# SUBMISSION on the KENYA SECURITY LAWS (AMENDMENT) BILL 2014

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*The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international NGO working for the practical realisation of human rights in the countries of the Commonwealth.*

# SUBMISSION on the SECURITY LAWS (AMENDMENT) BILL 2014
## ANALYSIS AND RECOMMENDATIONS FOR AMENDMENTS

## Introduction

This submission represents the Commonwealth Human Rights Initiative's (CHRI) consideration of the Security Laws (Amendment) Bill, 2014 and our corresponding recommendations. We have analysed the draft Bill, identified gaps and weaknesses, provided suggestions for amendment as well as recommended the inclusion of provisions that will better define powers and functions of the National Security Organs, clarify the limits of political control, strengthen accountability, and bring laws into line with the country's Constitution and international law, in particular the International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples' Rights (ACHPR) to which Kenya is a party.

CHRI is an independent, non-partisan, non-governmental organisation headquartered in New Delhi, India. CHRI's areas of work are focused on the right to information, access to justice, and human rights advocacy.[1] Since 2001, CHRI's Access to Justice programme has been promoting police reform in the Commonwealth East African countries of Kenya, Tanzania and Uganda. CHRI has published two reports on policing for each country, conducted regional roundtable conferences and helped establish civil society police reform networks. In 2009 and 2010, CHRI worked in partnership with the African Policing Civilian Oversight Forum (APCOF) and the East African Police Chiefs Cooperation Organisation (EAPCCO) and in collaboration with the East African Community to articulate common standards for policing in the region. In Kenya, CHRI was instrumental in the establishment of the civil society forum TURF – The Usalama Reform Forum – which is an organisation that brings together NGOs working in the area of security sector reform. Through TURF, CHRI has made contributions to the legislative reform process in the policing arena, with submissions made to the Police Reform Implementation Committee (PRIC) on Bills including the Independent Policing Oversight Authority Bill and the Private Security Industry Regulation Bill. This year, CHRI released a regional report on police reform developments in East Africa, titled "*A Force for Good? Improving the Police in Kenya, Tanzania and Uganda*".[2]

CHRI recognises the formidable security challenges being faced by Kenya, and the need for an adequate response by the government. Any and all responses must remain within the constitutional framework and most importantly not dilute any constitutional protections and other enshrined legal safeguards. The current draft largely disaccords with the letter and spirit of the 2010 Constitution. At the same time the Bill contains a number of controversial provisions that set back the process of reforming the police and broader security sector. If these amendments are passed as they are, we believe this will lead to greater insecurity and weaken the sanctity of the Constitution itself.

[1] For more information on CHRI's activities, please visit www.humanrightsinitiative.org

[2] The report is available at the link below:
http://humanrightsinitiative.org/publications/police/A_FORCE_FOR_GOOD_Improving_the_Police_in_Kenya_Tanzania_and_Uganda.pdf

While the Bill proposes to make genuinely progressive amendments in some parts, it disproportionately limits civil rights and liberties contained in the Bill of Rights. We submit that the Bill must be analysed through the lens of the Constitutional provisions, in particular, the Bill of Rights – "an integral part of Kenya's democratic state"[3] – and the Article 238. The latter stipulates that the national security of Kenya must be "promoted and guaranteed in accordance with the following principles:

(a) National security is subject to the authority of this Constitution and Parliament;
(b) National security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;
(c) In performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; and
(d) Recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions."

The Bill of Rights and Article 238 of the Constitution must be the central framework to review the Bill. In this light, numerous amendments proposed in the Bill must be dropped altogether, while there are some elements that can be improved through amendment. Accordingly, CHRI makes the following submissions in relation to provisions of the Bill.

# Analysis

## Clause 4

Clause 4 of the Bill amends the Public Order Act through the insertion of a new Section 5A. The proposed Section confers a power on the Cabinet Secretary by the notice in the Gazette to designate places and times at which public meetings, gatherings or public processions may be held.

It is submitted that this proposed amendment would impose unjustified controls on the right to freedom of assembly, enshrined in the Article 37 of the Constitution, Article 21 of ICCPR and Article 11 of ACHPR. The existing Section 5 of the Public Order Act already obligates any person seeking to hold a public meeting, gathering or public procession to notify the designated authority in advance of the date and time of the meeting or procession, the names and addresses of the organiser(s), and the proposed site and/or route. As per Section 5(6), the regulating authority can inform the organiser(s) that it will not be possible to hold the proposed meeting/procession at the proposed time/date or venue, and the organiser(s) will have to find a future date. Section 5(8) of the Act gives the power to the regulating authority to "stop or prevent" the holding of any meeting or procession which is held in breach of any of the conditions stipulated in Section 5; and if in breach, it will be deemed an unlawful assembly. These stipulated conditions are more than sufficient for regulation of public meetings, gatherings or public processions. In light of this, giving the Cabinet Secretary the power to designate the places and times at which public meetings may be held is not only unnecessary, but also gives the State excessive control over the right to freedom of assembly by allowing the Cabinet Secretary to pre-determine and dictate places and times where public meetings and processions may be held.

**Recommendation:** ***CHRI recommends that Clause 5A is deleted.***

[3] Constitution of Kenya, 2010, Article 19(1).

