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International Transport Workers' Federation  
Federación Internacional de los Trabajadores del Transporte  
Fédération internationale des ouvriers du transport  
Internationella Transportarbetarefederationen  
Internationale Transportarbeiter-Föderation  
Международная федерация транспортников  
التنظيم عالمياً، النضال من أجل حقوقنا

## Submission of the International Transport Workers' Federation to the UPR Session for Kenya, 18 July 2019

1. In advance of the Universal Periodic Review of Kenya due to take place in January 2020, the International Transport Workers' Federation (ITF), a global union federation representing 18.5 million members, from around 670 affiliates in 147 countries, submits the following information on behalf of workers and union members in Kenya and around the world
2. ITF concerns include:
  - Detention of union officials and government suppression of the legitimate right to strike;
  - Increased efforts against corruption for the protection of informal transport workers;
  - Due process of law to avoid the unjust criminalisation of seafarers.

### International Law

3. Kenya is a party to ILO Convention 98 on the Right to Organise and Collective Bargaining, though it has not ratified ILO Convention 87 on Freedom of Association and Protection of the Right to Organise. Notwithstanding the fact that Kenya has not ratified Convention 87, the Government has an obligation arising from the very fact of membership in the ILO to respect the fundamental principles and rights at work, including freedom of association and the right to strike.
4. Kenya is a party to both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 22 of the former protects the right to freedom of association with others, including the right to form and join a trade union to protect one's interests. Article 7 and 8 ICESCR also protect the right to just and favourable working conditions and the right to form and join trade unions that may function freely and, in particular, the right to strike.

### Previous UPR Session Outcomes

5. During the previous Universal Periodic Review of Kenya, the state supported a recommendation received from Uruguay that it guarantee freedom of expression, associations and peaceful assembly of participants in demonstrations (142.129).<sup>1</sup> Other labour-related items included Brazil's reference to ongoing challenges in ensuring freedom of association and expression in Kenya (140) and Albania and Egypt (at 142.60 and 142.71 respectively) confirming the need to take further efforts to combat child

<sup>1</sup>A/HRC/29/10, 20 March 2015, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/29/10&Lang=E>

labour, including by enforcing compulsory education. Issues of freedom of association are the focus of this submission as, despite the above state commitment to guaranteeing freedom of association, this is not the practice.

### **National Law**

6. Kenya's fourth periodic report to the Human Rights Committee on the implementation of the ICCPR was only lately published in April 2019. The state confirms, in the section thereof dedicated to article 22, that the Kenyan constitution recognises and protects freedom of association and the right to form join or participate in the activities of an association of any kind, including a trade union<sup>2</sup>. It emphasises the understanding that freedom of association is a fundamental right in any democracy and that this includes an individual's right to join an organisation of their choice.
7. The submission confirms that Kenyan law singles out only the National Police Service and Kenya Defence Forces as the two instances of limitations to the right to form and join trade unions and the freedom of association, as sanctioned by article 24(5) of the Constitution.
8. The Kenyan Constitution appears extensive and progressive in its provisions and protections. Article 36 guarantees the general right to freedom of association, and article 41 the specific rights to strike, to form, join or participate in the activities of a trade union and for that union to determine and organise its own activities and participate in collective bargaining. Article 37 goes so far as to specify the right to picket.

### **Suppression of Strike Action and Arrest of Trade Union Officials**

9. Despite upholding the Constitution as a guarantor of the right to organise, the ITF has concerns in relation to the Kenyan state's respect of trade union action in practice. In March 2019 Moses Ndiema, secretary general of the Kenya Aviation Workers Union (KAWU), and ten other union leaders were detained and denied bail as part of government efforts to suppress a strike by workers at Jomo Kenyatta International Airport in Nairobi. Other union officials detained included Richard Mutei, Robert Lichoro, Dan Kataka, Martha Wangeci, Selina Awala, Maxwell Osaka, Joyrender Ochieng, Charles Mwangi and Nicholas Barassa. Some of these leaders, including Ndiema and Barassa, are members of unions affiliated to the ITF.
10. It was reported that as many as 5000 workers were participating in this strike when it was violently broken up by police officers of the General Service Unit in full combat gear with use of clubs, kicks and tear gas, resulting in six workers being injured.
11. The demands of the participating workers were for an end to corruption, mismanagement and precarious work practices in the Kenyan aviation sector, in particular in response to a proposed merger between Kenya Airways and Kenya Airports Authority and the

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<sup>2</sup> Human Right Committee, Fourth Periodic Report, CCPR/C/KEN/4, April 2019, paras 149-154. at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKEN%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKEN%2f4&Lang=en).

anticipated resulting job losses. It is of note that 46.53 per cent of Kenya Airways is owned by the Government of Kenya.

