

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders

REFERENCE: AL
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Excellency,

We have the honour to address you in our capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the situation of human rights defenders pursuant to Human Rights Council resolutions 25/2 and 25/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the increasing intimidation, harassment and criminalisation of journalists, bloggers, online content creators and social media users, including attacks, arrests and prosecution, often under section 29 of the Kenya Information and Communication Act (KICA). It is alleged that this provision and its application do not comply with international human rights norms and standards, and are reportedly used to restrain media freedom.**

According to the information received:

Section 29 of the Kenya Information and Communication Act (KICA) criminalizes anyone who, via a licensed telecommunication system, "sends a message or other matter that is grossly offensive or of an incident, obscene or menacing character" or sends a message that is known to be false "for the purpose of causing annoyance, inconvenience or needless anxiety". Such acts constitute an offence and, upon conviction, can be punished with up to three months imprisonment and/or a fine of up to 50,000 shillings.

In April 2015, a petition has been reportedly filed before the High Court of Kenya at Nairobi Constitutional And Human Rights Division (Petition No.149 of 2015) to challenge the constitutionality of section 29 of the KICA on the grounds that

the law (a) infringes on the right to freedom of expression as protected by Article 33 of the Kenyan Constitution; (b) violates the principles of legality as enshrined in Article 50(2)n of the Constitution, due to its vague and overly broad provisions; (c) violates criminal law principles by not requiring intent as a precursor to guilt; and (d) has a chilling effect on the right to freedom of expression. The High Court is reportedly expected to deliver its judgement on this case in March 2016.

It is reported that since 2015 the number of cases of criminalisation and arrests of journalists, bloggers, online content creators and social media users had significantly increased. Further reports indicate that since January 2016, at least 13 bloggers have allegedly been arrested or summoned for questioning by the Directorate of Criminal Investigations in relation to messages shared through internet platforms and telecommunication devices. It is reported that many of these persons were arrested and charged with the offence of “undermining the authority of a public officer”, as set in section 132 of the Kenyan Penal Code. Others were charged for “alarming publications” or “defamation” under the Penal Code as well as for violating provisions of the National Cohesion and Integration Act of 2008. More recently, reports indicate an increasing use of section 29 of the KICA (applied to alleged improper use of a licenced telecommunication gadgets) to prosecute media workers, bloggers and social media users. It is reported that many of these individuals were prosecuted under section 29 of KICA for posting information and pictures that are considered by the authorities to be “provocative” and reportedly liable to criminal responsibility. Reports indicate conversely that bloggers and media workers are increasingly criminalized for expressing views on their blogs or on social media that are critical of the Government and its officials, including in relation to reports and allegations of corruption, misconducts of politicians or public officials, or other cases of public interest.

Reports also provide several accounts on cases of blogger or media workers arrested on a Friday and, while courts do not operate during the weekends, remain in custody without any charge the whole weekend, before being released by the police the following Monday when no charges had been brought against them.

Several cases of attacks, including one killing, threats and harassment of journalists and media workers were also reported.

Cases of journalists pressured by the authorities, including some being summoned to the Criminal Investigation Department to reveal their sources related to the reporting on notorious cases of public interest, were also reported. Other cases were reported in relation to journalists, including senior news editors and cartoonists, being suspended or dismissed, on alleged grounds of redundancy or flouting internal procedures, reportedly for publishing editorial lines critical to the Government.

We would like to express serious concern at the allegations of increasing intimidation and harassment, as well as physical attacks (including one killing) against journalists, bloggers, online content creators and social media users, in Kenya. In particular, concern is expressed at the increasing number of arrests and prosecutions of journalists, bloggers online content creators and social media users. We are particularly concerned at the use of domestic legislation, including section 29 of the Kenya Information and Communication Act (KICA), to target those with dissenting views, especially, those who are critical of the Government and its officials, including in relation to reports and allegations of corruption, misconducts of politicians or public officials, or other cases of public interest.