## Clause 5

Clause 5 of the Bill seeks to amend Section 6 of the Public Order Act by inserting new subsections (1A) and (1B). The proposed subsections aim to prescribe criminal punishment as well as restitution of damages for unlawfully convening, organising or promoting a public rally, meeting or procession. The scope of subsection (1A), to which subsection (1B) is linked, is much broader than the scope of Section 6 of the Act, which deals exclusively with prohibition of offensive weapons at public meetings and processions. It is puzzling as to why subsection (1A) should be incorporated into Section 6. While it would be more logical to place the said subsection in Section 5, this Section already punishes the organisation of an unlawful assembly. Therefore, it is unclear why there is a need to insert a new subsection that, in essence, duplicates existing provisions of the same law. The liability for damages or any loss suffered can be incorporated into Section 5.

**Recommendation:** ***CHRI recommends that the proposed Subsection (1A) is deleted altogether; and that the wording of Subsection 1B can be inserted as a new subsection following Section 5(11) of the Public Order Act.***

## Clause 7

Clause 7 of the Bill seeks to amend Section 8 of the Public Order Act, dedicated to curfew orders. On the one hand, the amendment updates the references to offices and institutions in the light of reorganisation of Kenyan government. Thus, the reference to the Commissioner of Police or Provincial Commissioner is substituted by the reference to Cabinet Secretary, acting on the advice from the Inspector-General. At the same time, the police's authority to issue curfew orders is shifted to the Executive. Also, the amendment removes the county police authorities from the process of making decisions leading to adoption of curfew orders, while the existing system provides for this possibility.

There are several concerns here. The first that the decision to issue curfew orders would ostensibly be with the political executive, only with advice from the Police Service. This could open the door to politicising of this power. It is strongly recommended that this remains primarily with the Police Service, who have the real-time information as to the public order concerns brewing and the necessity on the ground for the imposition of curfew orders. The amendment also cuts out local county-level police input into these decisions. This aspect runs contrary to Chapter Eleven of the Constitution, dedicated to the devolution of government. In particular, the objects of the devolved government are affected, namely, to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya and to enhance checks and balances and the separation of powers.[4] Accordingly, the counties must not be excluded from the decision-making.

**Recommendation:** ***CHRI recommends that the clause 7(a) of the Bill be redrafted as follows:***

> ***"(a) in subsection (1) by –***
> ***(i) deleting the words "Commissioner of Police or Provincial Commissioner" and substituting therefor the words " the Inspector-General of the National Police Service or the County Policing Authority";***

[4] Constitution of Kenya, 2010, Article 174(h) and (i).

***(ii) deleting the expression "(being, in the case of a Provincial Commissioner within his province)" and substituting therefor the words (being, in the case of a County Policing Authority)."***

***That the clause 7(b) of the Bill be redrafted as follows:***

***"(b) Every curfew order shall, forthwith on its being made, be reported to the Cabinet Secretary, and the Cabinet Secretary may, if he thinks fit, vary or rescind the curfew order."***

***That the clause 7(c) be deleted from the Bill.***

## Clauses 18 and 77

**Clause 18**

Clause 18 of the Bill amends the Criminal Procedure Code by inserting a new Section 36A. The new section aims to give guidance to the police and courts when applying the rule enshrined in Article 49 (g) and (h) of the Constitution that allows for prolonging detention of an arrested person beyond 24 hours. At present, no law stipulates a limit for further remand, and this is welcome guidance in terms of stipulating for the police the permissible grounds on which remand can be sought, the process of applying for further remand, and the court's powers in determining whether further remand is justified or not. Notably, subsection 7 of the proposed Section 36A allows the court preliminarily to grant remand for a maximum period of 30 days; subsection (10) gives the court power to extend the total period of remand up to 90 days, including the period for which the suspect was first remanded in custody.

While being necessary clarifications, it must be remembered that amendments of this nature which seek to allow further time in custody for an arrested person must be seen with the right to personal liberty. These amendments do raise concerns about the proportionality of the proposed measures and lack of safeguards to protect against unduly restricting personal liberty. There is no rationale or evidence-based study provided to justify the allowance of a maximum of thirty days, up to ninety days, for keeping an arrested person in custody. There is no stipulation as to the maximum period an arrested person can be kept in police custody (after which they must be shifted to a jail pending police investigation) if remand is extended. There is no requirement that the arrested person has to be produced before the court following the first court appearance, even as the police are allowed to apply for further extension of remand beyond the initial 30 day maximum.

These are precisely areas of law and procedure which require extensive debate, discussion and consideration before amendment. Considering the significant gaps in the Bill at present, we strongly recommend further discussion with experts, lawyers, and civil society organisations to consider how to frame these crucial provisions on remand in custody beyond 24 hours after arrest. At present, there are not sufficient adequate safeguards built in to ensure that extended remand under the proposed subsections (7) to (10) does not become routine or is being ordered for justifiable reasons. This can very easily lead to abuse and rampant cases of unjustified or illegal detention.