12. This treatment of union members exercising their legitimate right to strike is of great concern to the ITF. According to information received, the strike was legal, well planned and the authorities had been duly notified. We are concerned that the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development referred to the striking workers as “criminals”, stating that workers on strike should stay at home, and threatened them with dismissal for their actions. We call on the government to refrain from dangerous declarations of the illegality of industrial action and from violently breaking up picket lines. The wholly disproportionate response to the striking workers, who were unarmed and waving banners, cannot go without international condemnation. Trade union members and leaders should never be threatened with dismissal over their participation in industrial action.
13. We remind the Kenyan government that there cannot be arbitrary decisions taken over whether certain strike action is harming the economy in order to bring it to an end. The protections of international law are clear, and human rights of workers take precedence.
14. Following the establishment by the Ministry of Labour of a team to resolve the Kenya Airways strike and the employment and labour relations court being set to hear the dispute, charges were dropped against the union officials. It was reported that this was in exchange for calling off the strike and refraining from industrial action; and this despite an agreement confirming that “there shall be no victimisation of union officials, KAWU, and all employees in any manner whatsoever” by the employer. We urge the state not to suppress workers’ right to industrial action and allow union leaders to fairly negotiate when disputes arise.
15. There are further examples of transport sector union officials being wrongly arrested and detained in Nairobi in April 2015. Joseph Ndiritu and Mwangi Wanjoya, Chair and organiser respectively of the ITF-affiliated Public Transport Operators Union (Puton) were arrested and detained for six hours on 24<sup>th</sup> April without any statement being taken or any formal charges being brought. They were accused of the illegal collection of funds, despite carrying out the regular collection of union dues. The Assistant Labour Commissioner eventually intervened on behalf of the two union officials, to instruct the police officers that the union representatives’ actions were in fact legal and legitimate in Kenya under 2007 laws. We urge the Kenyan government to ensure the urgent, regular and thorough training of all police officers on all aspects of the criminal law and the protection of the rights of union officials and other human rights defenders.
16. Transport workers are not the only workers suffering under this kind of union repression in Kenya. In October 2018, the Secretary General of the Kenya National Nurses Union (KNUN), Seth Panyakoo, was also arrested after meeting nurses at Kenyatta National Hospital and advising them to go on strike.

17. Organisations such as Article 19 share the ITF's concern about the chilling effect that government interference like this has on the right to strike and protest, freedom of association and expression.<sup>3</sup>

### **Protection of Informal Matatu Workers in Nairobi**

18. A further concern of the ITF is that transport workers in Nairobi have not been included in plans to transform the capital and its public transport sector. Despite optimism around the Nairobi Bus Rapid Transport project and potential for the formalisation of employment, improved working conditions and increased safety for the 70,000 matatu workers in the city, this outcome depends on informal workers being consulted and integrated into the project. A recent report commissioned by the ITF, "Nairobi Bus Rapid Transport: Labour Impact Assessment",<sup>4</sup> (a copy of which was presented to the Ministry for Transport), outlines some major concerns. If matatu workers were formalised, they would be less vulnerable to these practices.
19. It is of note that many of these concerns stem from endemic corruption and extortion amongst the local authority and police in Nairobi, in addition to the daily targets system of payments to the vehicle owners, which pushes drivers into working excessively long hours. We call on the government to ensure an end to arbitrary harassment and extortion from police and other authorities, and abide by and respect all the rights and protections due to informal workers as set out in the ITF Informal Workers Charter.<sup>5</sup> We also call on the government to continue to crack down on the corruption that allows these practices to flourish.
20. In March 2016, there were announcements by the National Police Service Commission that traffic police officers who were found to also be matatu owners would be dismissed from the force due to the conflict of interest that this posed in their public role. There were concerns that matatu drivers, who were in direct competition, were being unduly harassed by self-interested police officers leading to trumped-up charges against motorists, wrongful detention of vehicles and licences and the payment of bribes.
21. The ITF commends these measures to eradicate this problem and further welcomes the vetting procedure that was announced would be carried out in relation to 12,000 traffic officers, to ensure fair protection of members of all members of the public, but particularly transport workers. In October 2015, 63 senior officers, many of them traffic police, were dismissed following a large corruption investigation.<sup>6</sup> The ITF is concerned that the problem is pervasive and these measures must be enhanced to ensure that corruption in the police force in Kenya is eradicated.

