutions. The change in leadership and the new draft constitution provide a unique opportunity for Kenya to rectify this imbalance and address longstanding human rights concerns. Human Rights Watch urges the new Kenyan government and the international community to embrace this opportunity.

## II. BACKGROUND

Kenya's last leadership transition occurred in 1978, when then Vice-President Moi took power upon the death of Jomo Kenyatta, leader since the country's independence from the British in 1963. Once in office, Moi immediately clamped down on dissent. In the 1980s and early 1990s, many courageous lawyers and activists who were critical of the government were harassed and jailed or fled into exile, and the press was tightly controlled. A coup attempt by the Kenyan air force in August 1982 was aborted. In 1982, the constitution was amended to make KANU the only legal political party. In 1987, it was amended again to give Moi the power to fire senior judges and civil servants. Both amendments were repealed in the 1990s, but the executive branch continues to wield

considerable control over the judicial and legislative branches of government through a system of patronage and threats. Throughout his tenure as president, Moi has rewarded certain individuals with government posts, jobs in government-owned companies known as parastatals, tracts of land, and other resources. This patronage has undermined the economy and the rule of law. Many Kenyans perceive that patronage has been bestowed most lavishly on members of Moi's Kalenjin tribe. This imbalance comes at the expense of Kenya's some forty other tribes and contributes to ethnic polarization. While much of Kenya's worst repression seems to be part of its past, corruption has helped to sustain a culture where injustice is often tolerated and protection for human rights is weak.

It was not until the end of the 1980s and the collapse of the Berlin Wall that foreign donors began to take a greater interest in democracy in Kenya and started funding local human rights and pro-democracy groups. There are now many such groups in Kenya; they monitor abuses, hold press conferences, and maintain an uneasy relationship with the government.

### **The 1992 and 1997 Elections**

According to Kenya's constitution, the president must call an election at least once every five years. However, throughout the 1970s and 80s, Kenya's elections were widely held to be shams, because there was no official opposition, ballots were not secret, and there were other voting irregularities. By 1991, pressure from domestic groups and foreign donors led to the legalization of political parties and the restoration of voting by secret ballot. In addition, the president's tenure was limited to two terms, meaning that even if Moi won the next two elections, he would be required by law to step down in 2002.

Shortly before the 1992 election, numerous opposition parties emerged, the largest and best organized of which was the Forum for the Restoration of Democracy (FORD). However, the leaders of FORD could not agree on a single presidential candidate, and the party split into three: FORD-Kenya, FORD-Asili, and the Democratic Party. In the first multiparty election since independence in 1992, Moi won easily against a divided opposition.

Before and after the election, there was widespread politically motivated ethnic violence, especially in the contested Rift Valley province. Hundreds of people were killed and hundreds of thousands of potential opposition voters were effectively disenfranchised when they had to flee from their homes. To date, tens of thousands of people remain displaced from their Rift Valley farms, and their land remains occupied by government supporters.<sup>1</sup> The clashes are believed to have been instigated by powerful individuals within KANU, who took advantage of a long history of land disputes in the region to stoke tribal hostilities. The politicians promised members of the Kalenjin, Maasai, and other pro-KANU tribes that they would install a policy of "majimboism," which roughly translates as federalism, but is in fact a form of ethnic cleansing. Under majimboism, land is allocated based on ethnic identity. Members of tribes suspected of being opposition supporters were forced to leave their land, even if they held title deeds and had lived there for many decades. In 1992 and 1993, gangs of Kalenjin and Maasai youths attacked members of other tribes, targeting in particular the Kikuyu, the Luhya, and the Kamba, who were suspected of being opposition supporters. The youths looted their property, set their houses on fire, and killed several hundred people.<sup>2</sup>

The violence surrounding the elections did not prevent the many civil society groups that emerged in the 1990s from using mass demonstrations and legal challenges to force the government to implement many important

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<sup>1</sup> Human Rights Watch/Africa, *Divide and Rule: State Sponsored Ethnic Violence in Kenya* (New York: Human Rights Watch, 1993); Human Rights Watch/Africa, *Failing the Internally Displaced: The UNDP Displaced Persons Program in Kenya* (New York: Human Rights Watch, 1997).

<sup>2</sup> David Throup and Charles Honsby, *Multiparty Politics in Kenya*, (Athens, OH: Ohio University Press, 1997); Jacqueline Klopp, *Electoral Despotism in Kenya: Land Patronage and Resistance in the Multiparty Context*, unpublished dissertation thesis, Department of Political Science, McGill University, Montreal, 2001; Human Rights Watch, *Playing with Fire: Weapons Proliferation, Political Violence and Human Rights in Kenya* (New York: Human Rights Watch, 2001); and *Report of the Judicial Commission appointed to inquire into tribal clashes in Kenya*. The Honorable Mr. Justice A.M. Akiwumi. Government of Kenya. Submitted August 1999. Released October 2002

reforms. The number of political detentions fell, small presses began publishing critical views of the government, and members of Parliament began to speak and vote more freely.

In the second multiparty elections of 1997, Moi again won easily against a fragmented opposition. Again, KANU politicians manipulated ethnic tensions to intimidate and disperse ethnic groups perceived to support the opposition. On the coast near Mombasa, KANU politicians engineered an organized “cleansing” before the election to evict Kikuyu and Luo migrants. Armed gangs killed hundreds of people in politically instigated attacks on homes and businesses. Similar clashes recurred in Rift Valley province.

Responding to public anger, KANU and the opposition came together to begin talks on reforming Kenya’s constitution, which still contained a number of repressive colonial laws and which had been amended by both Kenyatta and Moi to buttress their semi-authoritarian state. Parliament reached a compromise known as the Inter-Party Parliamentary Group (IPPG) reforms. These reforms included the repeal of the laws against sedition that had been used to intimidate the press, the creation of an Electoral Commission that included opposition representation, and the replacement of laws requiring permits for public rallies with a simple requirement that the police be notified of planned rallies in advance. Political parties that had been denied registration would now be registered, and the state broadcasting corporation would now be required to give equal time to all political points of view. In addition, the twelve nominated MPs would now be appointed not by the president alone, but by each political party according to its share of the popular vote. The parties also eventually agreed to undertake a comprehensive constitutional review following the election.

### **The 2002 Election**

The run-up to the December 2002 election differs in many respects from the last two elections. There has been far less violence and internal displacement this time, although clashes have occurred in Trans Mara, Isiolo, and other places. Violence has also broken out at several political rallies. Moi has been vigorously campaigning on behalf of his preferred successor, Uhuru Kenyatta, the son of former President Jomo Kenyatta. Uhuru is a young and politically inexperienced businessman appointed to Parliament by Moi in 2001 and then quickly promoted to Minister for Local Government. He belongs to the Kikuyu tribe, the largest in Kenya. In the 1960s and 1970s, the Kikuyu provided strong support for Uhuru’s father. In choosing Uhuru, Moi may have been offering an olive branch to the Kikuyu, who, during the past twenty-four years, have been victimized in ethnic clashes, have faced job discrimination in the civil service and parastatals, and have seen their businesses suffer, along with the rest of Kenya’s economy.

Moi’s choice of Uhuru Kenyatta angered some KANU ministers, who had hoped that the new candidate would be chosen by secret ballot at the party’s nominating convention. When Moi refused to permit this, the ministers formed a breakaway faction within KANU known as the Rainbow Coalition. Rainbow was led by Raila Odinga, former head of the largely Luo National Development Party, which had only recently merged with KANU. In October 2002, the Rainbow Coalition finally abandoned KANU and joined an opposition political party known as the Liberal Democratic Party (LDP). Meanwhile, most of the other main opposition parties were determined to avoid splitting the vote. Thirteen opposition parties, representing many different geographical regions and all of Kenya’s major tribes, came together to form the National Alliance Party of Kenya (NAK). In October 2002, NAK and the LDP merged to form a super-opposition alliance known as the National Rainbow Coalition (NARC), with Democratic Party Chairman Mwai Kibaki, also a Kikuyu, as its single presidential candidate, and Odinga as candidate for prime minister.

Even if NARC wins, it will not necessarily represent a significant break with the past. Many members of NARC, including former Vice President George Saitoti and Kibaki (himself a former vice-president under Moi) are past members of KANU; some have been implicated in serious economic crimes and human rights abuses, including the politically motivated ethnic clashes. As the election drew near, more and more KANU MPs and officials defected to NARC. This is why Kenya needs more than new leadership. It needs systematic reform on a grand scale, which is why the fate of the draft constitution may be of even greater potential significance than the election.

## **Moi's Legacy: A Nation Impoverished by Corruption**

During the past twenty-four years, Kenya has evolved a system of governance based on highly centralized and personalized executive power. Officials appointed by the president and accountable only to him have more power than elected officials, giving the president and his ruling circle enormous control over the police, judiciary, legislature, and local administration, from his statehouse in Nairobi down to the level of village chief.

The flight of foreign investors wary of corruption and the plunder of public resources that might have been invested in development have plunged Kenya into a vicious cycle of patronage, corruption, and deepening poverty. Kenya's economic growth rate fell to less than 2 percent last year, the lowest in the region.<sup>3</sup> The average Kenyan was poorer in 2002 than he was two decades earlier, and more than half the population lives in poverty. Deteriorating health services are unable to deal with the nation's considerable health burden, including worsening epidemics of HIV and tuberculosis. School enrollment and matriculation rates are now lower than they were ten years ago. Half of Nairobi's population of 3 million people lives on 6 percent of the land in shantytowns, and poverty is now increasing faster in urban than in rural areas.<sup>4</sup>

According to a recent parliamentary report on corruption, bribery occurs in virtually every sector of society, from government ministers, the judiciary, the police, health services, and local and provincial authorities.<sup>5</sup> It is ironic that levels of corruption may well have increased since the introduction of multiparty elections and other political reforms in the past decade. International and domestic pressure for reform have made it more difficult for Kenya's leaders to consolidate power through conventional repression. As a result, they may be turning to bribery, patronage, and theft of public funds with even greater zeal than before.<sup>6</sup>

During the past decade, a spate of corruption scandals have cost the Kenyan people, many of whom are hungry and lack adequate shelter, health care, and clean water, billions of dollars. The numerous inquiries and commissions that have been set up to investigate these scandals have produced no reports or recommendations, let alone convictions or reparations. In the early 1990s, shortly before the first multiparty elections, the Treasury created an illusory explosion of wealth in Kenya by printing billions of shillings. The resulting inflation impoverished millions of rural people. In the infamous "Goldenberg scandal" of the early 1990s, more than U.S.\$100 million was stolen from public coffers when a politically connected businessman received export compensation for diamond jewelry and gold that apparently did not exist. Several Treasury and KANU officials have been implicated in the case, but no reports were ever made public, and no one has been held accountable.<sup>7</sup> Around the same time, millions of shillings disappeared from the National Social Security Fund. Again, no one has been held accountable.

Later in the 1990s, large amounts of imported sugar and maize were reportedly smuggled into the country duty-free.<sup>8</sup> Before Kenya joined COMESA (the East and Southern African Common Market) in the mid-1990s, food imports were subject to very high duties and were very expensive. The smuggled goods were sold at the same prices they would have fetched had they been subject to duties, but it is not known where the profits from these sales, estimated in the millions of shillings, went.<sup>9</sup>

Perhaps the most widespread and disturbing form of corruption is the illegal appropriation of public land by government ministers, other politicians, senior civil servants, and their relatives. Thousands of people have been displaced by the illegal appropriation of huge tracts of land that once served as pastures, gardens, villages,

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<sup>3</sup> Extensive corruption, weak rule of law, and escalating insecurity are responsible for Kenya's worsening poverty, and poor governance is the key reason for Kenya's slow 1.8 percent growth rate, according to the United Nations Economic Commission for Africa's annual report, issued in July, 2002.

<sup>4</sup> Human Rights Watch interview with Makhtar Diop, country director, Kenya, Eritrea and Somalia, The World Bank, Nairobi, September 3, 2002.

<sup>5</sup> Republic of Kenya, *Report of the Parliamentary Anti-Corruption Select Committee*, May 2000.

<sup>6</sup> Klopp, *Electoral Despotism in Kenya*; Republic of Kenya, *Anti-Corruption Select Committee*.

<sup>7</sup> "Pattni Loses Bid to Stay Sh22b Goldenberg Cases." *The East African Standard* (Nairobi), April 11, 2002.

<sup>8</sup> Republic of Kenya, *Anti-Corruption Select Committee*.

<sup>9</sup> *Ibid*; Robert Shaw, "Should we brace for economic plunder?" *The Nation*, September 1, 2002.

playgrounds, and other public spaces for generations of poor people. Such land transactions are often highly secretive, and procedures required by law are rarely followed. According to the Parliamentary Select Committee Report on Corruption in Kenya, “The irregular allocation of Agricultural Development Corporation farms as well as forests and research stations to well connected individuals has been shrouded with secrecy and corruption. There has been no proper valuation, advertising and tendering before disposal and Kenyans have been badly fleeced.”<sup>10</sup> In 1999, the government established the Commission of Inquiry into Land Law and Policy, but it had produced no reports or recommendations as of October 2002. Its chairman, former Attorney General Charles Njonjo, refused to speak to Human Rights Watch.

In August 2002, 256 million shillings disappeared from the National Social Security Fund and ended up in a dubious account in a private bank. At the moment, no one seems to know where the money is, although a stockbroker has been arrested and is being questioned by the police.<sup>11</sup> At first, the authorities tried to silence a whistleblower who reported the missing money in the first place. In September 2002, Federation of Kenya Employers Chairman Walter Mukuria was arrested and held for several hours for questioning in the disappearance of the money.<sup>12</sup>

In September 2002, a group of Kenyan investors attempted to buy Kenya Re-Insurance Company, a parastatal slated for privatization, for about half its true value. Had the sale gone through, it would have cost the people of Kenya many millions of dollars, and created havoc in the insurance industry. The deal was suspended, and now a Zimbabwean re-insurance company has come in with a much better offer for the company.

The government’s failure to deal seriously with high-level corruption has not only cost Kenya billions of dollars of lost revenues from within Kenya itself, but also nearly \$350 million in stalled financial support from the International Monetary Fund (IMF) and World Bank, and bilateral aid from donor nations. Donor support was withdrawn after the Kenyan Parliament failed to pass legislation to establish a permanent, independent, anti-corruption authority in October 2001. Subsequently, the government did establish a Parliamentary Select Committee on Corruption, as well as an Anti-Corruption Police Unit and three anti-corruption courts. In addition, two new bills are under consideration in Parliament: a Public Officers’ Code of Ethics; and a Corruption Control Bill setting up a new anti-corruption authority.

These moves did not satisfy the international community. Nevertheless, the chairman of the Anti-Corruption Police Unit advisory committee, Tom Owuor, believes this new institution is working well. It has received good cooperation from the police department and has begun to recommend cases for prosecution. However, the unit is not independent of government control, and it has mainly dealt with only low-level graft cases so far, such as the extraction of bribes by the traffic police. To prosecute cases, the unit needs the consent of the attorney general, who has not prosecuted any significant corruption cases in the past decade.<sup>13</sup> While critics dismissed the unit as “public relations,” it has begun a promising education program for police officers and ministry officials. Also, investigators have started to dig into corruption scandals in the Ministries of Finance, Health, and Roads and Public Works. The three anti-corruption courts have begun prosecuting cases, albeit minor ones.

### **Constitutional Reform**

Released in September 2002, Kenya’s new draft constitution aims to remedy many of the ills of the current system by creating more accountability and a balance of powers. Many observers told Human Rights Watch that the biggest obstacle to good governance in Kenya is that too much power is concentrated in the person of the executive. The nation’s institutions are answerable to the president, rather than to the Kenyan people. Kenya became a republic in 1964 with an executive president who was also the head of the government, the state, and the ruling party. The constitution was amended several times to give the president even wider-ranging powers,

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<sup>10</sup> Republic of Kenya, *Anti-Corruption Select Committee*.

<sup>11</sup> Washington Akumu, “Stockbroker suspended over \$3.1 million NSSF stock deal,” *The Nation*, October 18, 2002.

<sup>12</sup> “Anti-corruption police take over case of missing Sh256m,” *The Nation*, September 28, 2002.

<sup>13</sup> Attorney General Amos Wako did not respond to Human Rights Watch’s requests for an interview and written questions sent to him.

including, for example, the power to appoint and dismiss ministers and the vice-president. The constitution also changed what was originally a federal system to a unitary one. Currently, the president is also head of Parliament, which has a one-chamber National Assembly.<sup>14</sup>

Many other laws passed since independence increased the president's administrative power, particularly his control of provincial administration, so that today the president appoints all administrative officials down to the level of village chief. Only local councils are elected, but they have small budgets and relatively little power. Several important limitations on executive power were passed in the early 1990s, including a constitutional amendment restricting the president to two five-year terms in office, the legalization of political parties, and the repeal of the amendment permitting the president to fire judges. Even so, the president can still manipulate justice in every corner of the country.

The draft constitution proposes trimming presidential powers by giving Parliament more authority, including the ability to impeach the president. It would also create the post of executive prime minister. The prime minister and two deputy prime ministers would run the day-to-day affairs of government, and the president would become the symbol of the nation and guarantor of human rights. The document also recommends devolving power to locally elected officials and abolishing the powerful provincial administration, which is now appointed by the president. It would also distribute legislative power by creating a second chamber of Parliament.

The president's power currently is enhanced by a system of patronage and corruption. To address this, the new constitution would establish various new commissions to oversee different organs of government, including a Commission on Ethics and Integrity to oversee public servants, a Human Rights and Justice Commission, a Judicial Services Commission, and an improved and transparent Land Commission. Members of civil society, including under-represented groups such as women and the disabled, would sit on these commissions, and their oversight should strengthen the rule of law.

It remained to be seen whether the new constitution would be implemented, given the long history of government resistance. The constitutional review process got underway in 2000, when the government appointed the Constitution of Kenya Review Commission (CKRC), consisting of seventeen MPs and ten representatives from a civil society group known as Ufungamano—mainly religious leaders who had been pushing for constitutional reform for years. —The commission began soliciting the views of human rights groups and other NGOs, as well as ordinary Kenyans, about the reforms they wanted to see in the new constitution. Moi has repeatedly tried to block the constitutional review process, or at least delay it until after the 2002 election, through parliamentary maneuvers and secret meetings with members of the CKRC.<sup>15</sup>

In September 2002, two KANU-backed lawyers won an injunction to block the commission from presenting its proposals on judicial reform. Leaked documents indicated that the review commission had concluded, and a great many Kenyans who had participated in the review process agreed, that many High Court and Court of Appeals judges were corrupt and should step down. The commission proposed that those who chose not to step down should submit to an inquiry. Two senior judges also joined the campaign to stop debate on judicial reform. The commission defied the injunction and issued its draft, including the section on judicial reform, on September 27, 2002. As protests over the judicial clampdown spread, citizens began wearing yellow ribbons in support of the constitutional review commission and its chairman, Yash pal Ghai.<sup>16</sup>

Following the document's publication, a month-long nationwide debating period began that was to culminate in a National Constitutional Conference and a parliamentary vote on whether or not to ratify the constitution. However, in late October 2002, Moi dissolved Parliament and set the date of the election for December 27, 2002. This meant that the new constitution could not possibly be ratified until after the election. The National

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<sup>14</sup> *Making Informed Choices: A Handbook for Civic Education*, Nairobi, 2001.

<sup>15</sup> Human Rights Watch interview with Gibson Kamau Kuria, Nairobi, September 6, 2002.

<sup>16</sup> Mburu Mwangi, "MPs prepare for battle with Judiciary," *Daily Nation*, October 3, 2002.

Constitutional Conference was due to begin on October 28, but when the civil society delegates and members of the review commission arrived at the venue they found their entry blocked by a ring of armed policemen.

The new constitution and strengthened institutions currently offer the best hope for expanded human rights protection in Kenya. The new government should bring the constitutional review to completion by promoting public and parliamentary discussion of the draft.

### III. HUMAN RIGHTS IN KENYA

The political transition of 2002 represents an important opportunity for Kenya to improve human rights in the country. Kenya has signed and ratified all the major international human rights treaties. But the government has not fulfilled its reporting obligations to international bodies. Nor have all the internationally accepted standards been incorporated into domestic law. The current Kenyan constitution guarantees many human rights, but the document is flawed and contradictory. The new government should use the constitutional review process to reaffirm its commitment to human rights by finally harmonizing the domestic and international legal protections it claims to guarantee.

Most importantly, the government must enforce existing protections. Kenyans today enjoy much greater freedom than they did in the 1980s, but serious human rights abuses persist. In the past, most victims were high-profile lawyers, opposition politicians, academics, and other elites. Recently, most are poor people whose cases often escape notice. The run-up to the current election has been more peaceful than past elections, but violations of the rights to a free and fair election, assembly, and personal security began to increase as polling day approached. Other issues of longstanding concern included the right to justice and economic rights. There were also threats to freedom of expression, which otherwise had been reduced in recent years.

Activists, as well as some government officials and politicians, continue to urge their often-reluctant leaders to implement human rights reforms. For example, in June 2002, Parliament passed a bill setting up a permanent Kenya National Commission on Human Rights to replace the government's Standing Committee on Human Rights. However, President Moi has not yet signed the measure into law. The formerly ineffective standing committee has become more assertive in the last few years, publishing stinging reports on prisons and juvenile detention centers, pressing successfully for prosecution of murders in prison and police cells, and jumpstarting an eight-year overdue National Action Plan on the Promotion and Protection of Human Rights required by the United Nations. Government does not try to intimidate the committee, said its chief executive, Thuita Mwangi; but it is often unresponsive to the committee's complaints.<sup>17</sup>

Kenya's new government should demonstrate its respect for human rights by ensuring the new commission's independent authority. A wide range of activists, lawyers, foreign donors and Kenyan citizens also raised the following concerns with Human Rights Watch.

#### **The Right to Personal Security**

##### ***Abuses within the Police Department and Prison System***

Under international law, governments have a duty to protect people's inherent right to life and to prosecute serious violations of physical integrity.<sup>18</sup> But the Kenyan government enforces these protections selectively, leaving people vulnerable to lawlessness and abuses such as police brutality, torture, and extrajudicial executions.

Kenya ratified the United Nations Convention Against Torture in 1997, and since then, the number of politically motivated torture cases has fallen dramatically, according to the U.S. State Department and the Kenyan government. Yet law enforcement authorities still inflict torture on ordinary Kenyans. People Against Torture

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<sup>17</sup> Human Rights Watch interview, Nairobi, September 1, 2002.

<sup>18</sup> Articles 6 and 26 of the International Covenant on Civil and Political Rights, to which Kenya is a signatory.

(PAT), a local rights group, documented at least seventy cases of death by torture in 2001 and eleven such deaths in the first three months of 2002. P.A.T. currently receives reports of between ten and thirty cases a day of torture, extortion, illegal arrests, and illegal confinement. Most cases of torture occur when officers attempt to extract confessions by force. Sometimes poorly paid officers torture suspects to extort bribes. In the past, they tortured poor farmers agitating for the right to bypass corrupt parastatal marketing boards and sell their own produce.<sup>19</sup>

Paul Kimani Wambiru, who died on March 21, 2002, was arrested and tortured at the Nyeri Police Station for allegedly stealing U.S.\$400. A post-mortem examination concluded that Wambiru died from multiple injuries including a ruptured bladder and small intestines and crushed testicles. Police had left him on a roadside and claimed Wambiru was injured only after they released him for lack of evidence. Five policemen were arrested and charged with Wambiru's death; however, a pathologist hired by the policemen reported Wambiru died of "inflammation of the brain." In May, at P.A.T.'s instigation, the body was exhumed and a third post-mortem was done. As of September, the police still had not released the results.

"When I write a letter to the Attorney General, I get no response," despite his official zero-tolerance policy on torture, said Kamanda Mucheke of P.A.T.<sup>20</sup> Other activists confirmed that Attorney General Amos Wako rarely reacts to complaints about abuses. Indeed, the Attorney General did not respond to repeated requests for an interview or written questions sent to him by Human Rights Watch.

The Kenyan constitution prohibits torture, but does not clearly define it or describe how to investigate it. P.A.T. has raised the issue with the Constitution of Kenya Review Commission, and has made the following recommendations: (1) The Evidence Act should be rewritten, so that assault victims' statements are heard by a magistrate, instead of the police; this would prevent the police from coercing suspects into signing statements that can be used against them in court. (2) The forms, known as P3, that are used to report police brutality should be made available in hospitals and other locations; currently they are only available in police stations and must often be collected from the very offices where the alleged abuse was committed. (3) The families of torture victims should be provided with the services of an independent pathologist free of charge; currently, government pathologists investigate torture cases, but they are often suspected of collusion with the police. (4) "Reasonable force" should be more clearly defined under the law. The new government should adopt these reforms.

Regular police officers, rapid response teams, and local administrative police are widely viewed as operating on a "shoot to kill" policy. The Kenya Human Rights Commission reported that police killed 251 people in 2001, compared with 198 people the year before.<sup>21</sup> In July 2001, police dragged seven suspects off a Nairobi bus and shot them execution-style in full public view.<sup>22</sup> Police promised to investigate, but their findings have not yet been published. In another case that drew public outrage, police officers in Thika beat six prisoners to death in a police cell in October 2001. Three officers were subsequently charged with murder.

*The Daily Nation*, a leading Kenyan newspaper, reported a dramatic rise in killings by police in 2001—an average of twenty-one victims a month, up from fifteen a month in the three previous years. Last year, nine out of ten Kenyans who were shot dead were victims of the police. Those killed were either robbery suspects or innocent victims of trigger-happy police officers.<sup>23</sup> Despite many news stories and editorials about police brutality and energetic activism by human rights organizations since then, some police officers continue to act with impunity. Currently, police who are suspected abusers are transferred to the remote northeast region of Kenya, where they sometimes join with local administrative police in politically motivated raids on villages. P.A.T. recommends that officers accused of abuses be suspended, and punished if found guilty.

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<sup>19</sup> Kenya Human Rights Commission, *Quarterly Report 2000 2(2)*: 28.

<sup>20</sup> Human Rights Watch interview, Nairobi, September 5, 2002.

<sup>21</sup> *U.S. Department of State Country Report on Human Rights Practices, 2001*: "Kenya", p. 1.

<sup>22</sup> "Police shoot seven dead in cold blood," *Daily Nation*, July 26, 2001.

<sup>23</sup> Brian Leyan, "Sharp rise in killings by police, says report," *Daily Nation*, January 14, 2002.

The police are trying to eliminate abuses by their officers, said Mwangi Kingori, a spokesman in the Kenyan police commissioner's office. Suspected officers are investigated and prosecuted or, if evidence is insufficient, compensation for the victim is negotiated, he claims. He attributed police beatings of inmates in cells to poor training and said such incidents were investigated. "We do dismiss a number of [officers]. Others we take to court. But we do not make it public," because it would be bad for morale in the force, he said. His office favors creating a commission to clarify conditions for firing officers, removing officers' prosecutorial powers, decentralizing the law enforcement power structure, and separating the police department from government control.<sup>24</sup> The recommendations should be implemented.

Rights groups and the government's own Standing Committee on Human Rights counter that when allegations of abuses are made, the police often fail to cooperate with investigations. Police Commissioner Philemon Abongo has established a public relations office that communicates with journalists and the general public, but requests for inquests still meet with long delays, or no response at all.

The police force receives some human rights training, but observers within and outside the institution agree that better pay and working conditions would help to reduce many abusive practices, including presumed police involvement in carjackings, bank robberies, and other crimes for profit. In August 2002, a conflict resolution training program was established to prepare officers nationwide to deal with election violence. But observers were pessimistic about the prospects for significant reform.

Brutality is a culture in Kenya's prisons, too. In September 2000, wardens at King'ong'o Prison in Nyeri murdered six inmates, later claiming the prisoners had been trying to escape by climbing the prison's high fence. Investigations by human rights groups and the Standing Committee on Human Rights concluded that the six had been battered to death, and a Nairobi court agreed. In February 2002—a year and a half after the murders—the attorney general ordered a fresh investigation. Four wardens were eventually charged with the murders.

In the past year, several investigations of Kenya's prisons revealed an environment rife with torture and other forms of inhuman and degrading treatment. President Moi has publicly acknowledged the deplorable state of the overcrowded, dangerous facilities: "Currently, the belief is that any prisoner who comes out of the prison alive must be lucky," Moi said, referring to harsh conditions and the high toll of AIDS. He ordered the prisons department to respect prisoners' rights and praised Prisons Commissioner Abraham Kamakil for making positive changes.<sup>25</sup> In fact, Kamakil has taken positive steps towards reform by, for example, ordering staff training by the Kenya Human Rights Commission on human rights and improving some prison conditions, such as better clothing.

### ***Vigilante Groups***

Vigilante groups pose another threat to personal security in Kenya. Some politicians have recruited ad hoc "private armies" of jobless youths as their personal bodyguards. In the run-up to all three multiparty elections, candidates have used these groups to rough up their opponents at political rallies. The groups have such names as "Taliban," "Jeshi la Mzee," "Baghdad Boys," and "Kosovo Boys." They are not permanent groups, but rather loose associations of slum youths who are easy to mobilize at short notice into dangerous gangs allied to particular political parties or tribes.

Vigilantes allied to KANU stirred up violence in the "ethnic clashes"—politically motivated battles whose purpose was to drive ethnic groups believed to support the opposition out of areas where KANU's support was insecure. Many of the impoverished youths who participated in the clashes blamed their landlessness and unemployment on migrants belonging to other ethnic groups, rather than on KANU's legacy of misrule and corruption.

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<sup>24</sup> Human Rights Watch telephone interviews, Nairobi, September 9 & 12, 2002.

<sup>25</sup> Mburu Mwangi, "Moi directs prisons to uphold inmates' rights," *Daily Nation*, February 1, 2002.

In 2002, vigilante groups in urban shantytowns were again responsible for outbreaks of violence, although the clashes were briefer and less destructive than in the past. The largest and most well known vigilante group is the Mungiki, a loose association of Kikuyu traditionalists who carry machetes, wear dreadlocks, and identify with the Mau Mau freedom fighters of the 1950s. At first, the Mungiki gained a following in slums, where they filled a void in services. They policed crime-ridden shantytowns, and took over water delivery and transport. Initially, residents welcomed them, but the Mungikis gradually became a law unto themselves, extracting bribes, trying “suspects” in kangaroo courts, torturing, and killing.<sup>26</sup>

The Mungiki currently support Uhuru Kenyatta, although Uhuru and KANU have publicly renounced them. But they continue to use violent means to secure the loyalty of their fellow Kikuyus, such as forced circumcision and oathing, in which individuals are kidnapped and forced to drink blood and swear their allegiance to Uhuru. Mungikis have disrupted Rainbow Alliance rallies in Nairobi and Mwingi, and have been linked to numerous incidents of recent violence in places where KANU support may be weakening, including Kakamega, Eldoret, Nyeri, Nyahuru, and Hoima Bay.<sup>27</sup>

On March 5, Mungiki gang members went on a rampage in Nairobi’s Kariobangi slum, hacking at least twenty-three people to death with machetes and injuring many others. The Mungikis targeted a Luo vigilante gang called the Taliban, who had allegedly killed two Mungikis. However, the majority of victims were residents with no connection to the Taliban. Following the massacre, several gang leaders were arrested, but the Mungiki members were released after a few days. Four Taliban leaders were detained without trial for the next six months, triggering accusations of leniency toward the pro-government Mungiki. To date, no one has been charged with the killings. The two gangs and twenty-five other vigilante groups operating nationwide were banned. Five months later, however, several thousand Mungiki members—some armed with machetes, swords and clubs—staged a massive march in Nairobi in support of Uhuru Kenyatta’s candidacy, in violation of the Public Order Act prohibiting armed demonstrations. Police spokesman Mwangi Kingori told Human Rights Watch that the march was allowed because its organizers had notified the police as individuals, not as Mungikis, and once it became apparent that they were Mungiki members, police were concerned they might trigger violence if they intervened.

“These guys are gutter rats. They were manipulated that morning,” Kingori said. “Even if I take [a vigilante gang member] to court, he’ll say he’s a watchman and was given 100 shillings [a little over \$1] to show up at the rally. ... They are the poorest of the poor. They look for strength in their poverty.”<sup>28</sup> Kingori said the police do hunt down all gang members, regardless of their political affiliation. But in fact, there has been little enforcement of the ban on gangs.

### **The Right to Independent and Impartial Courts**

The foundation of any democracy rests on the right to a fair trial. But in Kenya the judiciary is widely considered to be the weakest branch of government. In July 2002, a panel of Commonwealth judicial experts from Africa and Canada examined the court system and found it to be among the most incompetent and inefficient in Africa. Judges commonly accepted bribes and many were subject to political influence, the panel said. The courts are also understaffed and underfinanced, and Kenyans awaiting trial face long delays that violate their right to due process.

The Commonwealth judges called for a “short, sharp shock” to clean up the system, most urgently by creating a committee to hear complaints against judges and refer them to a tribunal for investigation. They also recommended that judges be appointed and disciplined in a more transparent manner; that civil society representatives be included on the Judicial Service Commission (JSC), the body that oversees the justice system, but which is currently appointed by the president; that the chief justice be excluded from the JSC, so that it will be more independent; that the attorney general be removed from Parliament; and that the tenure of the chief justice be limited to two five-year terms.<sup>29</sup>

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<sup>26</sup> Human Rights Watch interview with Kamanda Mucheke, People Against Torture, Nairobi, September 5, 2002.

<sup>27</sup> Mburu Mwangi, “Poll violence is just tip of the iceberg, say bishops,” *Saturday Nation*, October 12, 2002.

<sup>28</sup> Human Rights Watch telephone interview, Nairobi, September 12, 2002.

<sup>29</sup> David Mugonyi, “New reforms plan to curb corrupt judges,” *Daily Nation*, May 18, 2002.

Chief Justice Bernard Chunga angrily condemned the report as “far-fetched, untrue and in bad taste.”<sup>30</sup> But others, including Constitution of Kenya Review Commission chairman Yash pal Ghai and the Law Society of Kenya, have defended the panel’s findings.

The chief justice did institute some reforms in 2001. He established rules to facilitate enforcement of the constitution’s bill of rights and replaced lay magistrates with professionals. But more fundamental change is needed, and the political will must be found to fire corrupt judges. Parliament should have the power to approve judges appointed by the executive.

The draft constitution published in September 2002 recommended a complete overhaul of the judiciary. Earlier that month, in an apparent case of executive interference in the courts, two lawyers won a court order to stop the constitutional review commission’s work. The lawyers were concerned about the commission’s recommendations to dismiss corrupt or incompetent judges. Soon afterwards, two senior judges won a court order blocking public debate on judiciary reform. Both court orders were heavily criticized by religious leaders, civil society, and some politicians.

To create an independent, impartial judiciary, the new government should review the Commonwealth judges’ report. It should immediately reverse any executive interference in the courts and should permit debate on judicial reform. It should adopt the proposal in the new draft constitution to give Parliament the power to approve the hiring or dismissal of judges. It should offer judges early retirement at 65, and investigate those who refuse to retire but have been implicated in wrongdoing.

Archaic laws pose another barrier to justice in Kenya. Many of Kenya’s laws have not been revised since the British colonial era, and they are inadequate to protect human rights in a modern democracy. Colonial laws on policing, for example, were designed for social control, not for the protection of individual rights. The constitution does not explicitly define freedom of expression, leaving news media vulnerable to government interference. Many rights guaranteed in the constitution are compromised by exceptions and by contradictory laws. For instance, the Public Order Act restricts Kenyans’ rights of assembly and association otherwise guaranteed in the constitution’s bill of rights. Archaic laws should be removed or amended.

### **The Right of Assembly**

The current Kenyan constitution clearly guarantees the rights of assembly and association. These rights are especially important outside of Nairobi, where the only major broadcast news media is the government controlled Kenya Broadcasting Corporation. Public meetings and rallies are often the only way most Kenyans can hear dissenting voices. In 1997, the IPPG (Inter-Party Parliamentary Group) scrapped the sedition laws, which the government had used to detain and torture activists in the 1980s. However, dissidents who speak out in public can still be charged with the crime of incitement, or they can be harassed in more sinister ways.

Police often closely scrutinize meetings on the sensitive topic of land grabbing. The police have disrupted meetings in which farmers were attempting to organize to demand better prices for their crops, and in April 2002, they arrested three members of the human rights NGO Release Political Prisoners (RPP) at a Nairobi meeting about land rights. The activists were accused of holding a public meeting without notifying the police in advance, but RPP claims they were not required to notify the police, because the meeting was not a political rally. The case remains unresolved.

The Kenyan government and the U.S. Embassy both maintain that Kenya has no political prisoners. However, activists have been detained on other trumped up criminal charges. In Machakos in May 2002, a suspected thief was killed by a mob, after police repeatedly failed to arrest him. Two land reform advocates, Nicodemus Mutuku and Alois Mwaiwa Muia, were charged with the thief’s murder, even though they were not in the area at the time

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<sup>30</sup> Muriithi Muriuki, “Ghai attacks Judiciary,” *Saturday Nation*, July 20, 2002.

the victim was killed, according to RPP spokesman Gitau Wanguthi. He said the activists are being framed to silence their protests over land grabbing.<sup>31</sup>

Since 1997, politicians have had the right to campaign anywhere, as long as they notify the police in advance. But the police can refuse to grant permission for rallies, if they claim they are unable to guarantee security. Opposition groups claim that it is particularly common for the police to use such grounds to ban or disrupt opposition rallies in KANU areas, but KANU rallies have also been stopped. As the 2002 election approached, several rallies were disrupted, sometimes violently. While both opposition and KANU rallies were affected, opposition candidates were most likely to be harassed when they were campaigning in KANU strongholds, either by the authorities, or by rowdy KANU supporters. When James Orengo, Member of Parliament and former leader of the reform coalition known as Muungano Wa Mageuzi (People's Movement for Change), campaigned in Nairobi, the rallies were not disrupted; but when he took his campaign to smaller towns in the Rift Valley, violence broke out and he was arrested. In September 2002, Peter Angang' Nyong'o, an MP for the Social Democratic Party, called for a parliamentary vote of no confidence in the government. A week later, police detained him at an opposition party meeting in Nairobi.

In 2000, a consortium of Kenya's foreign donors established the National Civic Education Program (NCEP) to prepare voters for the elections expected two years later. The donors felt that Kenyans needed a better grounding in the history of their country, and the principles of democracy, the constitution, and governance. They also believed that the NCEP program would help to prevent the brutality and violence that accompanied the nation's first two multiparty elections in the 1990s. Education under the NCEP program was provided by local NGOs, many with religious affiliations, and the curriculum was clearly defined and strictly non-partisan. By the time the program ended in November 2002, it had reached 82 percent of Kenya's administrative divisions, and was judged to be a success by donors and civil society groups. In Kakamega, local police even requested civic education training for their own officers. The program has been so popular that donors may implement it again, to provide education about constitutional reform, after the election.

Initially, both the ruling party and many opposition politicians were skeptical about the NCEP program, but it proceeded largely without interference. However, some NGOs carrying out the workshops complained that in KANU areas the presence of individuals associated with the government-appointed provincial authorities sometimes created an atmosphere of intimidation at the meetings. Anthony Njui, who heads the Catholic Justice and Peace Commission office in Nairobi, said that an NCEP meeting was blocked in Trans Mara, apparently for reasons of security. In Meru, one of the commission's civic educators was arrested for expressing anti-government sentiments.<sup>32</sup> If implemented, recommendations in the draft constitution on devolving power to elected officials, rather than the provincial authorities, should create a freer atmosphere at public meetings.