**Recommendation:** ***CHRI recommends that the proposed subsections 36A (7), (8), (9), and (10) are vigorously and extensively discussed with experts, lawyers and civil society organisations to determine appropriate maximum limits, as well as the needed safeguards***

***to prevent illegal detention, for any extensions of remand in custody of an arrested person beyond 24 hours. While we are not in a position to prescribe appropriate limits, we are of the view that 30 and 90 days are excessive and should be shortened.***

**Clause 77**

Clause 77 of the Bill seeks to significantly amend Section 33 of the Prevention of Terrorism Act, which regulates extended remand in custody of persons arrested under the Act. The proposed amendments dilute key safeguards enshrined in the Act. The proposed amendments free the police officer, applying for prolonged detention, from the duty to substantiate his/her application for further remand by specifying the nature of the offence, evidence collected and the reasons necessitating the continued holding of the suspect in custody, all of which is required at present. This would allow remand to be granted in the absence of any reasons or rationale furnished as to the necessity of the remand. At the same time, the amendments deny the arrested person access to a copy of the police's remand application, as opposed to the present position that a court is barred for hearing an application for remand "unless the suspect has been served with a copy of the application".[5] It is therefore unclear how the Court can discharge its obligation to hear the objections that the accused may have if the accused is denied a copy of the remand application. These are huge departures from both Sections 33(2) and 33(3) of the Act.

Furthermore, the amendment changes the nature of circumstances contained in 33(5). In the Act, as per this subsection, a court is barred from making a remand order unless certain conditions and compelling reasons are satisfied. The proposed amendments weaken the judicial scrutiny required by allowing that the court "shall have due regard" to these conditions and reasons in making remand orders.

Finally, the period of remand under the Prevention of Terrorism Act is proposed to be extended from 90 days to 360 days. By any standard, detention in custody pending police investigation of a period of up to 360 days is excessive and wholly unjustifiable. If all these amendments are passed, this would allow a suspect under the Act to be detained up to 360 days, without having seen a copy of the police's remand application, and in the absence of any reasons or rationale provided to the court in the application.

Taken altogether, these amendments dangerously water down the guarantees of a fair trial that suspects apprehended under the Prevention of Terrorism Act are entitled to. As such, the proposed amendments to Section 33 constitute an extremely disproportionate restriction of personal liberty and unconstitutional limitation of the right to a fair trial.

**Recommendation:** ***CHRI recommends that Clause 77 is entirely deleted from the Bill.***

## Clauses 19 and 21

Clause 19 amends the Criminal Procedure Code by inserting a new Section 42A. This new section would oblige the prosecution to disclose the evidence they intend to rely on in court to the accused unless (a) the evidence may facilitate the commission of other offences; (b) the disclosure may lead to the intimidation of witnesses; and (c) the evidence is sensitive and it is not in the public interest to disclose it. The considerations that "deem" evidence as in the public interest are prescribed – one of these, problematically, being matters of

[5] Prevention of Terrorism Act, Section 33(3).

national security. Clause 19 goes on to state that the Court may receive concealed evidence in Chambers and in confidence.

Clause 21 of the Bill amends the Criminal Procedure Code by inserting a new section 160A. This obliges the accused to disclose to the prosecution the nature of his defence, including witness statements and documentary evidence, upon entering his or her defence.

The Constitution establishes a right of the accused to be informed in advance of the evidence the prosecution intends to rely on and guarantees "reasonable access" to that evidence to the accused.[6] The new sections 42A and 160A would restrict this constitutional right. Read in conjunction, the proposed amendments introduce an imbalance between the accused and the prosecution. On the one hand, the prosecution can withhold any evidence it considers to be detrimental to the public interest if disclosed. It is also not clear if the accused will be acquainted with the concealed evidence during confidential hearings. On the other hand, the accused has to disclose all the evidence he/she intends to rely on in their defence; and the possibility to refuse disclosure or to present it to the Court in confidence is not envisaged. The said imbalance, consequently, prejudices the Constitutional right to a fair trial[7] which cannot be limited.[8] While we recommend that the new Section 160A should not be incorporated, we suggest that additional guarantees, judicial review specifically, are needed in the proposed section 42A to ensure that the right to a fair trial is observed.

**Recommendation:** ***CHRI recommends the following amendments to Clause 19 with reference to a proposed Section 42A of Cap. 75: that subsection (2) is amended and a new subsection (3) is added:***

> ***(2) If the prosecution has reasonable grounds to not disclose certain evidence on which it intends to rely, it shall apply in writing to the court to request non-disclosure of certain evidence. In its application, the prosecution shall specify the reasons indicating how the disclosure of certain evidence will prejudice the interests of investigation or the public interest".***
>
> ***(3) The court shall not make an order for nondisclosure of certain evidence under subsection (2) unless it is satisfied that having regard to the reasons specified, it is necessary to grant the order.***

***CHRI recommends that Clause 21 is deleted from the Bill.***

## Clause 20

Clause 20 seeks to amends the Criminal Procedure Code through the insertion of a new Section 118A. This would stipulate that the police need to apply to a magistrate for a search warrant ex-parte. The police officer carrying out the search pursuant to such warrant "shall not, if acting in good faith, be liable to any legal proceedings".

This creates some legal ambiguity. It must be clarified that this does not make the officer liable when legality of the warrant is questioned, but the conduct of the officer during the search must comply with the Criminal Procedure Code, Service Standing orders and other relevant laws and regulations and, consequently, he/she can be held liable for any

[6] Constitution of Kenya, 2010, Article 50(2)(j);
[7] *Id*, 50(2);
[8] *Id*, Article 25(c).

wrongdoings or illegalities committed during the search. Therefore, additional safeguards are needed in this proposed Section.

