

Kenya

	2013	2014		
Internet Freedom Status	Free	Free	Population:	44.2 million
Obstacles to Access (0-25)	9	9	Internet Penetration 2013:	39 percent
Limits on Content (0-35)	7	7	Social Media/ICT Apps Blocked:	No
Violations of User Rights (0-40)	12	12	Political/Social Content Blocked:	No
TOTAL* (0-100)	28	28	Bloggers/ICT Users Arrested:	No
			Press Freedom 2014 Status:	Partly Free

* 0=most free, 100=least free

Key Developments: May 2013 – May 2014

- Two bills—the Kenyan Information and Communications Amendment (KICA) 2013 and Media Bill 2013—were signed into law in December 2013 with provisions that threaten to restrict media freedom both online and offline; the High Court halted implementation of both laws in January 2014 until the full Court considers the legal claims (see **Obstacles to Access** and **Violations of User Rights**).
- A new regulatory body, the Communications Authority of Kenya (CA), was created under KICA, though the degree of its independence is debatable due to the political appointment process of its board members (see **Obstacles to Access**).
- In May 2014, political activist Moses Kuria reported that his Facebook account had been shut down for alleged hate speech (see **Limits on Content**).
- Additions to SIM card registration regulations were drafted in January 2014 that, if implemented, will provide the communications regulator with unfettered access to mobile network service providers' subscriber records without a court order (see **Violations of User Rights**).
- A Vodafone report published in June 2014 included Kenya as one of 29 countries that requested access to user communications data (metadata) on Vodafone networks, while Google's Transparency Report documented 13 government requests for user account information (see **Violations of User Rights**).

Introduction

In 2013 and 2014, Kenya's information and communication technology (ICT) field continued to be vibrant, attracting investments from global ICT giants such as Huawei, ZTE and Cisco, which operate in collaboration with local operators. The country was cited as one of two countries in Africa with the highest internet Gross Domestic Product (iGDPs)¹—which is the measure of the internet's contribution to a country's economy—behind Senegal, even though neither country ranks among the continent's largest economies, reflecting the respective governments' concerted efforts to stimulate internet demand.

The growing use of ICTs in Kenya has put a spotlight on issues of freedom of expression and privacy in the country, particularly the problem of hate speech stemming from ethnic tensions that have polarized the country for decades. During the 2007 post-electoral period, hate speech was disseminated via SMS text messages, fueling political conflict and ethnic violence that resulted in the deaths of over 1,200 people. Hate speech was subsequently criminalized with the passage of the National Cohesion and Integration Act of 2008 and the Communications Amendment Act 2009. In the lead up to the country's general election in March 2013—which saw citizens and politicians alike using ICTs to disseminate information and prevent electoral violence—hate speech shifted from text messages to the internet, particularly on blogs and social media platforms such as Facebook and Twitter.² Consequently, the government monitored blogs and social media outlets for hate speech and launched several investigations against bloggers for their alleged hate speech activities.³ While no major government abuses were reported during the coverage period, the country's ambiguous efforts to control hate speech online threatened to infringe on freedom of expression and privacy.

There were no known incidents of government filtering or interference with online content over the past year, compared to the previous period when one popular web forum was shut down for failing to moderate hate speech, and text messages were reportedly blocked en masse during the March 2013 elections to prevent political conflict. However, several bloggers faced probes over incitement on social media, and one political activist had his Facebook account shut down for alleged hate speech. Extralegal intimidation or violence against netizens is uncommon in Kenya, though Dickson Bogonko Bosire, the editor of the controversial news blog, *Jackal News*, was reported missing in September 2013 and was still mysteriously missing as of mid-2014. It is widely believed that his disappearance is not linked to the government.

Two legislative measures passed in December 2013, the Kenyan Information and Communications Amendment Act (KICA) 2013 and Media Act 2013, were seen as posing a threat to press freedom and freedom of expression, both online and offline. While the High Court halted implementation of both bills in January 2014 due to questions regarding their constitutionality, the laws are particularly problematic for their establishment of a Communications and Multimedia Appeals Tribunal under the state-controlled Communication Authority that will have the power to revoke journalists' press

1 McKinsey Global Institute, "Lions go digital: The Internet's transformative potential in Africa," 2013, http://www.mckinsey.com/insights/high_tech_telecoms_internet/lions_go_digital_the_internets_transformative_potential_in_africa; Emmanuel Amberber, "The Internet of Africa," Your Story, December 2, 2013, <http://yourstory.com/2013/12/internet-africa/>.

2 Report of the Experts' Meeting on 'Addressing the Challenge of Hate Crimes on the Internet in Kenya. 2013, Centre for Human Rights and Policy Studies (CHRIPS) And Centre for Human Rights and Peace (University of Nairobi) pg 5.

3 Fred Mukinda, "14 bloggers linked to hate messages," *Daily Nation*, March 28, 2013, <http://www.nation.co.ke/News/14-bloggers-linked-to-hate-messages/-/1056/1732288/-/cut5kvz/-/index.html>.

credentials and impose heavy fines on media outlets and journalists for breach of conduct, among other restrictions.