## **The Right to Free and Fair Elections**

### ***Ethnic Clashes and the Manipulation of Political Violence***

The results of Kenya's first two multiparty elections were suspect, because they were preceded by politically motivated ethnic violence that resulted in hundreds of deaths and the displacement of some 400,000 people, mainly opposition supporters. Ethnic clashes have also occurred during the current election season, although they have been far less common and severe than before. Several clashes in Trans-Mara and Tana River were not covered by the news media. In Isiolo in September 2002, members of the Borana tribe raided a Turkana community, killing ten people and displacing hundreds of families. Although the police initially dismissed the conflict as a traditional cattle-rustling incident, they later claimed that powerful people, including the local MP, had incited tribal violence.<sup>33</sup>

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<sup>31</sup> *Silencing the voices of peasants and the poor: Nicodemus Mutuku and Alois Mwaawa Muia, framed for murder in Makweni district, Kenya.* A report of the Kenya Human Rights Network, June 2002.

<sup>32</sup> Human Rights Watch interview, Nairobi, September 11, 2002.

<sup>33</sup> Patrick Mathangani, "Police allege sinister plot in Isiolo," *Daily Nation*, September 10, 2002, p. 7.

Violence has also broken out at numerous political rallies. The police have vowed to ensure peaceful elections, and in October, a new elite squad was being trained for that purpose.<sup>34</sup> But the police have been criticized for responding slowly to a September 22<sup>nd</sup> attack on crowds returning home from a Rainbow Alliance meeting by suspected Mungiki members chanting pro-Uhuru slogans; two people were killed in Nyeri and two others in Mathare, a Nairobi slum.<sup>35</sup> In October, more violence broke out between pro-Uhuru and Rainbow Alliance supporters at rallies in several locations, where crowds subjected President Moi to unprecedented booing and heckling. In Kakamega, in Western Kenya, two people were killed and scores injured when a riot erupted at one such rally.<sup>36</sup>

### ***The Electoral Commission***

The Electoral Commission of Kenya, which oversees elections, claims the 2002 election will be much fairer than past elections. Voter registration went relatively smoothly, and the deadline was extended to reach as many Kenyans as possible. Seventy percent of eligible voters registered, surpassing expectations. Some 2,000 new polling stations were added. In October 2002, Parliament passed a measure permitting votes to be counted at polling stations. In the past, ballots have been transported to central locations for counting, and this has raised suspicions of tampering. The president must now sign the measure into law before the elections, and Human Rights Watch urges that he do so.

The Electoral Commission is not entirely independent. The president appoints its twenty-two members, although since 1997 opposition political parties have been able to nominate some commission candidates. The government does not directly interfere with the commission's work, but it can exert indirect influence through budgetary control.<sup>37</sup> Commissioners recommended to the constitution review commission that giving Parliament the power to appoint commissioners would strengthen the Electoral Commission's independence. These recommendations should be adopted.

Kenya has some forty political parties, most of which represent one or a small number of the nation's tribes. The Registrar General registers the parties, but the criteria are vague. Representatives from the Electoral Commission told Human Rights Watch that they believe the Registrar General has too much discretion over which parties become registered and which do not. Nomination procedures within political parties are often neither transparent, nor democratic. Electoral Commission Chairman Samuel Kivuitu considers the lack of democracy within the parties a serious hindrance and has recommended that the new constitution address the issue.

Kivuitu also criticizes the way parties campaign. Since the Kenyatta era, candidates have used community fundraisers called *harambees* to introduce candidates to voters. Today, the spirit of *harambee* ("Let's pull together") has been turned into votebuying, he said. "The chief guest comes with a big pot of money. It's used as a way of selling oneself." The Parliamentary Anti-Corruption Select Committee raised similar concerns about *harambees*.<sup>38</sup> Kivuitu has called for public campaign funding and better regulation of parties.<sup>39</sup> The commission's vice-chairman, G. K. Mukele, pointed out that Kenyans' widespread poverty makes voters vulnerable to bribery: "Poverty and democracy don't coexist. A starving person, when given money to go vote for X, will do so."<sup>40</sup>

### **The Right to Freedom of Expression**

During the past ten years the Kenyan media has expanded considerably, and is much freer than in the past. But freedom of expression is still limited in numerous subtle ways, especially outside of Nairobi.

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<sup>34</sup> Waweru Mugo, "We will deal firmly with poll violence, police warn," *Daily Nation*, October 4, 2002.

<sup>35</sup> "One more dies after Sunday's Mungiki attack," *Daily Nation*, September 25, 2002.

<sup>36</sup> "Two killed as riots rock Uhuru campaign in Kakamega," *Daily Nation*, October 8, 2002.

<sup>37</sup> Human Rights Watch interview with Samuel Kivuitu, chairman, and G. K. Mukele, vice-chairman, Electoral Commission of Kenya, Nairobi, September 9, 2002.

<sup>38</sup> Republic of Kenya, *Anti-Corruption Select Committee*.

<sup>39</sup> Human Rights Watch interview, Nairobi, September 9, 2002.

<sup>40</sup> *Ibid.*

### *Libel Litigation*

Since the IPPG repealed the sedition laws in 1997, the number of libel cases against newspapers, magazines, and bookstores has soared. Kenya's defamation laws are similar to British common law. To launch a case, a plaintiff need only claim that a statement subjects him to ridicule and contempt, and need not prove that it was false, or that he suffered specific damages as a result. The burden is on the defendant to prove justification, for example, that the statement is true, or that it is fair comment. Journalists have some privileges under the law, and if they claim such privileges, the burden then shifts to the plaintiff to prove that the report was malicious. However, in 2001, a Court of Appeal decision<sup>41</sup> implied that plaintiffs are not required to prove actual malice in order to recover damages in cases where the media claims a qualified privilege. High Court Justice Joyce Aluoch's statement that the judiciary's increasingly tough stand on libel cases was "not to stifle [the press], but to encourage mature and responsible journalism," was greeted with skepticism by journalists and lawyers.<sup>42</sup>

In Kenya defendants often face a compromised and corrupt judiciary that sets awards at its discretion. In 1992, defamation cases in which the plaintiff had been implicated in a capital offense were made subject to minimum awards of one million shillings. Many Kenyan journalists claim that the defamation laws are the greatest threat to freedom of expression in Kenya today, because they can bankrupt smaller news outlets and because they encourage self-censorship. Most recent defamation cases have been brought by members of the ruling party, but pro-KANU newspapers such as the *Kenya Times* and the *East African Standard* have also lost expensive defamation cases.

In 1997, Joshua Kulei, a member of Moi's inner circle at Statehouse, won a 10 million shilling (U.S.\$133,333) award against *The People Daily*. Cabinet Minister Nicholas Biwott, President Moi's longtime associate, has won 67.5 million shillings (U.S.\$900,000) in libel awards. Two books published in 1997 alleged that he was involved in the 1990 murder of former Foreign Minister Robert Ouko. The books, *The Rogue Ambassador*, a memoir by former U.S. Ambassador to Kenya Smith Hempstone, and *Dr. Ian West's Casebook*, by Ian West (a pathologist involved in an investigation of Ouko's murder) and Chester Stern, have been banned in Kenya. Biwott won awards against West and Stern and three Nairobi bookstores that tried to sell the books. He also won an injunction to prevent the *Nation* newspaper from serializing the books. Biwott also sued Hempstone in 2001; that suit is pending.<sup>43</sup>

After *The People Daily* printed a story alleging Biwott's corrupt involvement in a contract award for the Turkwell Gorge hydroelectric dam, Biwott sued that newspaper, too. In March 2002, he was awarded 20 million shilling (U.S.\$266,667). Since 1997, *The Nation* has been sued by a son of President Moi, a government minister, the Statehouse controller, and a lawyer. *Nation* editors believe the paper is a frequent target of libel cases because it often exposes judicial wrongdoing.

In December 2001, news publishers complained to the attorney general about the increasing number of libel suits, which Media Owners Association chairman Wilfred Kiboro called a conscious attempt to intimidate and cripple the press. The law "protects the character more than the press," according to High Court Judge Richard Kuloba.<sup>44</sup>

The media is particularly vulnerable to libel litigation in Kenya because it must contend with a strong culture of secrecy in government. Journalists seeking sensitive information complain that government officials frequently

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<sup>41</sup> J.P. Machira vs. Wangethi Mwangi & Another, Court of Appeal at Nairobi Civil Appeal No. 179 of 1997(Unreported).

<sup>42</sup> See Kibe Mungai "Cash Constraints: the Ultimate Press Censor." *The East African Standard* (Nairobi) May 6, 2002.

<sup>43</sup>Information for this section came from the following sources: Human Rights Watch interviews with Wangethi Mwangi, editorial director, Nation Media Group and *Nation* editor Joseph Odindo, Nairobi, September 9, 2002; David Makali, director, The Media Institute, Nairobi, September 5, 2002; and *Daily Nation* stories including: Tony Kago, "Sh30 million libel award for Minister Biwott," December 21, 2000; "Lobby faults courts for libel awards," April 12, 2002; Pamela Chepkemei and Tony Kago, "Biwott wins more libel millions," June 12, 2002.

<sup>44</sup> Ken Opala and Mwakera Mwajefa, "Judge defends libel awards as media feels threat," *Saturday Nation*, December 1, 2001.

dodge them, and that government documents that could substantiate allegations of wrongdoing are inaccessible. This makes it very difficult for the press to follow up leads, even when doing so is strongly in the public interest, and hampers the defense in defamation cases. Also off limits to the press is information about military treaties and loan agreements with foreign governments and institutions, including the United States, World Bank, and IMF.

The International Commission of Jurists (Kenya Chapter) has drawn up legislation for a freedom of information act, to empower the press to gain access to government documents related to public affairs. The proposed legislation also called for the creation of an ombudsman who would accept requests for information from the press and order the government to honor them. However, this legislation has never been tabled in Parliament.