**Recommendation:** ***CHRI recommends the following amendments to Clause 20 with reference to a proposed Section 118A of Cap. 75: that the proposed Section 118A is redrafted with the addition of a new subsection as follows:***

> ***"118A. (1) An application for a search warrant under section 118 shall be made ex-parte to a magistrate and the police officer carrying out the search pursuant to such warrant shall not, if acting in good faith, be liable to any legal proceedings.***
>
> ***(2) Nothing in this section should be interpreted as relieving the police officer, carrying out a search, from liability for any violations of law or disciplinary offences."***

## Clause 23

Clause 23 of the Bill amends the Criminal Procedure Code by introducing a system of police supervision in proposed new Sections 343 to 346. Police supervision embraces a number of restrictive measures that apply to particular categories of convicted persons after their release. These measures include: a) to reside within the limits of a specified area; (b) not to transfer his residence to another area without the written consent of the police officer in charge of that area; (c) not to leave the area in which he resides without the written consent of the police officer in charge of that area; (d) at all times to keep the police officer in charge of the area in which he resides notified of the house or place in which he resides and provide his telephone and other contacts; (e) to present himself, whenever called upon by the police officer in charge of the area in which he resides, at any place in that area specified by that officer (ss.344, 344A).

The system is twofold. On the one hand, police supervision may be established when a person, convicted of an offence punishable with imprisonment for a term of three years or more, is again convicted of an offence punishable with imprisonment for a similar term, or convicted of not complying with conditions of police supervision. In this case, police supervision is optional and the Court decides whether to apply any of the abovementioned restrictive measures at the time of passing sentence. On the other hand, police supervision is obligatory in relation to any person convicted under the Prevention of Terrorism Act, the Sexual Offences Act and certain provisions of the Penal Code. In these cases, all of the abovementioned restrictions apply.

We submit that the system of police supervision in its entirety is an unjustified and disproportionate restriction of personal liberties protected by the Constitution and international law. Firstly, the proposed amendments affect equality and freedom from discrimination. According to the Article 27 of the Constitution "every person is equal before the law and has the right to equal protection and equal benefit of the law".[9] It can be argued that subjecting an individual, who has already served their sentence, to police supervision is discriminatory in nature. It is a basic assumption of criminal justice that a crime entails a punishment, and that serving the punishment is enough indicator that justice has been served. Consequently, the convicted person upon release is deemed to have suffered his punishment and is "clean" in the eyes of law and society. Thus, the police supervision

[9] Also, ICCPR, Article 26; ACHPR, Articles 3 and 19.

unjustifiably extends the punishment beyond the limits of imprisonment and, more broadly, beyond the limits of criminal justice. In this sense, the police supervision also violates human dignity.[10] Police supervision entails continuous treatment of a released person as a criminal, who needs to be supervised and controlled. It is thus a degrading punishment in the meaning of the Article 5 of the ACHPR.

Granted that even if an individual with a record as a repeat offender needs some monitoring post-release, the measures suggested as "police supervision" are excessive, particularly in severely limiting an individual's freedom of movement and residence.[11] Requiring that a person must reside in a specified area and cannot leave the area or shift residence without the written consent of police officer in charge is undue and unjustified control over the most basic decisions of an individual's personal life. While these freedom can be limited in the interests of national security, it is submitted that considerations of national security are at large irrelevant to police supervision. Police supervision applies to a vast majority of crimes under Kenyan Penal Code, most of which cannot be possibly clustered as concerning national security. What is more, to consider a released person as a potential threat to national security, and accordingly limit his freedom of movement, runs contrary to the presumption of innocence. Therefore, police supervision is a disproportionate limitation of freedom of movement. The same purpose can be achieved through less restrictive means, for instance, keeping records of prisoners and their data (as already suggested by the section 39 of the Bill that amends the Prisons Act), or mandated reporting visits to the local police at regular intervals for a period of time post-release.

Finally, the Article 24(2) of the Constitution states that a provision in legislation limiting a right or fundamental freedom is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation. At the same time, the State must demonstrate the necessity of the proposed restriction and only take such measures that are proportionate to the pursuance of legitimate aims,[12] including national security. The present Bill fails to comply with this requirement.

**Recommendation:** ***CHRI recommends that Clause 23 is deleted from the Bill.***

## Clauses 25 and 26

Clause 25 of the Bill seeks to amend Section 364 of the Criminal Procedure Code by inserting a new paragraph (c). Clause 26 of the Bill amends the Criminal Procedure Code by inserting a new Section 379A. Both sections confer a right on the Director of Public Prosecution to stay release of the accused on bond or bail for 14 days upon his indication of intention to appeal the respective decision of the subordinate courts and/or the High Court. Consequently, the accused remains in custody for the said period.

It is submitted that Clauses 25 and 26 constitute a disproportionate and unjustified restriction on the constitutional right of the accused to be released on bond or bail.[13] This in turn is linked to the individual's right to freedom and security of person, particularly

[10] Constitution of Kenya, 2010, Article 28; ICCPR, Preamble; ACHPR, Article 5;
[11] Constitution of Kenya, 2010, Article 39; ICCPR, Article 12; ACHPR, Article 12;
[12] Human Rights Committee, General Comment 31, para 6;
[13] Constitution of Kenya, 2010, Article 49(1)(h);

freedom from arbitrary detention, and must be seen as such.[14] It must be noted that Article 49(1)(h) of the Constitution specifies that this right can be curtailed only if "there are compelling reasons not to be released". Case law lays down the standard to be met in terms of "compelling reasons" and holds that the prosecution cannot rely on speculation, but must provide evidence to support its request.[15] These tests should be met by the prosecution in its arguments to the court on whether to grant bail or not. The court would have examined the potential "risk" factors involved with reference to release on bail of the accused (risk of flight, danger to the public or to witnesses, potential to conceal, tamper with or destroy evidence, etc). With this extensive review going into the decision to grant bail, it is not justified to stay the court's order, keeping the accused in custody for an automatic period of fourteen days, pending the filing of the Director of Public Prosecution's review. It is in the nature of granting bail to impose reasonable conditions on the accused pending a charge or trial to secure his appearance before the court. The conditions imposed by bail or bond, backed up by punishment for non-compliance, are sufficient measures to guarantee appearance of the accused before the court.

**Recommendation:** ***CHRI recommends that Clauses 25 and 26 are deleted from the Bill.***

## Clause 38

Clause 38 of the Bill seeks to amend the Prisons Act by the insertion of a new section 36A. The said section aims to separate prisoners convicted under the Prevention of Terrorism Act and other prisoners convicted of a serious offence from the other prisoners, and to prevent as far as practicable any social interactions between them, even including "seeing" other prisoners.

While the separation of prisoners depending on the nature and gravity of their charges is a well-established practice in penitentiary systems across the world, our concern is the extreme wording of the suggested 36A. It is worded as to justify the practice of confining the persons convicted under the Prevention of Terrorism Act and for serious offences to solitary cells, as it bars them from "seeing, conversing or holding any communication with other prisoners." Solitary confinement will inevitably lead to social isolation, and damage to the mental and psychological well-being of these prisoners. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment emphasised that solitary confinement may cause the severe "mental pain or suffering" and therefore can amount to torture or cruel, inhuman or degrading treatment or punishment.[16] This is to be prevented at all costs. Also, while those convicted under the Prevention of Terrorism Act are specified, any new section must clearly state and enumerate the "serious" offences for which those convicted have to be kept separately.

**Recommendation:** ***CHRI recommends the following amendments to the Clause 38 with reference to a proposed Section 36A of Cap. 90: that the Clause 38 is redrafted as follows:***

***"The Prisons Act is amended by inserting the following new section immediately after section 36 –***

[14] *Id*, Article 29(a).

[15] *Dancun Livingstone Kimanthi & Another v Republic* [2013] High Court Crim. Case No. 50 of 2012, eKLR;

[16] UN General Assembly (2011). Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, A/66/268, para 81.

***36A. (1) The Commissioner shall confine persons who are imprisoned for committing an offence under the Prevention of Terrorism Act, 2012 or for committing a serious offence in a separate prison or in separate parts of the same prison, from the other prisoners.***
***(2) Nothing in this section should be interpreted as being a ground for solitary confinement of persons mentioned in the subsection (1)."***

## Clause 58

Clause 58 of the Bill seeks to amend the Refugees Act through the insertion of a new section 16A. The said section *inter alia* limits the number of refugees and asylum seekers permitted to stay in Kenya to 150,000 people.[17] The most immediate consequence of this is that new refugees will be denied entry into Kenya, while refugees, who are in Kenya, could face a risk of expulsion which is illegal under domestic and international law. The Refugees Act, the UN Convention relating to the status of Refugees, and the African Union's Convention Governing Specific Aspects of Refugee Problems in Africa, to which Kenya is a party, prohibit expulsion of refugees and outlaw denial of entry to refugees and asylum seekers.[18] At the same time, the ACHPR explicitly prohibits mass expulsion of non-nationals.[19] If adopted, this provision will lead to illegal anti-refugee measures and a likely ostracism on the part of international community and human rights groups.

**Recommendation:** ***CHRI recommends that Clause 58 is deleted from the Bill.***

## Clause 62

Clause 62 of the Bill seeks to amend the National Intelligence Service Act through the insertion of a new Section 6A. The proposed Section 6A gives officers of the National Intelligence Service officers policing powers to stop and detain persons on suspicion of engaging in "any act or thing or being in possession of anything which poses a threat to national security". There are several considerations here, primarily that core policing powers are being outsourced to the Intelligence Service. Outsourcing any policing powers to other public authorities is not recommended, as the proper exercise of these powers requires a particular kind of training and total adherence to law and procedure. Also, according to the Article 238(1) of the Constitution, national security is "the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests." This definition is vague and, consequently, power to stop and detain anyone for doing anything, which, directly or indirectly, poses a threat to national security is likely to be abused in the absence of stricter parameters.