The September 2013 terrorist attack on the Westgate Mall in Nairobi and the subsequent slew of attacks by the Al Shabab terrorist group across the country has led to a growing sense that the government has expanded its surveillance activities, though the extent of the country's surveillance capabilities is unclear. In January 2014, the government drafted additions to SIM card registration regulations that will provide the communications regulator with unfettered access to mobile network service providers' subscriber records without a court order, which if implemented, would contravene constitutional rights to privacy. The proposed regulations also prescribe heavy fines and prison sentences for offending subscribers, agents, and providers. Meanwhile, in mid-2014, Vodafone named Kenya as one of 29 countries that requests access to user communications data on Vodafone networks, and Google's Transparency Report documented requests for user account information from the Kenyan government for the first time since Google began reporting this data in July 2009.

Obstacles to Access

ICTs are continuing to spread in Kenya, in no small part due to the government's commitment to developing the country's ICT infrastructure as a tool for economic growth. According to available government data from December 2013, the percentage of the population with access to the internet stood at over 52 percent, increasing from 41 percent recorded in December 2012.⁴ By contrast, data from the International Telecommunications Union (ITU) from 2013 estimated a lower penetration rate of 39 percent, up from 32 percent in 2012.⁵ Penetration for fixed-line broadband subscriptions remained very low at 0.1 percent in 2013.⁶

Meanwhile, mobile phone subscriptions stood at over 31 million,⁷ with a penetration rate of 77 percent (71 percent according to 2013 ITU data, with no notable change from the previous year⁸), though many people have more than one subscription with different providers to take advantage of lower prices or expand their geographic coverage, putting the actual number of users much lower. The mobile sector is the predominant provider of data and internet services to Kenyan users, accounting for 99 percent of total internet subscriptions.⁹ As such, internet-enabled mobile phones are the primary drivers of growing internet uptake in Kenya, as citizens turn to their handsets for value-added mobile services such as social media, entertainment, mobile money transfer, and lower cost text messaging applications.¹⁰

Kenya has comparatively low-priced mobile services for Africa, with monthly costs averaging KES 161

4 CCK, "Quarterly Sector Statistics Report: Second Quarter of the Financial Year 2013/2014 (Oct-Dec 2013)," http://216.154.209.114/resc/downloads/Sector_Statistics_Report_Q2_201314.pdf

5 International Telecommunication Union, "Percentage of Individuals Using the Internet, 2000-2013," <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

6 International Telecommunication Union, "Fixed (Wired)-Broadband Subscriptions, 2000-2013."

7 CCK, "Quarterly Sector Statistics Report: Second Quarter of the Financial Year 2013/2014 (Oct-Dec 2013)."

8 International Telecommunication Union, "Mobile-cellular Telephone Subscriptions, 2000-2013."

9 CCK, "Quarterly Sector Statistics Report: Second Quarter of the Financial Year 2013/2014 (Oct-Dec 2013)."

10 CCK, "Local internet subscriptions record first-ever negative growth," January 16, 2014, http://216.154.209.114/news/2014/internet_low_growth.html.

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(US\$1.90) for 30 calls and 100 SMS text messages.¹¹ The average user pays about US\$36 per month for 1-2 Mbps of unlimited data services and US\$37 for unlimited internet through a USB dongle (3G modem).¹² These relatively affordable costs are in large part the result of strong regulatory interventions that have led to the implementation of the lowest mobile termination rates across the continent.¹³ Data bundles are available for prepaid mobile customers, while mobile broadband subscriptions on GPRS/EDGE and 3G networks have also continued to increase. The growth in mobile internet subscriptions can be attributed to competitive mobile internet tariffs, special offers and promotions, and the rise in social media use, particularly among the youth population.

Nonetheless, the cost of mobile devices and internet subscriptions remains a stumbling block for many impoverished Kenyans to access the web, and access to inexpensive quality internet remains far-reaching for many low-income earners, prompting the government to set up a Universal Service Fund in 2013 to raise KES 1 billion yearly from the industry to expand mobile and internet services.¹⁴ According to a Gallup poll published in 2013 on worldwide median income, Kenya has an annual per capita income of US\$402.¹⁵ Still, Kenya is ranked by the Alliance for Affordable Internet as the fifth most affordable country in Africa for internet access and 18th in the world, among the 46 total countries examined.¹⁶

Despite decreasing costs, internet speeds are still slow, averaging 1.9 Mbps (compared to a global average of 3.9 Mbps), according to May 2014 data from Akamai's "State of the Internet" report.¹⁷ In addition, Kenya's broadband adoption (characterized by connection speeds greater than 4 Mbps) was about 5 percent (up from 2 percent from the previous year), while the country's narrowband adoption (connection speed below 256 kbps) is 2 percent (down from 3 percent).¹⁸

Further, while internet penetration continues to increase across the country, there is still a large disparity in access between rural and urban areas. Internet use in Kenya is mainly concentrated in Nairobi, and significant action is needed to address issues of access outside of the capital.¹⁹ According to a November 2013 report by the McKinsey Global Institute, Kenya's urban internet penetration rate

11 Frankline Sunday, "Lack of Expertise Slows Down ICT Growth," *Standard Digital*, December 22, 2012, http://www.standardmedia.co.ke/?articleID=2000073463&story_title=lack-of-expertise-slows-down-ict-growth.

12 Orange, "Orange Launches Unlimited Internet Bundles," press release, January 18, 2011, <http://oran.ge/1bWXY5i>.

13 Mobile termination rates are a measure of the costs that mobile operators charge each other for terminating inter-network calls.

14 Muthoki Mumo, "Sh74 billion needed to bridge Kenya's yawning digital divide," *Daily Nation*, May 28, 2013. <http://bit.ly/1IPvXUo>.