### ***Unequal Access to Information***

Kenya's many newspapers are influential in Nairobi, but less than one percent of Kenyans nationwide buy newspapers, according to the Nairobi-based Media Institute, which has conducted surveys of media users. In addition, there are very few Swahili or vernacular publications. Even most broadcasts are in English, which is widely spoken in urban areas, but less so in many rural areas. Most people—more than 40 percent—get their political news from radio. But most listeners outside the capital hear only the KANU point of view, because the government-run Kenya Broadcasting Corporation (KBC) is the only local news station outside of Nairobi. *The Nation Group* was finally granted a TV and radio license, but is restricted to broadcasting within sixty kilometers of Nairobi. Government regulations and bureaucracy make it difficult for private stations to obtain licenses or broadcast frequencies.

The disparity between Nairobi's relatively crowded news scene and the dearth of independent news sources in the rest of the country represents an urban-rural gap that leaves millions of Kenyans without access to news necessary to inform political choice. On September 7, 2002, KBC carried live coverage of a Nakuru campaign rally for Uhuru Kenyatta for four hours. Rainbow Alliance and NAK rallies also took place that day, but received little coverage. The KBC Act requires that all political points of view receive equal airtime, and the Electoral Commission threatened legal action against KBC following complaints that it was paying excessive and unfair attention to events featuring Kenyatta.<sup>45</sup> In response, KBC began to provide fairer coverage of the opposition in October 2002.

Media sources told Human Rights Watch that many journalists and news photographers had experienced harassment from politicians including physical attacks and threatening remarks. Some have been roughed up at political rallies.<sup>46</sup>

In the last three years, the government has prosecuted several journalists under a Penal Code law on "alarming" publications that could potentially incite violence. In August 2002, a magistrate sentenced opposition MP Njehu Gatabaki to six months in prison for publishing "an alarming story" on the 1997 ethnic clashes. The story, "Moi Ordered Molo Massacre," appeared in the December 1997 issue of *Finance Magazine*, which Gatabaki publishes. Four days later, Moi pardoned Gatabaki. The government may have relented because Gatabaki had threatened to appeal. This would allow his lawyers to subpoena documents, including testimonies and reports about the ethnic clashes, which the attorney general and other members of the government were trying to suppress.<sup>47</sup>

### ***The Media Law of 2002***

In May 2002, Parliament passed a Media Law that threatened many small presses. Under previous Kenyan law, publishers were required to register with the government, pay a libel insurance bond, and submit copies of every publication to the government registrar. The new law raises the bond amount one hundredfold, from U.S.\$128 to U.S.\$12,800, and penalizes vendors who sell unregistered publications. While the law's proponents claimed the measure was an attempt to eradicate a proliferating and irresponsible "gutter press," critics saw in it an attempt to

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<sup>45</sup> "KBC live coverage of Kanu rally sparks public outcry," *The Nation*, September 9, 2002, p. 4.

<sup>46</sup> Human Rights Watch interviews, Nairobi, September 2002.

<sup>47</sup> Human Rights Watch interview with David Makali, Media Institute, Nairobi, September 5, 2002.

muzzle opposition voices in a critical election year. As of September 2002, the law had not yet been enforced, but it remained a potentially serious weapon. It should be repealed, along with the law on alarming publications.

### **The Right to Due Process and Protection from Violations of Economic and Social Rights**

Although Kenya has made much progress on human rights since its first multiparty elections were held a decade ago, the socio-economic condition of the average Kenyan has deteriorated considerably since then. During the past ten years, average incomes have fallen, and unemployment has risen. Health services have deteriorated, and school enrollment and matriculation rates have declined. The swelling ranks of the urban and rural poor experience the sharp end of Kenya's governance failures. Many poor people complain that they have become second-class citizens in their own country and lack many of the basic rights that even the current, flawed, constitution should guarantee. Kenya has signed the International Covenant on Economic, Social and Cultural Rights obliging it to protect the right to work, social security, and an adequate standard of living. The new government should incorporate those standards into domestic law and honor them in practice.<sup>48</sup> However, during the past ten years, the rights of poor farmers, slum dwellers, and petty business people working in the informal economy have been systematically violated in many different ways. These violations are serious in their own right, but they also contribute to deepening poverty.

### ***The Irregular and Illegal Privatization of Public Land***

In rural and urban areas, politically connected individuals, including government ministers, other politicians, senior civil servants, and their relatives, have appropriated great tracts of land that were once used as pastures, villages, playgrounds and other public spaces for generations of poor people. Land grabbing has deprived thousands of agrarian people of their livelihoods, and thousands of squatters of shelter.

“Land is an emotional thing because it's a serious resource issue—it provides the sole livelihood to millions of people,” said Karuti Kanyinga of the Institute of Development Studies at Nairobi University. Perhaps another reason why land issues are so important to ordinary Kenyans is that they lie at the root of the nation's corrupt political culture as well. Throughout his tenure as president, Moi has consolidated his power through a combination of patronage and violence, and land has been used as an instrument of both. Since the World Bank required Kenya to reduce the size of its civil service and privatize many weak parastatals, there have been fewer government jobs to distribute to favored clients. Increasingly, the government has used land as a source of patronage instead.<sup>49</sup>

Land disputes have also been an important means of instigating ethnic conflict in the run-up to all three multiparty elections. In the Rift Valley, where many Kikuyu had been resettled in the 1950s and 1960s, the 1992 clashes broke out after Kalenjin peasants were incited to assert a traditional claim to land occupied by Kikuyu and other farmers. Tens of thousands of clash victims remain internally displaced in Kenya, their land now occupied by government supporters. Others have been pressured to sell their land for far less than it was worth, or have found the title deeds have been changed without their knowledge. When clash victims seek redress from the courts, the district authorities, or the Land Registration Office, they are typically told to go elsewhere.<sup>50</sup>

The ethnic clashes were particularly violent in regions with a long history of land disputes that had been intensified by weak governance and growing poverty. “This just diverted the target [of people's grievances] from the political elite to the Kikuyu,” said Kanyinga. Something similar happened on the coast in 1997, where developers, who received valuable public land previously occupied by squatters, had displaced thousands of

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<sup>48</sup> Kenya ratified the ICESCR in 1972. In 1992, it also ratified the African Charter on Human and Peoples' Rights, whose preamble contains this excerpt: “*Convinced* that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.”

<sup>49</sup> Karuti Kanyinga, *Redistribution from above: the politics of land rights and squatting in coastal Kenya* (Uppsala: Nordiska Afrikainstitutet, 2000); Klopp, *Electoral Despotism in Kenya*.

<sup>50</sup> Human Rights Watch/Africa, *Failing the Internally Displaced*.

people. Just before the election, thousands of mostly Kikuyu migrant traders were violently evicted from the area, this time by indigenous Digo people.

“[The instigators of the clashes] told people, ‘You are poor not because we stole your land, but because the Kikuyu dominate economic activities,’” said Kanyinga.<sup>51</sup>

In many cases, the underlying motive in the grabbing of public land has been clearly political. Not only is land used to as a reward for loyalty and kickbacks to KANU associates, but land grabbing can also be used to manipulate elections. For example, in 1994, an open-air market in the Westlands neighborhood of Nairobi was sold in a clandestine deal to private developers. The vendors who had used the market for decades tried to preempt the deal and buy the land themselves. When they were prevented from doing so, they suspected that the real motive was to displace them, since they were mostly Kikuyu, a tribe known to sympathize with the opposition, and they were a threat to the incumbent KANU MP Fred Gumo.<sup>52</sup>

Those displaced by land grabbing in Kenya far outnumber those affected by the recent farm occupations in Zimbabwe; but in Kenya the victims are not wealthy whites, but poor blacks, whose plight receives little international attention. In Kenya, few individuals have ever been held accountable for the illegal appropriation of public land, and transactions within the Ministry of Lands are highly opaque. The records of land transactions should be available in the Ministry of Lands, and squatters on state-owned land should have some rights, at least to resettlement and compensation. However, it is often difficult or impossible even for lawyers to determine who owns a particular piece of formerly public land, or the circumstances under which a particular plot of public land was privatized.

In 1999, the government established the Commission of Inquiry into Land Law and Policy, which was intended to establish greater transparency in land transactions, but it had produced no reports or recommendations as of October 2002. Its chairman, former Attorney General Charles Njonjo, refused to speak to Human Rights Watch. The new draft constitution would establish more transparent mechanisms for the transfer of land and create oversight mechanisms that should make it more difficult for elites to loot public resources, including land. It also recommends that Parliament urgently create mechanisms for enforcing the rights of poor people to public land, and provide for the resettlement of landless people, including squatters. Human Rights Watch supports these recommendations.

### ***Harassment of Street Hawkers and Kiosk Owners***

About half of Kenya’s workers now make their living in the informal economy, as street hawkers, roadside vendors at stalls known as “kiosks,” and as bus touts, maids, garbage scavengers, prostitutes, or casual laborers.<sup>53</sup> The government has few official policies dealing with the informal sector, and workers on the margins of society are vulnerable to arbitrary and harsh treatment by the authorities. For example, many hawkers and kiosk owners complain bitterly about harassment by the local council *askaris* (guards), the police, and the licensing officers.<sup>54</sup> Local councils do allocate areas for hawkers and kiosks to operate, and the authorities do have a right to remove trespassers who set up shop outside of these designated areas. However, the hawkers and kiosk owners claim that the government has failed to clarify and protect their rights and establish policies governing their activities. The authorities then exploit the ambiguity of the law to harass them, sometimes for material, and sometimes for political, ends.

During the past year, the police and the city council have instigated a number of sweeps on informal marketplaces in which kiosks have been demolished and hawkers dispersed. Kiosk owners and hawkers say the sweeps come

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<sup>51</sup> Human Rights Watch interview, Nairobi, September 5, 2002.

<sup>52</sup> Jacqueline Klopp, “Pilfering the public: the problem of land grabbing in contemporary Kenya,” *Africa Today* 47 (2000): 7-26.

<sup>53</sup> Kenyan government statistics as reported in “Govt. gangs demolish homes in Kenya,” *The Financial Gazette*, April 4, 2002.

<sup>54</sup> This section is based on Human Rights Watch interviews with street hawkers Allan Kiragu, Joseph Mwangi Kobocho, and Pius Mulwa, Nairobi, September 13, 2002, as well as organizations advocating for the poor, September 1-20, 2002.

without warning, sometimes early in the morning. Kiosk owners and hawkers claim the *askaris* and police usually steal their goods, and they are never compensated; sometimes they are beaten.