What is more alarming about granting policing powers to the National Intelligence Service is that it is excluded from scrutiny by independent external oversight bodies, first and

[17] For the present context and further information, according to the UN Refugee Agency, there are currently 534,938 refugees in Kenya (UNHCR (2014). "2015 UNHCR country operations profile – Kenya", available online: http://www.unhcr.org/pages/49e483a16.html).
[18] Refugees Act, s.18; African Union's Convention Governing Specific Aspects of Refugee Problems in Africa, Article II; Articles 31 and 33, UN Convention relating to the Status of Refugees
[19] ACHPR, Article 12(5);

foremost, the Independent Policing Oversight Authority. The Authority's oversight functions are limited to the National Police Service and do not cover National Intelligence Service officers, which means the IPOA cannot receive or investigate complaints against intelligence officers.[20] While policing powers are being given to the intelligence officers, their accountability is not being expanded. For all of these reasons, we strongly recommend this Clause is deleted.

**Recommendation:** ***CHRI recommends that Clause 62 is deleted from the Bill.***

## Clauses 63 and 64

Clause 63 of the Bill seeks to amend the National Intelligence Service Act by repealing Section 10 which guarantees the security of tenure of the Director-General of the Service, spells out the grounds on which the Director-General can be removed, as well as the procedure to be followed before removal. The repeal of this section would remove all of these safeguards and is of serious concern, as Section 10 is of paramount importance to the overall accountability and independence of the National Intelligence Service. Security of tenure, stipulated grounds for removal as well as a process, protect the Director-General, and the Service in general, from arbitrary interventions on the part of the Executive and therefore is essential to guarantee the Service's professionalism and independence. As it is, Section 10(4) of the National Intelligence Service Act allows the Director-General to be removed at any time before the expiry of his/her tenure by the President. It is important that pre-tenure removal is always done on the basis of stipulated legal grounds, and through a legally sanctioned process. If this amendment is adopted, the President will be able to fire the head of the Intelligence Service at any time without following any procedure and in the absence of reasoned grounds. This is peril for an independent government authority.

**Recommendation:** ***CHRI recommends that Clause 63 is deleted from the Bill. It would follow then that Clause 64 would also have to be deleted.***

## Clause 66

Clause 66 of the Bill seeks to amend the National Intelligence Service Act by repealing Part V "Warrants" and substituting it with Part V "Covert Operations" that would consist of a single Section 42. According to the proposed Section 42, National Intelligence Service officers can engage in "covert operations" that are aimed at "neutralising threats against national security" and are necessary to "deal with any threat to national security". Such an operation can be commenced following the written authorisation by the Director-General of the Service. The said authorisation allows Service's officers to "(i) enter any place or obtain access to anything", "(ii) search for or remove or return, examine, take extracts from, make copies of or record in any manner the information, material, record, documents or thing", "(iii) monitor communication", "(iv) install, maintain or remove anything", and "(v) do anything considered necessary to preserve national security." The written authorisation is valid for 180 days.

It is submitted that if this Section is adopted, it will allow the Service's officers to engage in any activity, lawful or not, with impunity. Neutralising and dealing with threats to national

[20] Independent Policing Oversight Authority Act, 2011, s.6.

security is ambiguous enough to include targeted and extrajudicial killings. The fact that the permission by the Director-General is enough to authorise any of the abovementioned activities is equally troubling. The court's power to issue or deny warrants to the National Intelligence Service to guarantee legality of the officers' actions and the Service's accountability must be retained. Read in conjunction, the proposed sections 63, 64 and 66 create an unaccountable and non-independent Intelligence Service. These amendments run contrary to the letter and spirit of the Constitution, and dangers related to their application can hardly be overestimated.

**Recommendation:** ***CHRI recommends that Clause 66 is deleted from the Bill.***

## Clause 73

Clause 73 of the Bill seeks to amend the Prevention of Terrorism Act through the insertion of new Sections 12A-12D. The Section 12A criminalises possession of weapons and explosive devices for terrorist purposes. At the same time, the subsection 12A(2) stipulates that "unlawful possession of improvised explosive devices, assault rifles, rockets propelled grenades or grenades shall be presumed to be for terrorist purposes." The Sections 12B and 12C introduce penalties for possession of weapons in the places of worship for visitors and persons in charge of a place of worship respectively.

It is submitted that the subsection (2) of the Section 12A effectively places a burden of proving that the said weapons and devices were not in possession for terrorist purposes on the accused. At the same time, Sections 12A-12C establish an unjustified discrimination between any person in possession of weapons and explosive devices and persons in possession of explosive devices in places of worship. We submit that there is no need to create separate provision to emphasise the illegality to possess weapons in places of worship. Otherwise, the proposed distinction is likely to disproportionately target Muslim communities, a fear that is supported by recent raids by the police on mosques in Mombasa.[21] Such practices, indirectly endorsed by the Sections 12B and 12C, are discriminatory and therefore unconstitutional[22] and could fuel communal violence.

A new proposed Section 12D seeks to criminalise "radicalisation" by holding that a person who "adopts or promotes an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious or social change commits an offence…". A maximum sentence of thirty years imprisonment is prescribed. In our view, this is excessive punishment for simple acts of "adopting" and "promoting" which cannot even be classified as criminal conduct. It is near impossible to give precise definitions to such loaded subjective terms as "extreme belief system" or "ideologically based violence" or "political, religious or social change", which calls into question the very nature of the ingredients of this particular offence. Therefore, Section 12D should be deleted.