15 Glenn Phelps and Steve Crabtree, "Worldwide, Median Household Income About \$10,000," Gallup World, December 16, 2013, <http://www.gallup.com/poll/166211/worldwide-median-household-income-000.aspx#1>.

16 "The Affordability Report 2013," Alliance for Affordable Internet, accessed August 11, 2014, http://a4ai.org/wp-content/uploads/2014/01/Affordability-Report-2013_Final-2.pdf.

17 Akamai, "Average Connection Speed: Kenya," map visualization, *The State of the Internet Q1* (2014), <http://www.akamai.com/stateoftheinternet/soti-visualizations.html#stoi-map>.

18 Akamai, "Broadband Adoption (connections to Akamai >4 Mbps): Kenya," map visualization, *The State of the Internet, Q1 2014*; Akamai, "Narrowband Adoption (connections to Akamai <256 kbps): Kenya," map visualization, *The State of the Internet, Q1 2014*, <http://www.akamai.com/stateoftheinternet/soti-visualizations.html>.

19 David Souter and Monica Kerretts-Makau, "Internet Governance in Kenya -- An Assessment for the Internet Society," ICT Development Associates Ltd, September 2012, pp. 28.

stood at 78 percent (compared to a national rate of 39 percent), with 95 percent of urban Kenyans possessing an internet-enabled mobile phone.²⁰

Kenya has four submarine cables—Seacom, the East Africa Marine Systems (Teams), EASSY, and Lower Indian Ocean Network (LION2)—that have improved available bandwidth, though this has not necessarily made access cheaper as ISPs have yet to pass down reduced costs to retailers.²¹ In addition, large parts of the country, particularly rural areas, have not been able to benefit from Kenya's high-capacity bandwidth in part due to market disparities and weaknesses in last mile connectivity, which is pricey and requires basic infrastructure such as electricity, roads, and cable security that are often limited in rural areas. Nevertheless, there have been no reports of the government controlling the internet infrastructure to limit connectivity.

To help overcome Kenya's infrastructural challenges to connectivity, Ushahidi—the Kenyan technology non-profit known for its crowd mapping platform created in response to the post-election violence in 2007-08—developed a modem called BRCK in June 2013 that can keep users connected even without electricity.²² Described as a “backup generator for the net,” BRCK was designed to work in regions where connectivity is unpredictable and has the potential to vastly expand internet access to remote areas across the continent.²³

Through the country's open market-based licensing process instituted in 2008, competition is present in most segments of the telecommunications market. There are over ten fixed wireless ISPs in Kenya and four mobile phone providers. In 2013, Safaricom dominated the market for mobile phone services with a 68 percent share of all mobile subscriptions.²⁴ The three other mobile operators—Airtel Networks, Essar Telecom, and Telkom Kenya (Orange)—served the other 32 percent of the mobile market. Among the same mobile providers, Safaricom had an even more dominant position in the mobile data and internet sector, commanding 74 percent of the market.²⁵

The competitive setting in the mobile phone and data subsector has notably led to a broad deployment of infrastructure to many parts of the country. There are no restrictions on the number of operators permitted to launch and operate telecommunications infrastructure in Kenya, with both data carriers and cellular licenses allowed to run domestic fiber networks.²⁶ Meanwhile, service providers have formed organizations such as the Kenyan ISP Association, the Telecommunications Service Providers of Kenya, and the Kenya Cybercafe Owners to lobby the government for better regulations, lower costs, and increased efforts to improve computer literacy.

20 James Manyika et al., “Lions go digital: The Internet's transformative potential in Africa,” McKinsey Global Institute, November 2013, pp. 56, <http://bit.ly/1bfrmYn>.

21 Jeevans Nyabiange, “Why cheaper internet remains a mirage despite fibre option roll out,” *The Standard*, December 15, 2013, <http://bit.ly/1lPw1nf>.

22 Lyndsey Gilpin, “With Ushahidi's global innovation engine, Africa has joined the tech revolution,” *TechRepublic*, February 3, 2014, <http://tek.io/VgjWjr>.

23 “Kenya Techies to Launch ‘Internet Back Up Generator,’” Ventures, June 20, 2103, <http://www.ventures-africa.com/2013/06/kenya-techies-to-launch-internet-back-up-generator-brck/>.

24 CCK, “Quarterly Sector Statistics Report: Second Quarter of the Financial Year 2013/2014 (Oct-Dec 2013).”

25 CCK, “Quarterly Sector Statistics Report: Second Quarter of the Financial Year 2013/2014 (Oct-Dec 2013).”

26 Robert Schuman and Michael Kende. “Lifting Barriers to Internet Development in Africa: Suggestions for improving connectivity,” Internet Society, May 2013, pp. 35, <http://bit.ly/1s1sL10>.

The Kenya Information and Communication Amendment Act (KICA) 2013,²⁷ passed in December, replaced the Communications Commission of Kenya (CCK) with the Communications Authority of Kenya (CA) and tasked the new body with regulatory responsibilities over both broadcast and online media. While KICA explicitly enshrined the independence of the new regulatory body, the act was widely criticized for the power it granted to the Cabinet Secretary to appoint the new authority's Board without stakeholder input, in addition to the presidential appointment of the Board's chairperson.²⁸ Due to these concerns regarding CA's independence—among numerous others regarding KICA in general (see "Violations of User Rights")—the High Court in Nairobi halted KICA's implementation in a ruling on January 31, 2014.²⁹ Nevertheless, the government moved forward with replacing the CCK with the new Communications Authority (CA) as the primary regulatory body in June 2014.³⁰

Limits on Content

During the coverage period, the government kept a watchful eye over the spread of hate speech on the internet. In May 2014, a political activist reported that his Facebook account had been shut down for alleged hate speech.