Pius Mulwa, a 49-year-old street hawker from Machakos, came to Nairobi in 1970 with four years of schooling and few skills. He obtained a license to set up a kiosk selling hot snacks near the busy main bus terminal. Working round the clock, he was able to earn enough to support his wife and four children. Then early one morning in 1992—an election year—city council *askaris* and police demolished his kiosk without notice. He lost everything, and he and his wife turned to selling clothing on the street, which earned far less. His son was accepted at the University of Nairobi, but Mulwa could not afford to send him; every day his son looks for a job, but cannot find one. Among the legions of street hawkers working on the streets of Nairobi are quite a few out-of-work youths with university degrees, Mulwa said.

Mulwa believes the kiosk demolitions that destroyed his livelihood were politically motivated. “Most of the kiosks are run by Kikuyus, and it looked like a political game, because Kikuyus don’t support the current government,” said Mulwa. “When an election is near, they’ll demolish everything. Then in comes a politician and says, ‘I’ll take care of you,’ so we vote for him. We are blackmailed.” Mulwa is vice-secretary of an aid society of street hawkers who help each other when someone is sick, and pay for funerals, school fees, and fines. The group fills the gap left by lack of job benefits and social security. The leader of the hawkers’ group is Joseph Mwangi Kibocha, a 40-year-old clothing seller who said he has been imprisoned some thirty times for hawking without a license because he could not pay the required fine. “I’m not a criminal. I’m just fighting for my kids to eat,” he said.

The government claims the hawkers and kiosks are a public nuisance and security threat. But critics say assaults on hawkers and kiosks can also be seen as attempts to intimidate opposition voters. Between December 2001 and March 2002, repeated sweeps of kiosks and makeshift slum dwellings displaced an estimated 8,000 people in Mombasa, most of them from “upcountry” ethnic groups, including the Kikuyu. On the pretext of cleaning up the city, Minister in the Office of the President Shariff Nassir supervised the sweeps, which were carried out by youth gangs and police. They beat residents, destroyed property worth millions of shillings, and looted at will, according to news accounts.<sup>55</sup>

Further sweeps elsewhere in the country recalled the ethnic violence on the Coast and in Rift Valley ahead of elections in 1992 and 1997. In February and March 2002, local authorities and youth gangs demolished 1,000 kiosks and displaced 100 families in the Nairobi slums. Other sweeps took place around the same time in Kisumu, Eldoret, Nakuru, and Nyeri, according to news accounts throughout the period.<sup>56</sup> Advocates for the poor accused the authorities of abuses including illegal eviction, displacement, inhuman treatment, destruction of property, and targeting certain ethnic groups. In September 2002, police shot dead one trader and wounded two others during a demonstration in Migori, in which 600 vendors were protesting the demolition of kiosks by the municipal council.<sup>57</sup>

### **Accountability for Past Crimes**

During the past decade, the government has established numerous inquiries and commissions to investigate past scandals, including the Goldenberg and NSSF cases, the politically motivated ethnic violence that occurred before and after the elections of the 1990s, and the grabbing of public land by well-connected private developers. These inquests have defused some of the political tension surrounding these issues, but few of these commissions have ever released their reports to the public, and punishment for high-level corruption or political crimes is virtually unknown.

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<sup>55</sup> See, for example, “Nassir ‘clean-up’ now targets slum dwellers,” *Daily Nation*, February 25, 2002.

<sup>56</sup> “Govt. gangs demolish homes in Kenya,” *The Financial Gazette*, April 4, 2002.

<sup>57</sup> Elisha Otieno, “Trader shot dead by riot police,” *Saturday Nation*, September 7, 2002.

Perhaps the most eagerly awaited report was the “Akiwumi Commission” report on the politically motivated ethnic clashes of the 1990s.<sup>58</sup> Retired Court of Appeal Judge Akilano Molade Akiwumi submitted the commission’s report to President Moi in 1999, but for years the government refused to release it to the public. In July 2002, in a rare show of judicial independence, a High Court judge ordered that the report be released. Attorney General Amos Wako challenged that ruling in court, but the report was finally released in October 2002. As expected, it implicated numerous powerful individuals, some of whom are current or past government employees, including Nicholas Biwott, Julius Sunkuli, and William ole Ntimama, in the instigation of the clashes. Moi and the attorney general have called the report “biased” and have issued a long rebuttal. Biwott has pledged to sue the Akiwumi Commission to have his name removed from the report.

The attorney general claims that criminal investigations surrounding the clashes are underway, but it remains to be seen whether any of the major architects of the election-related atrocities of the 1990s will ever be brought to justice, or whether any of the victims of the clashes, many of whom are still displaced, will be compensated. In a worrying development, nine days after the release of the Akiwumi report, the Criminal Investigation Department (CID) raided the offices of HUREDICA (Human Resettlement and Disaster Core Clash Victims Group), an NGO in Nakuru that documents the property and lives lost by clash victims and that lodges claims against the government for compensation and resettlement. Three HUREDICA officials were held for questioning for six hours, and numerous files and documents were confiscated. The HUREDICA files contain a great deal of evidence against the suspected planners and funders of the clashes.

How can accountability for past crimes by government officials and well-connected businessmen best be handled? This is clearly a delicate matter, and one that Kenyans must decide for themselves. Some Kenyans who spoke with Human Rights Watch would like to see President Moi and others in his circle tried in court. Others believe Kenya’s past leaders must be given amnesty for crimes committed before some cut-off date, such as 1997.<sup>59</sup> Otherwise, they fear, a smooth political transition will be impossible, because President Moi would block any democratic election unless he felt protected from prosecution for political and economic crimes committed during his twenty-four year rule.

Attorney General Wako has proposed a limited amnesty provision in the Corruption Control Bill awaiting debate in Parliament, arguing that the Anti-Corruption Police Unit would need up to twenty years to work through cases identified by the Parliamentary Anti-Corruption Select Committee if there were no cut-off date.

Some members of Parliament, including nominated Social Democratic Party MP Peter Anyang Nyong’o, have called for the establishment of a South African-style truth-and-reconciliation forum. Government officials and other perpetrators of past crimes, including tribal atrocities and economic crimes, would be forced to admit their guilt or face prosecution. Such a forum would also establish compensation for victims. Uhuru Kenyatta has said he does not favor an inquiry into past misdeeds. National Rainbow Coalition presidential nominee Mwai Kibaki has said that a NARC government would not seek prosecution of those who caused the ethnic clashes or those responsible for the massive corruption that has impoverished so many Kenyans. Instead, he would attempt reconciliation and rebuilding of the economy.<sup>60</sup> Upon taking office, any new government should release all long-overdue inquiry reports so that an informed national dialogue about accountability can take place.

#### IV. THE ROLE OF THE INTERNATIONAL COMMUNITY

Kenya is the richest country in East Africa, and it has a relatively peaceful history compared to its neighbors. It is a strategic ally of the United States and European Union in the war on terrorism and serves as a negotiator among the warring factions in Sudan and Somalia. Many international institutions, foreign media organizations, and non-governmental organizations have their regional headquarters in Nairobi. But in spite of its generally positive

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<sup>58</sup> Human Rights Watch, *Playing with Fire*.

<sup>59</sup> Human Rights Watch interviews, Nairobi, September 2-20, 2002.

<sup>60</sup> “NAK bid to clip Moi’s wings,” *Sunday Nation*, September 1, 2002.

history of international relations, the Kenyan government under President Moi has frustrated donors with its “stop-and-go” record on fighting corruption, mismanagement, and human rights abuses. Heading into the election, donors, like many Kenyans, look forward to a change of leadership.

Donors share concerns about such human rights violations as police abuse, corruption in the judiciary, mistreatment of prisoners, torture, vigilantism, and gender inequity. They recognize that many abuses occur not so much as a matter of government policy, as in some other African countries, but as a result of patronage, overweening presidential power, and weak governance.

In the 1990s, twenty-six diplomatic missions in Kenya formed a consortium, known as the Democratic Development Group, to divide up responsibilities and speak more or less with one voice on their policy toward Kenya. With varying intensity, they call for economic restructuring, the expansion of civil society, and a sincere effort in the fight against corruption.

Most foreign donors continue to support programs in community development, education, health care, AIDS research, and gender equity. During the past three years, they have also been active in the area of good governance. The Democratic Development Group has initiated a number of programs to support democracy: the National Civic Education Program (NCEP) described above; Engendering the Political Process (EPP), a program to encourage the political participation of women; the Domestic Observation Program of Kenya (DOP-K), which provides election observers; the Donor Information Center for Elections (DICE-K), an information clearinghouse which will make the findings of the DOP observers available to the public; and the Central Depository Unit, which monitors and documents election-related abuses and violence.

Donors are in the difficult position of having to mediate the adversarial relationship between the Kenyan government and the nation’s human rights and democracy groups, which the donors actively support. This may explain why many observers perceive donor support for democracy and human rights as episodic. Donors have been criticized, both for failing to support state institutions such as the Electoral Commission and the constitutional review process, and also for failing to support civil society groups in a consistent manner.

At the same time, the government criticizes the donors for meddling in Kenya’s internal affairs. During the past decade, several donors, including the U.K., Belgium, and the Netherlands, have joined with the International Monetary Fund (IMF) to cut or suspend financial support to the government because of corruption. In January 2000, the IMF and World Bank refused to disburse a loan package of nearly U.S.\$350 million until the Kenyan government established a permanent, independent, anti-corruption authority and took sincere steps to prosecute significant graft cases. These conditions have not yet been met. Indeed, Kenya’s legendary corruption reached inside the World Bank itself. In May 2002, the World Bank officer in charge of Kenya’s roads program pleaded guilty to bribery. Earlier this year, three employees of the Nairobi office of the U.N. High Commission for Refugees were charged with accepting bribes from people seeking resettlement in third countries.<sup>61</sup>

Even though progress on reducing corruption seems to be slow, basic civil and political rights in Kenya have improved in the past decade.

