

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

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Saturday, January 14, 2017

Hon. Uhuru Kenyatta

President of the Republic of Kenya

Email: president@statehousekenya.go.ke

Hon. William Ruto

Deputy-President of the Republic of Kenya

Email: dp@deputyresident.go.ke

Hon. Joseph Nkaissery

Interior & Coordination Ministry□

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Mr. Joseph Boinnet

Inspector General of Police

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Re: Enforced Disappearance of Lawyer Simon Lilan on 9 January 2017
Remedial action urgently required

Dear Mr. President, Excellencies, Ministers, Inspector-General, Chairs,

I am writing on behalf of Lawyers' Rights Watch Canada (LRWC), a committee of lawyers and other human rights defenders who promote international human rights and the rule of law through advocacy, education and legal research. LRWC is a volunteer-run NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

Kenyan lawyer **Simon Lilan** has not been seen since 9 January 2017. Immediately prior to his disappearance he had been involved in obtaining an injunction to prevent the burial of the late politician Mark Too, who Mr. Lilan alleges was assassinated. Speaking to media the week prior to his disappearance he asserted that “powerful people want to finish me following my stand on the death of Mr. Too,” and that he had sought protection from the police.¹

We are gravely concerned that the enforced disappearance of Mr. Lilan is the latest in a pattern of violations against lawyers and other human rights defenders, including the disappearance and murder of lawyer Willie Kimani with his driver in June 2016. Four police officers have been charged with murder in that case; while Kenya's own human rights body has identified 25 extra-judicial killings between 2013

¹ Dennis Lubanga and Wycliff Kipsang “Panic as Lawyer Goes Missing Days After Claiming Mark Too Was Assassinated” 11 Jan 2017 Nairobi News online:

<http://nairobinews.nation.co.ke/news/panic-lawyer-goes-missing-days-claiming-mark-assassinated/>

and 2015,² non-governmental watchdog Independent Medico-Legal Unit (IMLU) says the police killed 97 people in 2015 alone.³

LRWC condemns in the strongest terms the enforced disappearance of Mr. Lilan, and the disappearance and extra-judicial killing of other lawyers and human rights defenders by police and security forces. We join the Law Society of Kenya (LSK) and others in calling for immediate action to:

- locate and secure the safe release and return of Simon Lilan;
- provide protection for his family members who may also be at risk;
- investigate and ensure appropriate criminal sanction of responsible parties;
- provide adequate reparations and avenues of redress for the victim, Mr. Lilani, and his family;
- Guarantee in all circumstances the physical integrity and security of human rights defenders, activists, advocates, their families, and their staff.
- Establish an Independent Commission of Inquiry to review cases of forced disappearance and extra-judicial killings and to address specific and systemic factors contributing to the high rate of disappearance and assassination in Kenya; and
- Comply with all provisions of the UN Declaration on Human Rights Defenders⁴ and in particular with Articles 1 and 12.2.

Kenya has a positive legal duty to prevent and punish enforced disappearance and extra-judicial killing, which constitute grave violations of rights guaranteed by the *Constitution of Kenya*,⁵ the *African Charter on Human and Peoples' Rights*, the *Universal Declaration of Human Rights* (UDHR), and the *International Covenant on Civil and Political Rights* (ICCPR), to which Kenya is a State Party.

The *Declaration to Protect all People from Enforced Disappearances*⁶ confirmed that state duties to effectively prevent and punish enforced disappearances are part of duties under the ICCPR and UDHR to ensure rights to liberty and security, freedom from torture and equal protection of the law. The Declaration also confirms that,

“No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.”

Under the *UN Declaration on Human Rights Defenders*,⁷ Kenya must safeguard the ability of human rights defenders to make complaints about official policies and acts, to attend public hearings and trials, and to benefit from effective remedies. Importantly, Art. 12(2) imposes on States a responsibility

“to take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.”

² *Human Rights Baseline Survey Report 2016*, Kenya National Commission on Human Rights, online:

http://www.knchr.org/Portals/0/GeneralReports/KNCHR_Human-Rights-Baseline-Survey-Report_2016.pdf

³ “Report on deaths from police bullets from January to December 2015”, The Independent Medico-Legal Unit, online: <http://www.imlu.org/2011-06-30-23-44-4/2015-08-28-09-08-23/reports/finish/2-reports/457-report-on-deaths-from-police-bullets-from-january-to-december-2015/0.html>

⁴ “Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms”, A/RES/53/144 adopted by the UNGA 1998.

⁵ *Constitution of Kenya (2010)*, ss. 19-22, 26, online:

<https://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf>

⁶ A/RES/47/133, 18 1992 of the UNGA.

⁷ A/RES/53/144 adopted 8 March 1999.

It is widely accepted that states must adopt and maintain effective measures to ensure the safety and independence of lawyers and the freedom to engage in their professional activities as lawyers and prosecutors without reprisals. The United Nations' *Basic Principles on the Role of Lawyers* ("Basic Principles")⁸ describe specific state duties that ensure the right to legal representation by ensuring the independence and safety of lawyers, including from interference by state and other actors. Article 16 of *The Basic Principles* provide that lawyers must be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference and that lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. Article 17 requires that states shall adequately safeguard the security of lawyers who are threatened as a result of discharging their functions.

LRWC reminds the Kenyan authorities that under the *Vienna Convention on the Law of Treaties* States are bound by their treaty obligations and all treaty obligations must be performed in good faith (the principle of *pact sunt servanda*).⁹ Article 27 of the *Vienna Convention* reads: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This principle was part of international law long before *The Vienna Convention* came into force.

Failure to act quickly and effectively would in the circumstances, itself constitute a violation of the ICCPR. As determined by the UN Human Rights Committee,

"There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."¹⁰ (emphasis added)

LRWC calls on the Government of Kenya to act immediately to locate and secure the release and return of **Simon Lilan** and to ensure remedial action to prevent future and punish past violations.

We look forward to your response.

Sincerely,



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⁸ *The Basic Principles*, adopted by the Eighth United Nations' Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁹ Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January 1980. U.N.T.S. Vol. 1155, p. 331 [Vienna Convention].

¹⁰ Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

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