There were no reported incidents of internet censorship or content removal during the May 2013 - May 2014 coverage period, and the Kenyan government did not employ any form of technical or administrative censorship to restrict access to political or other content. Kenyans have unrestricted access to social networking platforms and communication applications such as Facebook, Twitter, YouTube, Whatsapp and the blog-hosting site Blogger, all of which rank among the 10 most popular sites in the country.³¹

In the lead-up to the last general elections in March 2013, the government reportedly ramped up its efforts to curb the spread of content that could trigger unrest or incite violence. One website, the popular forum Mashada.com, was shutdown in January 2013 for allegedly failing to moderate hate speech.³² The website came back online in late April 2013.³³ In another strategy leading up to the elections, the former CCK regulator issued guidelines for mobile phone providers to regulate the

27 Republic of Kenya, "The Kenya Information and Communication (Amendment) Bill, 2013," *Kenya Gazette Supplement No. 105 (National Assembly Bills No. 19)*, July 22, 2013, <http://bit.ly/1vyJYiY>.

28 Republic of Kenya, "The Kenya Information and Communication (Amendment) Bill, 2013," *Kenya Gazette Supplement No. 105 (National Assembly Bills No. 19)*, July 22, 2013, <http://bit.ly/1vyJYiY>.

29 Freedom House, "Kenya journalists win court victory against repressive media laws," press release, February 5, 2014, http://www.ifex.org/kenya/2014/02/05/court_victory/; Kurian Musa, "Reprieve as oppressive media laws suspended," *The Standard*, February 1, 2014, <http://bit.ly/Vd8bug>.

30 In June 2014, the government formally launched the new Communications Authority of Kenya (CAK) website (<http://www.ca.go.ke/>), shutting down the CCK webpage. Analysts argue the move is in outright contempt of the January 2014 court ruling that halted the KICA implementation. Other analysts contend that the government may argue that there was no specific court injunction on KICA.

31 Alexa, "Top Sites in Kenya," <http://www.alexa.com/topsites/countries/KE>, accessed September 15, 2014.

32 "Popular Kenyan Online Forum Shut Down Following Government's Clampdown on 'Hate Speech,'" *Mwakilishi.com*, January 30, 2013, <http://www.mwakilishi.com/content/articles/2013/01/30/popular-kenyan-online-forum-shut-down.html>.

33 Mashada.com's Facebook page, post from April 9, 2013, accessed September 12, 2014, <https://www.facebook.com/Mashada>.

transmission of bulk text messages³⁴ and reportedly asked providers to block messages that could potentially incite violence.³⁵ During the elections period, then-permanent secretary of the Ministry of Information and Communication, Dr. Bitange Ndemo, announced that mobile phone providers were blocking more than 300,000 text messages each day to prevent electoral violence,³⁶ though no evidence or other reports surfaced to substantiate this claim. Some independent observers believe Ndemo may have fabricated or exaggerated the claim to discourage citizens from trying to spread hate speech via text messages.³⁷ Nonetheless, there were no further reports of this practice occurring after March 2013.

Following the 2013 elections, the government kept a watchful eye over the spread of hate speech on the internet. In May 2014, political activist Moses Kuria reported that his Facebook account had been shut down for alleged hate speech.³⁸ Otherwise, Kenya does not actively block or filter internet content, though the Blue Coat PacketShaper appliance—a device that can help control undesirable traffic by filtering application traffic by content category—was detected in Kenya in January 2013, as well as in 18 other countries around the world, including China, Bahrain, and Russia.³⁹ There has been no further evidence to reveal the extent to which the filtering device has been implemented, though its discovery in Kenya is noteworthy given the government’s increasing concern over the spread of hate speech and inflammatory content via ICTs.

Intermediaries can be held liable for illegal content, such as hate speech, though they are not required to actively monitor traffic passing through their networks unless they are made aware of illegal content. Under the National Cohesion and Integration Act of 2008, which outlaws hate speech, a media enterprise can be fined up to KES 1 million (nearly US\$11,000) for publishing “utterances” that can be characterized as hate speech under the law’s broad definition.⁴⁰ While there have been no reported cases of intermediaries held liable for hate speech to date, the law has encouraged proactive self-regulation by providers in monitoring and moderating hate speech on their networks and platforms. For example, the big media houses in Kenya have developed community guidelines similar to those developed by YouTube as one measure of controlling online

34 According to Article 9.4 of the guidelines, “Political Messages shall not contain inciting, threatening or discriminatory language that may or is intended to expose an individual or group of individuals to violence, hatred, hostility, discrimination or ridicule on the basis of ethnicity, tribe, race, colour, religion, gender, disability or otherwise.” See: Communications Commission of Kenya, “Guidelines for the Prevention of Transmission of Undesirable Bulk Political Content/Messages via Electronic Communications Networks,” September 2012.

35 To do so, service providers reportedly installed a firewall that could detect messages containing particular words, such as “kill,” which were automatically flagged for further scrutiny. See: “Short Message Service (SMS) & The Kenyan General Elections,” *Africa Speaks 4 Africa* (blog), accessed June 22, 2013, <http://www.africaspeaks4africa.org/?p=2550>.

36 Fred Mukindia, “Phone Firms Block 300,000 Hate Texts Daily, says Ndemo,” *Daily Nation*, March 21, 2013, <http://www.nation.co.ke/News/Phone-firms-block-300-000-hate-texts-daily-says-Ndemo/-/1056/1726172/-/ktkiafz/-/index.html>.

37 Based on interviews with independent analysts in Kenya.

38 Evelyn Musambi, “Moses Kuria’s Facebook account closed,” *Daily Nation*, May 29, 2014, <http://www.nation.co.ke/news/Moses-Kuria-says-his-Facebook-account-closed/-/1056/2330838/-/2dqutuc/-/index.html>.

39 Morgan Marquis-Boire et al., “Planet Blue Coat: Mapping Global Censorship and Surveillance Tools,” Citizen Lab, Munk School of Global Affairs, University of Toronto, January 15, 2013, <https://citizenlab.org/2013/01/planet-blue-coat-mapping-global-censorship-and-surveillance-tools/#4>.

40 Section 62 (1) defines hate speech as “words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race.” Section 62 (2) holds: “A newspaper, radio station or media enterprise that publishes the utterances referred to in subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings.” See: National Cohesion and Integration Act, 2008, Section 62, accessed September 12, 2014, http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalCohesionandIntegrationAct_No12of2008.pdf.

hate speech.⁴¹ According to a spokesperson, Standard Group handles close to 50,000 comments and censors 30,000 on a daily basis.⁴² Intermediaries can also be held liable for the transmission of obscene content under the Communications Amendment Act of 2009, which entails a fine of up to KES 200,000, imprisonment of up to two years, or both.⁴³

There are no known state-run, government-influenced, or partisan online media outlets. Citizens are able to access a wide range of viewpoints, with the websites of the BBC, CNN, and Kenya's *Standard Online* and *Daily Nation* newspapers being the most popular news outlets.⁴⁴ While print outlets, television, and radio continue to be the main sources of news and information for most Kenyans, all major television stations have live-stream features and use YouTube to rebroadcast news clips and actively engage audiences on Facebook and Twitter.

There has been a notable increase in the number of blogs in recent years, covering a diverse range of topics from entertainment, fashion, and photography to technology and business. Individual internet users are generally comfortable expressing themselves openly online, though the use of digital technologies to spread ethnic, racist, and xenophobic commentary continues to pose a serious challenge to freedom of expression in Kenya, particularly during politically contentious periods such as national elections. In this complex debate, and in the absence of a suitable framework to regulate online hate speech, many feel that the emphasis should be on self-regulation by internet users, with the government stepping in to tackle hate crimes on the internet when needed.⁴⁵

The internet continues to grow as an important platform for political debate and mobilization around critical issues. Additionally, digital media has revolutionized the ways in which netizens and civil society groups in Kenya network, share information, and affect change. For example, in June 2013, Kenyans rallied online using Facebook and Twitter to launch the #OccupyParliamentReloaded campaign in protest against members of parliament (MPs) who were seeking to give themselves a hefty pay raise.⁴⁶ The activists succeeded in their efforts, leading the MPs to not only back down from their demands for a pay rise, but also concede to a paycut.⁴⁷

41 "Report of the Experts' Meeting on 'Addressing the Challenge of Hate Crimes on the Internet in Kenya,'" (2013) Centre for Human Rights and Policy Studies (CHRIPS) And Centre for Human Rights and Peace (University of Nairobi), pg 12.

42 "Report of the Experts' Meeting on 'Addressing the Challenge of Hate Crimes on the Internet in Kenya,'" (2013) Centre for Human Rights and Policy Studies (CHRIPS) And Centre for Human Rights and Peace (University of Nairobi), pg 12.

43 Section 84D of the Kenya Communications (Amendment) Act, 2009 states: "Any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest and its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied therein, shall on conviction be liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years, or both."

44 Top 50 most visited Kenyan websites. <http://bloggers.or.ke/top-50-most-visited-kenyan-websites/>.

45 "Report of the Experts' Meeting on 'Addressing the Challenge of Hate Crimes on the Internet in Kenya,'" (2013) Centre for Human Rights and Policy Studies (CHRIPS) And Centre for Human Rights and Peace (University of Nairobi), pg 4.

46 Kamau Mbote, "Occupy Reloaded protest against Kenyan Parliament ongoing," *Humanipo*, June 11, 2013, <http://www.humanipo.com/news/6494/occupy-reloaded-protest-against-kenyan-parliament-ongoing/>.

47 "Kenyan MPs back down from demanding pay rise to accept pay cut," *The Guardian*, June 12, 2013, <http://www.theguardian.com/world/2013/jun/12/kenyan-mps-accept-pay-cut>.

Violations of User Rights

Two bills—the Kenyan Information and Communications Amendment (KICA) 2013 and Media Bill 2013—were signed into law in December 2013, with provisions that threaten to restrict media freedom both online and offline; the High Court halted implementation of both laws in January 2014 until the full Court considers the legal claims. The government also increased its efforts to crackdown on hate speech spread through social media and blogs. In the aftermath of the September 2013 terrorism attack on the Westgate mall in Nairobi, there was a strong sense that the government stepped up its surveillance efforts. In January 2014, the government drafted additions to SIM card registration regulations that will provide the communications regulator with unfettered access to mobile network service providers' subscriber records without a court order.

Freedom of expression is enshrined in Article 33 of Kenya's 2010 Constitution and includes the right to seek, receive, or impart information and ideas, while Article 31 provides for the right to privacy. These rights, however, do not extend to propaganda, hate speech, or incitement to violence. Criminal defamation laws remain on the books, waiting to be repealed or amended to conform to Kenya's 2010 constitution. Meanwhile, existing laws that are inconsistent with the new constitution are considered unconstitutional,⁴⁸ and supplementary legislation continues to be developed through the parliament.

The progressive constitution appeared to conflict with two laws passed in December 2013—the Kenyan Information and Communications Amendment 2013 (KICA) and Media Act 2013—which practitioners regarded as a threat to media freedom in Kenya, both online and off. Despite widespread criticism, the president subsequently signed both into laws without revision. In protest against the new laws' problematic provisions, the Kenya Correspondents Association (KCA), Kenya Editors Guild (KEG), and Kenya Union of Journalists (KUJ) separately moved the High Court in January 2014 to challenge the constitutionality of the two laws, which they argued violated guarantees for the independence of the media regulator.⁴⁹ The High Court in Nairobi subsequently halted implementation of both laws until the full court could consider the legal claims.⁵⁰ The hearing of the case was scheduled for October 2014.⁵¹

If implemented in its current form, KICA would establish a government-appointed Communications and Multimedia Appeals Tribunal with the power to hear appeals on complaints initially handled by the Complaints Commission and Media Council of Kenya created under the Media Council Act.⁵² The KICA Tribunal would also have the ability to revoke journalists' press credentials and prescribe minimum educational standards for journalists to qualify. KICA would further allow legislators to revise the Journalists Code of Conduct and impose heavy fines⁵³ on media outlets and journalists

48 The Constitution of Kenya, Article 4.

49 On the grounds that the laws violate Article 34 of the Kenyan Constitution, which bars the state from interfering in the media sector.

50 "Kenyan journalists win court victory against repressive media laws," Freedom House (blog), February 4, 2014, <http://www.freedomhouse.org/article/kenyan-journalists-win-court-victory-against-new-restrictions>.

51 "High court gives new date for hearing of case on controversial media laws," Kenya Correspondents Association, Facebook post, August 7, 2014, <https://www.facebook.com/KenyaCorrespondentsAssociation/posts/578377745622229>.

52 "Kenyan Parliament urged to reverse new media law," International Press Institute, January 9, 2014, http://ipi.freemedia.at/index.php?id=269&tx_ttnews%5Btt_news%5D=444&cHash=35f81991154863507f56eabe53cf0977.

53 Fines involve up to 500,000 shillings (€4,160) for individual journalists who breach the journalistic code of conduct and a maximum of 20 million shillings (€167,000) for companies that do so.

for breaching provisions of the code.⁵⁴ The laws explicitly apply to both print and online journalists, though the status of bloggers as online journalists is ambiguous. Some bloggers believe the laws may be used against them given the government's growing interest in regulating speech on various online platforms.⁵⁵ Another provision in KICA replaces the CCK with the Communications Authority (CA) as the broadcast and online media regulator whose board and chairperson would be appointed by the communications secretary and the president without stakeholder input. Flouting the January 2014 court injunction on KICA, the government launched the new Communications Authority in June.⁵⁶

Meanwhile, a number of positive laws have been drafted in recent years to protect the rights of Kenyan internet users. The draft 2012 Data Protection Bill, for example, aims to regulate the collection, processing, storing, use, and disclosure of information relating to individuals processed through automated or manual means.⁵⁷ The 2012 Freedom of Information Bill underwent stakeholder consultation in mid-2013 and awaited consideration in parliament as of mid-2014.⁵⁸ Both bills promise to enhance internet freedom in Kenya, illustrating the country's commitment to the development of its ICT sector and the use of ICTs to enhance public sector accountability.

Hate speech is penalized under the 2008 National Cohesion and Integration Act, passed in response to widespread ethnic violence that ensued after the 2007 general elections.⁵⁹ Individuals found guilty of spreading hate speech, broadly defined, can be fined up to KES 1 million (nearly US\$11,000) or sentenced to up to three years in prison, or both. In the past year, the government increased its efforts to crackdown on hate speech spread through social media and blogs.⁶⁰ In May 2014, the National Steering Committee on Media Monitoring recommended that controversial Ugandan scholar David Matsanga be probed for alleged incitement on social media.⁶¹ It also pushed for the prosecution of seven bloggers who were purported to have used inciting language and extreme hate speech in their social media postings. The committee urged bloggers to cease posting emotive and abusive comments.

The interception of messages and the disclosure of their content is a criminal offence,⁶² though in the lead-up to the March 2013 elections, worries over potential unrest reportedly led the

54 The Kenya Information and Communications (Amendment) Bill, 2013, No. 41A, December 11, 2013, <http://africanmediainitiative.org/content/2014/01/26/KICA-Act-2013.pdf>; "New laws prescribe educational standards, revise code of conduct for journalists in Kenya," IFEX (new alert), December 19, 2013, http://www.ifex.org/kenya/2013/12/19/new_laws/.

55 Neelam Verjee, "In Kenya, Bloggers Say New Media Bill Makes Them Vulnerable to Prosecution," *TechPresident*, January 21, 2014, <http://techpresident.com/news/wegov/24688/kenya-bloggers-media-bill-vulnerable-prosecution>.