“Everyone is better off today than ten years ago,” said U.S. Ambassador Johnnie Carson, speaking of human rights. Donors’ support for civil society groups has helped, he claimed.<sup>62</sup> Since 1990, the U.S. has pressured Kenya to become more democratic. Most recently, when some members of the ruling party tried to extend Moi’s term in June 2002, Carson and other ambassadors made it clear that they were firmly opposed to this, and KANU backed down.

Unlike some other donors, the U.S. has not reduced aid to Kenya. In fact, largely because of the war on terror, US support for Kenya rose in 2002, to more than U.S.\$53 million, and additional funds were requested for anti-

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<sup>61</sup> See *Human Rights Watch World Report 2002*.

<sup>62</sup> Human Rights Watch interview, Nairobi, September 10, 2002.

terrorism efforts along Kenya's borders. Carson said the U.S. does not overlook human rights abuses in return for support on the war on terror, adding that building strong institutions is the best way to protect against terrorism.<sup>63</sup>

So far, donor support for good governance in Kenya has mainly gone to non-governmental groups. However, a multi-donor subgroup led by the U.S. and U.K. is beginning to support parliamentary and judicial reform as well, mostly by providing advisers and seminars. In particular, donors increasingly recognize that aid agreements that directly affect the lives of millions of people have in the past been drawn up behind closed doors between the ruling party and the donors. There is a growing awareness that Parliament, which is more independent of the executive than it was even a few years ago, should be more involved in government decision making. The U.K. provided support to a group of MPs who submitted legislation to establish a parliamentary budget office that would scrutinize government spending; however, the legislation did not pass.

U.S. trade with Kenya rose in 2002, largely because Kenya is one of the countries receiving benefits under the African Growth and Opportunity Act (AGOA). Kenyan textile exports to the U.S., for example, rose by 75 percent in the first six months of 2002, compared to the first six months of 2001. Otherwise, Kenya's foreign investment and trade have declined in the past few years.

One exception is the flower trade, which is largely in the hands of British and Dutch companies. Kenyan businessmen also own some flower farms. Human rights activists claim that working conditions on Kenya's vast flower farms are very poor. Wages are extremely low, and many workers are employed on a casual basis, without benefits or job security. The flowers are grown under large tents, and workers are exposed to concentrated chemical fumes that they say could be dangerous. The companies are worried that the workers' concerns could spark a boycott of Kenyan flowers in Europe, and they have formed an association to impose uniform standards on working conditions on the farms and communicate with the public. Rights groups are continuing to monitor the situation.

Donors should continue to support human rights groups in Kenya, particularly those involved in civic education. But they must also work harder to improve the accountability and integrity of Kenya's governmental institutions. They must focus not only on corruption in those institutions that might be involved in laundering money for terrorists, or that could threaten their own loans and investments. They must also focus more aggressively on corruption in those institutions that threaten the rights of ordinary Kenyans, including the police, the prisons, and the Ministry of Lands. Finally, donors need to help the new government find imaginative solutions to Kenya's considerable economic problems. Foreign investors have been leaving in droves for years, even though the country has one of the most buoyant private sectors in Africa. At the moment, there is a tendency to see Kenya's dire economic condition as entirely the fault of Moi and the corrupt system he has created. However, it is not clear that rapid economic growth will resume as soon as Moi steps down. Land shortages, staggering urban unemployment, and a manufacturing sector weakened by smuggling and foreign competition are challenges that any new leader will face.

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<sup>63</sup> Ibid.

## V. RECOMMENDATIONS

### **To the Government of Kenya**

The new government should eradicate the culture of impunity, tackle the pervasive corruption that is so closely linked to continuing human rights abuses, and strengthen the rule of law. The government must investigate, prosecute, and punish human rights violators according to the law. It should attack chronic violations in the areas of personal security, justice, freedom of assembly, free and fair elections, and freedom of expression. The police and prisons are of particular concern. Steps must be taken to reduce bribery, and human rights training should be integrated into all levels of law enforcement to end arbitrary arrests and detentions, brutality, torture, extrajudicial executions, and inhuman conditions in jails and prisons.

The new government should ensure that the constitutional review process moves forward quickly and without interference from government. Key recommendations in the draft on reducing executive power and creating an independent judiciary should be adopted. The biased and ineffective court system must be overhauled to protect Kenyans' right to a fair trial and restore respect for the rule of law.

Kenyans must enter into a national debate about the issue of accountability for past crimes by high-ranking individuals. Long-awaited government inquiries into political and economic crimes should be released to the public, and individuals implicated by the inquiries brought to justice. A permanent, independent anti-corruption authority should be established, with the powers to punish those found to have engaged in graft.

Clear policies must be established to protect the rights of the millions of Kenyans who live and work in the informal sector. The government should investigate violations of civil rights related to illegal land grabbing and attacks on slum residents, hawkers, and kiosk owners.

The new president should sign into law a bill passed by Parliament to set up a permanent Kenya National Commission on Human Rights. The government should ensure its independence and give it adequate support as well as the power to punish offenders. The government should also support the drafting of a National Action Plan on the Promotion and Protection of Human Rights, and expedite its parliamentary review and delivery to the United Nations High Commissioner for Human Rights.

Kenya has signed most of the major international human rights treaties, and it should now articulate their principles clearly in the new constitution, and repeal or amend domestic laws that contradict the provisions of the treaties. The new government should also submit long-overdue reports required under those treaties to the appropriate international bodies.

### **To Donors (Including the IMF, World Bank, E.U., and U.S.)**

The International Monetary Fund, World Bank, and donor nations should call on the new government to encourage the rule of law and respect for human rights. They should press the government on the issue of accountability for past injustices, including releasing withheld reports of official inquiries and prosecuting major crimes.

Donors should continue to condition financial aid on anti-corruption and good governance reforms, but they should also tie aid to credible efforts to investigate and prosecute serious human rights abuses.

The international community should continue to provide long term and consistent support to human rights groups, but they must also support governmental institutions, in particular the strengthening of judicial and parliamentary independence. More open communication between donors and Parliament should encourage more effective use of development loans and grants.

Donors should increase support for the constitutional review process and civic education about the draft constitution.

The U.S. and E.U. should not abate pressure on the new government to act on longstanding human rights violations, simply because of Kenya's strong support in the war on terror.

## VI. ACKNOWLEDGEMENTS

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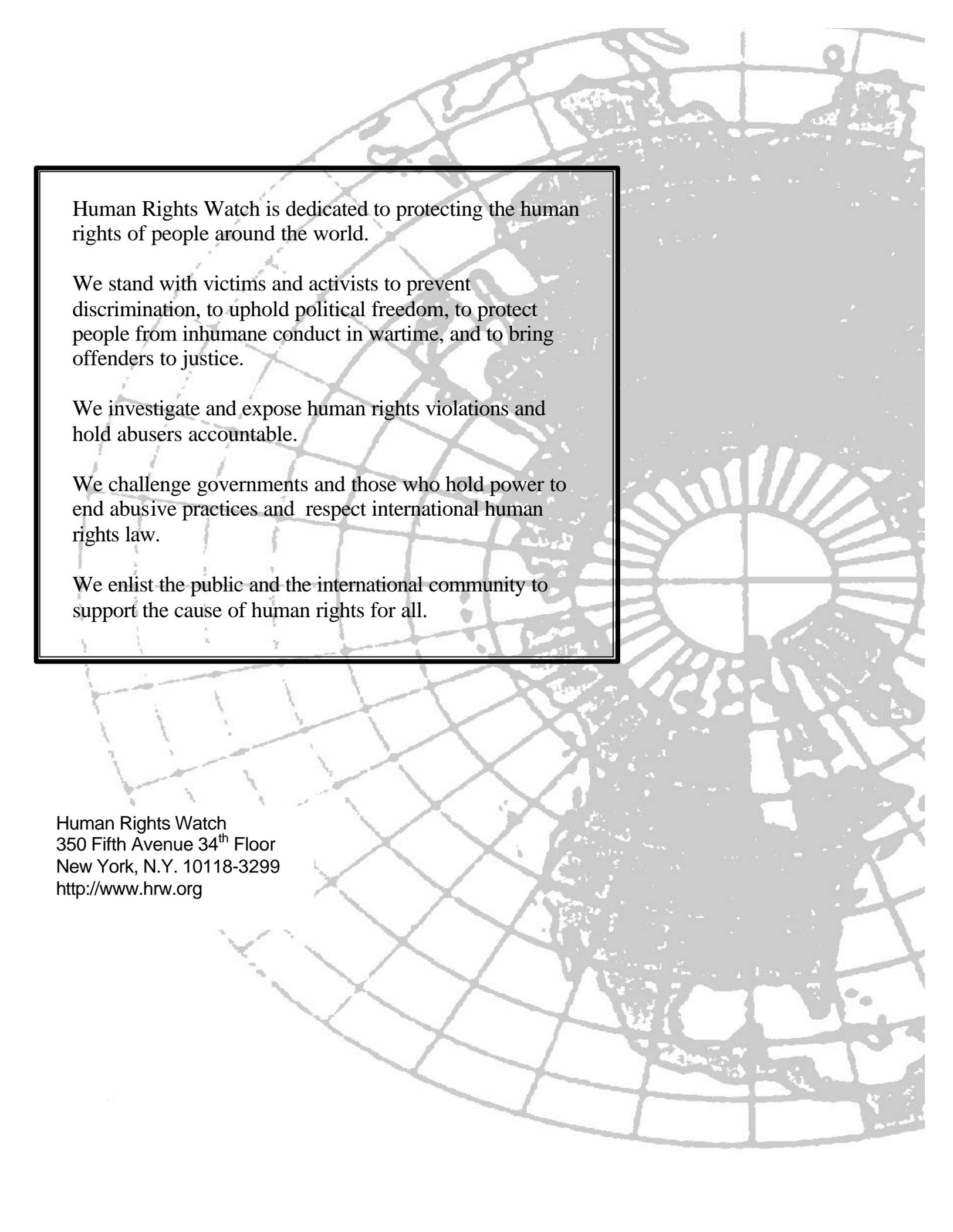
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