**Recommendation:** ***CHRI recommends the following amendments to Clause 73 with reference to new Sections 12A of No. 30: that subsection (1) is amended as follows:***

[21] "251 youth arrested in massive police raid at radical Mombasa mosques" (2014). *Daily Nation*. Available online: http://www.nation.co.ke/news/Youth-arrested-raid-Mombasa-mosques/-/1056/2524850/-/6uw19fz/-/

[22] Constitution of Kenya, 2010, Articles 10(2)(b), 27(4), 238(2)(b) and (c).

***"73. The Prevention of Terrorism Act is amended by inserting the following new sections immediately after section 12 –***

***12A. (1) A person who is in possession of a weapon, an improvised explosive device or components of an improvised explosive device for purposes of terrorism commits an offence and is liable, on conviction, to imprisonment for a term of not less than twenty years.***

***(2) The Cabinet Secretary shall, on recommendation of the National Security Council, by notice in the Gazette, publish a list of components of improvised explosive devices for purposes of subsection (1)."***

***We also recommend that the new Sections 12B, 12C, and 12D are deleted from Clause 73.***

## Clauses 75 and 15

Clause 75 of the Bill amends the Prevention of Terrorism Act by inserting new sections 30A-30F. Section 30A establishes grounds for prosecuting a person who publishes or utters a statement that directly or indirectly encourages or induces another person to commit an act of terrorism. In the subsection (2) it clarifies what the content of the statement should be to fall within the scope of section 30A: either the circumstances and manner of the publications are such that it can reasonably be inferred that it was intended to encourage or induce a person to commit an act of terrorism, or the intention is apparent from the contents of the statement. The subsection (3) states that it is irrelevant whether any person is in fact encouraged or induced to commit an act of terrorism.

Section 30F in subsection (1) provides that any person must seek authorisation from the National Police Service to broadcast any information, "which undermines investigations or security operations relating to terrorism." Subsection (2) obliges a person, intending to publish or broadcast pictures of victims of terrorist attack, to obtain permission from both the National Police Service and the victim to do so. Nevertheless, subsection (3) reserves a right of any person to publish or broadcast factual information of a general nature to the public.

At the same time, Clause 15 of the Bill seeks to amend the Penal Code through the insertion of a new section 66A, which criminalises publishing obscene, gory or offensive material, "which is likely to cause fear and alarm to the general public or disturb public peace."

All of these proposed amendments must be checked against Constitutional rights and freedoms. The Constitution stipulates that every person has the right to freedom of opinion.[23] Moreover, according to the Article 33 of the Constitution, every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or idea, freedom of artistic creativity and academic freedom and freedom of scientific research. This, however, does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred.[24] Article 34 the Constitution reads that freedom and independence of electronic, print and all other types of media is guaranteed,

[23] Constitution, 2010, Article 32(1);
[24] *Id*, Article 33(2).

but does not extend to any expression specified above. Furthermore, it is stipulated that the State must not exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium.[25] Equally, it must not penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.[26]

We submit that, while the qualification envisaged in the subsection (2) of the proposed Section 30A is useful, the criminalisation of statements that indirectly encourage or induce to commit acts of terrorism unreasonably limits the freedom of expression and freedom of opinion, especially when read in conjunction with subsection (3). As such, any kind of statements may fall under the scope of the section 30A. Since the limits of indirect inducement are not established, and it is irrelevant if anyone actually was induced to commit an act of terrorism, it gives the state unlimited authority to interpret what statements amount to inducement or encouragement of commission of a terrorist act. At the same time, clarification of the said limits in the subsection (2) can only reasonably describe direct encouragement or inducement.

Similarly, the section 30F could unreasonably limit the freedom of expression. In fact, every time a journalist wants to publish information regarding the anti-terror operations, he has to obtain a permission from the National Police Service. Equally, the application of the section extends to social media like Facebook or Twitter. Consequently, it creates an atmosphere of legal uncertainty, where journalists and ordinary Kenyans will be uncertain whether their statements related to security operations are lawful or not, thus, hindering their right to freedom of opinion and expression.

Moreover, sufficient regulation of ethics and media practices already exist in laws and rules, including the Kenya Information and Communications Act 1998, Media Act 2013 and Code of Conduct for the Practice of Journalism that already address concerns about alarming and disturbing publications. The Media Council of Kenya, a body created under the Media Act 2013, is specifically empowered to deal with these situations. Consequently, there is no need to create an additional layer of regulation, which not only creates new criminal offences and moreover unjustifiably restricts Constitutional freedoms.

**Recommendation:** ***CHRI recommends the following amendments to Clause 75 with reference to a proposed Section 30A of the Prevention of Terrorism Act: that the proposed Section 30A be redrafted as follows:***

> **(1) A person who publishes or utters a statement that is likely to be understood as directly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.**
>
> **(2) For purposes of subsection (1), a statement is likely to be understood as directly encouraging or inducing another person to commit or prepare to commit an act of terrorism if –**
>
> > **(a) the circumstances and manner of the publications are such that it can reasonably be inferred that it was so intended; or**

[25] Constitution, 2010, Article 34(2);
[26] *Ibid.*

**(b) the intention is apparent from the contents of the statement**

***CHRI recommends that Clause 15 and the proposed Section 30F introduced by Clause 75 are deleted from the Bill.***

The proposed Section 75 in subsection (1) aims to penalise persons who knowingly attend training or receive instructions at any place, whether in Kenya or outside Kenya, including the training on the use of weapons, that are intended for purposes connected with the commission or preparation of terrorist acts. However, subsection (2) states that it is irrelevant whether the person (a) in fact receives the training; or (b) the instruction is provided for particular acts of terrorism.