56 Kennedy Kangethe, "Communications Authority of Kenya succeeds CCK," *CapitalFM*, June 24, 2014, <http://www.capitalfm.co.ke/business/2014/06/communications-authority-of-kenya-succeeds-cck/>.

57 Commission for the Implementation of the Constitution "The Data Protection Bill, 2012," <http://www.cickenya.org/index.php/legislation/item/174-the-data-protection-bill-2012#.UW10zaJ-bvE>.

58 Commission for the Implementation of the Constitution, "The Freedom of Information Bill, 2012," <http://www.cickenya.org/index.php/legislation/item/173-the-freedom-of-information-bill-2012#.UW178KJ-be>.

59 Milly Lwanga, "Freedom of expression and harmful speech: The Kenyan situation," Article 19, September 27, 2012, <http://www.article19.org/join-the-debate.php/82/view/>.

60 "Full List of Bloggers Wanted For Hate Speech Together With Matsanga," *Diaspora Messenger News Media*, May 29, 2014, <http://diasporamessenger.com/full-list-of-bloggers-wanted-for-hate-speech-together-with-matsanga/>.

61 Ann Kamoni, "Ugandan David Matsanga, 7 bloggers face probe over social media incitement," *Daily Nation*, May 28, 2014, <http://www.nation.co.ke/news/Ugandan-David-Matsanga-faces-probe-over-social-media-incitement/-/1056/2329384/-/6b4xm9z/-/index.html>.

62 Alice Munyua, Grace Githaiga and Victor Kapiyo, "Intermediary Liability in Kenya," *Association of Progressive Communications*, October 2012, pg 11, <http://www.apc.org/en/pubs/intermediary-liability-kenya>.

government to implement precautionary surveillance measures to curb the spread of hate speech. A year before the elections in 2012, the CCK announced a requirement for telecom service providers to install an internet traffic monitoring system, which supposedly worked by assigning a unique internet protocol (IP) identity to individual gadgets, effectively making any communication traceable to its device of transmission. In their attempts to reassure consumers that the CCK would not proactively spy on internet users, officials noted that the system “does not have to read and disclose people’s information” and “will only monitor traffic.”⁶³ No further information was revealed about the extent to which service providers complied with the installation requirement or how the system had been put into practice, and no known abuses surfaced during the March 2013 elections or thereafter.

SIM card registration requirements have been in place since 2009 in collaboration with service provider, and were reinforced in January 2013 by the implementation of the Kenya Information and Communications (Registration of Subscribers of Telecommunications Services) Regulations 2012, which placed explicit responsibility on mobile providers to record and maintain an index of all subscribers.⁶⁴ SIM card registration requirements were more strictly enforced following the Westgate Mall terrorist attack in Nairobi in September 2013.⁶⁵ The increased security threat also prompted Kenya to join Rwanda, Uganda, and South Sudan in an agreement to establish a cross-border SIM card registration framework aimed at curbing the rise in crimes perpetrated by mobile devices.⁶⁶

Problematic additions to SIM card registration regulations were proposed in January 2014 that grant the CCK with access to service providers’ sites and records without a court order⁶⁷ and reportedly prescribe penalties of up to KES 300,000 (approximately US\$3,500) for individuals and KES 5 million (US\$58,000) for mobile providers, while agents can be fined up to KES 500,000 (US\$5,800) or imprisonment of up to one year.⁶⁸ Mobile phone providers and consumer rights activists oppose the proposed regulations that will grant sweeping powers to the regulator and contravene constitutional rights to privacy.⁶⁹

There are no known requirements for ICT service providers to proactively monitor their users. However, in the aftermath of the September 2013 terrorism attack on the Westgate mall in Nairobi, there is a strong sense that the government has stepped up its surveillance efforts, though the

63 Lilian Nduati, “We Will Not Spy on Kenyans Online, says Internet Watchdog,” *Sunday Nation*, March 22, 2012, <http://bit.ly/18Gcsb0>.

64 The Kenya Information and Communications (Registration of Subscribers of Telecommunication Services) Regulations, 2012, January 4, 2013, http://216.154.209.114/regulations/downloads/REGISTRATION_OF_SUBSCRIBERS_OF_TELECOMMUNICATION_SERVICES_REGULATIONS.pdf.

65 Macharia Kamau, “Kenya Warns Telcom Operators Over Unregistered SIM Cards,” *Standard Digital*, October 8, 2013, <http://www.standardmedia.co.ke/m/story.php?id=2000095113&pageNo=1>.

66 Charles Wokabi, “East African states to share SIM card, national ID data,” *Daily Nation*, September 21, 2013, <http://www.nation.co.ke/business/East-African-states-to-share-SIM-card-and-national-ID-data/-/996/2121474/-/iqt4hez/-/index.html>.

67 Section 15. “A licensee shall grant the Commission’s officers access to its systems, premises, facilities, files, records and other data to enable the Commission inspect such systems, premises, facilities, files, records and other data for compliance with the Act and these Regulations.” Kenya Information and Communications (Registration of Subscribers of Telecommunication Services) Regulations, 2013, (draft) http://216.154.209.114/links/consultations/current_consultations/Draft_Regulations_on_Registration_2013_Amended.pdf.

68 Nick Sato, “Kenyan operators concerned over privacy infringement in SIM regulations,” *humanipo*, January 20, 2014, <http://www.humanipo.com/news/39028/kenyan-operators-concerned-over-privacy-infringement-in-sim-regulations/>.