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<sup>3</sup> <https://www.article19.org/resources/kenya-use-of-force-on-striking-aviation-workers-violates-right-to-protest/>

<sup>4</sup> Available at <https://www.itfglobal.org/en/reports-publications/nairobi-bus-rapid-transit-labour-impact-assessment>

<sup>5</sup> Signed in Kampala, Uganda, August 2016 and available here: <https://www.itfglobal.org/en/training-education/informal-transport-workers-charter>

<sup>6</sup> <https://nairobi.news.nation.co.ke/hustle/city-market-stall-owners-hawkers-fight-space>

## **Criminalisation of Seafarers**

22. The ITF draws attention to the case of the MV Amin Darya, a vessel flying the Iranian flag that was intercepted by the Kenyan Naval Service on 2<sup>nd</sup> July 2014 and the crew charged with trafficking narcotic drugs. Nine of the twelve crew are foreign nationals, two of whom are Indian, [one Iranian](#), and the rest of Pakistani origin. These crew members have been kept in detention from the date of arrest and remain in detention to date. Meanwhile their three Kenyan counterparts who were also on board were granted bail while awaiting determination of their case.
23. The ITF is concerned that there may be no solid basis for the criminal charges brought against the captain and crew and that these seafarers have not received a fair trial within the criminal justice system at first instance in Mombasa. The seafarers still await the conclusion of their hearing, five years after their original arrest, from their detention in Shimo la Tewa prison.
24. The two Indian nationals, both trainees on their first sea voyages, were released in December 2017. After the court found they had not case to answer, lawyers were able to secure an order for their release. It should be noted that prosecutors opposed their release.
25. Issues with the case include forensic evidence, which has suffered chain of custody issues and a purported confession was not recorded by police as required by law, and jurisdictional issues relating to the position of the vessel when seized by the Navy. It is our understanding from media reports that the vessel, along with any substance found on board, was destroyed by the Kenya Naval Service on the open seas. It is presumed that evidence, including logbooks, ownership records, cargo manifest and other documents were destroyed along with the vessel.
26. The ITF campaigns for the fair treatment of seafarers and believes that these seafarers have been victims of unjust criminalisation. Due process requires that individuals subject to detention by the state should be tried within a reasonable time and released if the charges are held to be unfounded.

## **Recommendations**

27. We urge the state to improve the situation for transport workers in Kenya by:
  - Respecting, in law and in its implementation in practice, its obligations under ICCPR and ICESCR, especially the right to organise and by fully abiding by the protections set out in its Constitution;
  - Ratifying and effectively implementing ILO Convention 87, to reinforce its commitment to freedom of association and the right to strike;
  - Adopting measures to ensure that all police officers are regularly and thoroughly trained on all aspects of the criminal law and legal protections of the rights of union officials and other human rights defenders;
  - Ensuring that informal matatu workers are involved in consultations on plans to overhaul Nairobi's public transport, that there is provision for their formal employment in the city's urban transport network and that their concerns are fully reflected in the labour conditions provided for;

- Adhering to the informal worker rights and protections set out in the ITF Informal Transport Workers' Charter.
- Increasing commendable efforts to crack down on the prohibition of corruption, extortion and conflicts of interest of traffic police in Nairobi;
- Reviewing the sentences of detained seafarers under conditions that meet international standards of a fair trial, and ensuring that their appeal is heard without any further undue delay.