We submit that both the conditions stated in subsection 2 – actually receiving the training as well as that the instruction is provided for acts of terrorism – are both central elements and cannot be disregarded. In fact, they are crucial to determining that the training or instructions received are in fact "intended for purposes connected with the commission or preparation of terrorist acts".

**Recommendation: *CHRI recommends the following amendments to Clause 75 with reference to a proposed Section 30B of the Prevention of Terrorism Act:* that the proposed Section 30B(2) is deleted from the Bill.**

Clause 30C confers a power on the Cabinet Secretary to designate any country to be a "terrorist training country". Any person, who travels to such a country without passing through designated immigration entry or exit points, is presumed to have visited this country to receive training in terrorism, unless he ordinarily resides in Kenya within an area bordering designated country.

This runs contrary to the presumption of innocence, and is likely to indiscriminately target innocent Kenyans, refugees as well as people engaged in certain criminal activities that nevertheless fall short of terrorism (*e.g.* smugglers or drug traffickers). While it is important to fight trans-border crime and control the movement across borders, especially borders with state, from the territory of which terrorist attacks emanate, it is illegal and unconstitutional to treat persons as terrorists on a mere basis that they did not, or perhaps were unable to comply, with the border regime. Moreover, less restrictive measures are available to Kenyan government, first and foremost being better investment in border control.

**Recommendation: *CHRI recommends that Clause 75 is amended by deleting the proposed Section 30C from the Bill.***

## Clause 79

Section 79 of the Bill seeks to amend the Prevention of Terrorism Act by giving the power to issue interception of communications orders to the Chief Magistrate alongside the High Court. It is submitted that since under the Constitution[27] the High Court enjoys jurisdiction to determine whether a right or fundamental freedom is threatened, it must remain the sole authority to issue interception of communications orders to provide the strongest guarantee

[27] Constitution of Kenya, 2010, Article 165(3)(b);

that it is well considered that no rights are affected or curtailed as a consequence of the issuing of these orders.

**Recommendation:** ***CHRI recommends that Clause 79 is deleted from the Bill.***

## Clause 83

Clause 83 of the Bill seeks to amend the Prevention of Terrorism Act by inserting a new section 39A. According to the proposed section, "the Court shall have due regard to the authenticity and accuracy of the evidence presented before it without due regard to technicalities of procedure." There is direct and imminent danger that this provision is likely to undermine the basic principle of a fair trial, that is – due process. According to the Constitution, all evidence "obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."[28] The proposed amendment suggests that courts should disregard the way the evidence was obtained, when they are hearing cases under the Prevention of Terrorism Act, and accept all evidence put forth by the prosecution. As such, this could mean that evidence obtained through torture, inhuman or degrading treatment, threats and intimidation could be admissible in terrorist cases. This in turn could encourage or facilitate resorting to such illegal and brutal methods. Therefore, Clause 83 is an unequivocally unconstitutional amendment.

**Recommendation:** ***CHRI recommends that Clause 83 be deleted from the Bill.***

## Clauses 97-100

Clause 97 of the Bill seeks to amend Section 12 of the National Police Service Act related to the appointment of the Inspector-General of the National Police Service. The proposed amendment does away with an independent and diverse selection panel, and transparent and consultative shortlisting of three candidates for the post of Inspector-General of Police. Instead, it allows the President, on his/her sole discretion, to forward a single nominee to Parliament.

In turn, Clause 98 of the Bill changes the procedure of removal of the Inspector-General by essentially vesting this power solely in the President. Clause 99, dealing with the removal of the Deputy Inspector-General, is amended in the same way, while Clause 100 removes security of tenure of the Director of Criminal Investigations.

These clauses contradict the Article 246 of the Constitution that requires the National Police Service Commission to be involved in the appointment and removal of "persons holding or acting in offices within the Service", which also includes the Inspector-General, his Deputies and the Director of Criminal Investigations. More largely, these clauses defeat the gains of Kenya's police reform process as the National Police Service Act 2011 puts in place a truly democratic, rigorous and transparent process for appointment of the police chief. Stringent

[28] *Id*, Article 50(4).

processes, based on checks and balances and transparency, are the best safeguards against undue political interference in policing. These are essential to guarantee the Police Service's professionalism and independence. Hence, the sections 97-100 apart from being unconstitutional are detrimental to the performance of the National Police Service.

**Recommendation:** ***CHRI recommends that Clauses 97-100 are deleted from the Bill*****.**

## Clause 103

Clause 103 of the Bill seeks to amend Section 88 of the National Police Service Act by inserting a new subsection (3A). The said subsection intends to limit criminal responsibility of the police officers to a maximum of ten years, which effectively discriminates between the police officers and every other Kenyan citizen. This is a flagrant violation of Constitutional principles of equality and rule of law,[29] and contradicts existing police legislation, for instance, s.95 of the National Police Service Act that prescribes 25 years of imprisonment as a punishment for torture.

**Recommendation:** ***CHRI recommends that Clause 103 is deleted from the Bill*****.**

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[29] Constitution of Kenya, 2010, Articles 10(b), 27, 238(2)(b); ICCPR, Article 26; ACHPR, Articles 3, 19.