69 Okuttah Mark, “CCK trashes telecom users’ privacy with new spying rules,” *Business Daily Africa*, January 20, 2014, <http://www.businessdailyafrica.com/CCK-trashes-telecom-users--privacy-with-new-spying-rules/-/539546/2152122/-/item/0/-/t13jx/-/index.html>.

extent of those efforts are unclear and unreported. One government initiative proposed in April 2014 aims to register the biometric details of all Kenyans in a new national digital database.⁷⁰ In May 2014, the president reportedly asked the Safaricom mobile phone operator to “develop a security communication and surveillance system that would urgently boost the capacity of the national security agencies to fight terrorists.”⁷¹

In June 2014, Vodafone published its “Law Enforcement Disclosure Report” that included Kenya as one of 29 countries that requested access to user data and communications on Vodafone networks between April 1, 2013 and March 31, 2014.⁷² With a 40 percent shareholding in Safaricom in Kenya, Vodafone reported that it was not required to implement the technical requirements necessary for lawful interception and therefore did not receive any demands from the government to assist with the lawful interception of communications. On the issue of user and communications-related data (or “metadata”) requests, Vodafone was unable to report the exact number of requests received in Kenya due to the country’s unclear legal provisions under the Official Secrets Act that prohibit the publication of certain government information. Nevertheless, Vodafone’s report notes that the laws governing the disclosure of communications data in Kenya—such as KICA and the National Intelligence Service (NIS) Act of 2012—all require the authorities to obtain a court order or search warrant for data requests, with the exception of “extreme cases of emergency” during which the Director-General of NIS is allowed to operate without a warrant for up to 36 hours.⁷³

Among content hosts and social media platforms, Google’s Transparency Report documented requests for user account information from the Kenyan government for the first time since Google began reporting this data in July 2009. For the reporting period of July to December 2013, 11 account requests were documented with a compliance rate of 63 percent (or 7 requests), while 2 account requests were made during the January to June 2014 period with 0 percent compliance.⁷⁴ No requests were reported for user information from Twitter during the coverage period, and Facebook did not have updated data beyond the first half of 2013.

Extralegal violence against online journalists and ordinary internet users is not common in Kenya, though bloggers and social media users often harass each other with inflammatory language and hate speech.⁷⁵ In one unusual instance during the coverage period, Dickson Bogonko Bosire, the chief editor of the controversial news blog *Jackal News* was reported missing in September 2013. Bosire had periodically experienced threats in response to his blog’s coverage of corruption investigations and scandals, and according to Reporters Without Borders, Bosire had gone into

70 “Government to register all Kenyans afresh in digital database,” *Daily Nation*, April 14, 2014, <http://mobile.nation.co.ke/news/Digital-database-for-all-kenyans/-/1950946/2279712/-/format/xhtml/-/uityfn/-/index.html>.

71 “Why State House made a call to Safaricom chief over insecurity,” *Daily Nation*, May 13, 2014, <http://www.nation.co.ke/news/Why-State-House-made-a-call-to-Safaricom-chief-over-insecurity/-/1056/2313756/-/ybd3dt/-/index.html>.

72 Vodafone, “Law enforcement demands country-by-country,” *Sustainability Report 2014*, http://www.vodafone.com/content/sustainabilityreport/2014/index/operating_responsibly/privacy_and_security/law_enforcement/country_by_country.html#top.

73 Vodafone, “Law Enforcement Disclosure Report,” *Sustainability Report 2014*, http://www.vodafone.com/content/dam/sustainability/2014/pdf/operating-responsibly/vodafone_law_enforcement_disclosure_report.pdf.

74 Google, “Kenya” *Transparency Report*, accessed September 16, 2014, <http://www.google.com/transparencyreport/userdatarequests/KE/>.

75 Lillian Mutegi, “Ethnicity Still Drive to Online Hate Speech in Kenya,” *CIO East Africa*, July 4, 2014, <http://allafrica.com/stories/201407070007.html>.

hiding or fled Nairobi on several occasions.⁷⁶ As of March 2014, his family still had not heard from him, ruling out an initial theory that Bosire had gone into hiding after he published a controversial blog post about the International Criminal Court (ICC) proceedings against President Uhuru Kenyatta in which he listed the name of an ICC witness.⁷⁷ Nevertheless, it is widely believed that his disappearance is not linked to the government.

There were no politically motivated cases of technical violence against civil society or opposition websites during the coverage period. In 2013, the government launched several initiatives aimed at reining in the growing wave of crime perpetrated by use of technology, such as the Kenya Computer Incidence Response (KE-CIRT), the Public Key Infrastructure (PKI), and a National Cybersecurity Master Plan.⁷⁸

76 Reporters Without Borders, "Editor of controversial Kenyan news blog missing since September," new alert, October 16, 2013, http://www.ifex.org/kenya/2013/10/16/editor_missing/.

77 Magdalene Wanja, "Bogonko Bosire parents appeal for help to find their son," *Daily Nation*, March 10, 2014, <http://mobile.nation.co.ke/counties/Bogonko-Bosire-blogger-jackal-news-parents/-/1950480/2237794/-/format/xhtml/-/ghxe3cz/-/index.html>.

78 Macharia Kamau, "Tech Experts Root for Private Sector Let Cyber Security," *Standard Digital*, December 1, 2013, https://www.standardmedia.co.ke/m/?articleID=2000099097&story_title=Tech-experts-root-for-private-sector-led-cyber-security.