The criminalisation of free speech and critical reporting imposes undue restrictions to the legitimate exercise of their right to freedom of expression – which applies both online and offline – as provided under article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Kenya in 1972.

We are particularly concerned at the provisions of section 29 of the KICA that provides vague and overly broad provisions which do not comply with article 19 of the ICCPR. In particular, we would like to recall that restrictions to the right to freedom of expression may only be imposed for one of the grounds set out in paragraph 3 of article 19; must conform to the strict tests of necessity and proportionality; must be applied only for those purposes for which they were prescribed; and must be directly related to the specific need on which they are predicated. The mere fact that forms of expression are considered to be insulting to a public figure, including those exercising the highest political authority, such as heads of State, is not sufficient to justify the imposition of penalties. Legislation on these matters, such as defamation laws, must be crafted with care to ensure that they comply with article 19 of the ICCPR and that they do not serve, in practice, to stifle freedom of expression (see UN Human Rights Committee General Comment 34, CCPR/C/GC/34).

Further concern is expressed at the vague and overly broad provisions of section 29 of the KICA on criminal offences which lacks sufficient precision and predictability and allows for an overly broad interpretation of the law, in contradiction with the principles of legality and equality before the law. These principles require legal provisions, like criminal offences, to be formulated with sufficient precision, in order to prevent unfettered discretion of the authorities to restrain the right to freedom of expression (see also CCPR/C/GC/34).

Serious concern is expressed at the implications of the criminalisation of journalists, bloggers, online content creators and social media users on their work and at the deterrent effect this would have on any other media worker or individuals to freely express and publish legitimate criticism of the Government. The possibility of such a

prosecution could prevent critical reporting and increase media self-censorship, unduly restricting the right to freedom of expression, which includes the right to impart information and ideas of all kinds, as well as the right to seek and receive such information.

Finally, we also express concern at the general deterrent effect this may have on all individuals who seek to promote and defend human rights. We would like to refer to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1 and 2. In addition, in this context we bring to the attention of your Excellency's Government article 6 points b) and c), which provides for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights.

In view of these concerns, we would like to call on your Excellency's Government to take all steps necessary to conduct a comprehensive review of section 29 of the KICA and its application, ensuring its compliance with international human rights norms and standards, in particular with the right to freedom of expression, as provided under article 19 of the ICCPR.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above mentioned allegations.
2. Please provide detailed information on measures taken to ensure the compliance of the KICA with Kenya's obligations under international human rights law and standards, particularly with the right to freedom of expression as enshrined in article 19 of the ICCPR.
3. Please provide detailed information concerning measures taken to ensure that individuals and groups, in particular journalists, bloggers, online content creators and social media users, can exercise their rights to freedom of opinion and expression, in a safe and enabling environment without fear of prosecution for exercising their legitimate right to freedom of expression when expressing views critical of the Government or public figures.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Michel Forst
Special Rapporteur on the situation of human rights defenders

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to the following human rights standards:

We would like to refer your Excellency's Government to Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 19 of the Universal Declaration of Human Rights, ratified by Kenya on 1 May 1972, which provide the right to freedom of opinion and expression that includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The UN Human Rights Committee indicated in its General Comment No.34, in relation to freedom of expression and the media, that “[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output” (para.13). The UN Human Rights Committee also added that “the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, desecration, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.” (para.38)

The Human Rights Committee added that States should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of Article 19 paragraph 3 and that restrictions must not be overbroad. The Committee observed in its General Comment No. 27 that “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their

protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". It also added that "[the principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat". (General Comment no.34, paras. 34 and 35)

In that regard, we would like to refer to Human Rights Council Resolution 22/6 adopted on 21 March 2013, which urges States to ensure that laws affecting human rights defenders are "clearly defined, determinable and non-retroactive".

Finally, we would like to bring to the attention of your Excellency's Government the following provisions of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, and in particular articles 1 and 2 which state that "everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" and that "each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice. In addition, in this context we also bring to the attention of your Excellency's Government article 6 points b) and c), which provides for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights.