

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; et the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

REFERENCE: OL
KEN 7/2014:

18 December 2014

Excellency,

We have the honour to address you in our capacities as Chair-Rapporteur of the Working Group on Arbitrary Detention; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism pursuant to Human Rights Council resolutions 24/7, 25/2, 24/5, 25/18, and 22/8.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **Security Laws (Amendment) Bill, 2014**, amending the existing Kenya anti-terrorism legislation, which may unduly restrict the right to freedom of association and of peaceful assembly, if adopted without further changes.

According to the information received:

On 10 December 2014, Kenyan's Parliament passed at the 1st Reading, the Security Laws (Amendment) Bill 2014, a counter-terrorism bill which would amend several laws, including the Public Order Act, the Extradition (continuous and foreign countries) Act, the Penal Code, the Criminal Procedure Code, the Prevention of Terrorism Act, the Sexual Offenses Act, the Registration of Persons Act, the Evidence Act, the Prisons Act, the Firearms Act, the Radiation Protection Act, the Rent Restriction Act, the Kenya Airport Authority Act, the Traffic Act, the Investment Promotion Act, the Labour Institutions Act, the National Transport Safety Authority Act, the Refugee Act, the National Intelligence Service Act, the Kenya Citizenship and Immigration Act, the National Police Service Act, the Civil Aviation Act, and the Public Benefits Organizations Act.

Clause 4 of the Bill proposes to amend the Public Order Act, and will give new power to the Cabinet Secretary to designate where and when to organise public gatherings or public processions.

Clause 15 of the Bill provides that “A person who publishes or causes to be published or distributed obscene, gory or offensive material which is likely to cause fear and alarm to the general public or disturb public peace is guilty of a felony”. Clause 17 also criminalises anyone who intentionally insults the “modesty” of any other person by intruding upon that person’s privacy or strips such person.

Furthermore, Clause 15 contains harsh penalties, including imprisonment up to 3 years, for those convicted under these provisions. If committed by a media enterprise a fine not exceeding 5 million Kenyan shillings (about 55,000 US dollars) may apply.

Clause 73 provides for up to 30 years imprisonment for those “adopting or promoting an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious or social change”.

Similarly, Clause 75 provides for an imprisonment term not exceeding three years for those broadcasting information “undermining investigations or security operations relating to terrorism” without the prior permission of National Police Service.

Clause 72 further punishes anyone who “advocates, glorifies, advises, incites or facilitates” the commission of a terrorist act with up to 20 years imprisonment.

The Bill also provides the Director-General of the National Intelligence Services with the power to authorize covert operations where he has reasonable grounds to believe that such operation may prevent terrorism activities. Reportedly, according to the New Part V- Covert Operations, the National Intelligence Service (NIS) must no longer seek a warrant from court to carry out such activities.

Clause 18 (4) (c) and (10) provide that individuals suspected of terrorism may be held without charge for a period of up to 90 days. Furthermore, Clause 77 grants courts with the power to provide for remand of suspects for up to 360 days pending trial. These provisions do seem to not comply with the safeguards against arbitrary arrest and detention.

Furthermore, Clause 31 gives the Director of Registration with the power to take away citizenship rights from any person for a number of reasons including “any other justifiable cause”.

Serious concerns are expressed about the above mentioned provisions of the Bill which may have an adverse impact on a number of human rights, among others the rights

to freedoms of peaceful assembly and of association, the right to freedom of opinion and expression, the right to liberty and security of person, the right to due process of law, and the right to privacy. In particular serious concerns are expressed at the number of provisions which are so vaguely worded and broad that could be implemented in an arbitrarily manner including to carry out mass surveillance thus contradicting the fundamental principle of legality (Clause 15, 17, 31 and 72). In Clause 17, the fact that ‘modesty’ is a matter meriting inclusion in a Bill aiming at counter terrorism raises concerns as to the individuals who may be directly impacted by this draft legislation. Concern is also expressed at the restrictions this Bill would introduce which may adversely impact the right to seek, receive and impart information and freedom of the press. In particular, penalties imposed under Clause 15, including 3 years imprisonment, do not seem to meet the standards of necessity and proportionality as established by international norms and standards and may then produce a chilling effect on the enjoyment of the most fundamental rights and freedoms as stated above. In addition concern is expressed at Clause 72 which prohibits additional conducts other than “incitement” to commit terrorist acts as per international human rights standards.

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 this issue.

Since 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 any comments you may have on the above-mentioned allegations.
2. Please provide full details on the status of this Bill and its content and explain how its provisions are compatible with Kenya’s obligations under international human rights law to protect the rights to freedoms of association, peaceful assembly and expression, as well as the rights to liberty and security of person, to due process of law, to privacy and to information.
3. Please provide full details as to whether independent civil society actors have been involved in the drafting process of a law that has the potential to adversely affect their role and activities.

We are intending to publicly express our concerns in the near future as we are of the view that the information upon which the press release is going to be based is sufficiently reliable to indicate a matter warranting immediate attention. The press release will indicate that we have been in contact with your Excellency’s Government’s to clarify the issue/s in question.

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.

Mads Andenas
Chair-Rapporteur of the Working Group on Arbitrary Detention

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

Maina Kiai
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Michel Forst
Special Rapporteur on the situation of human rights defenders

Ben Emmerson
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Annex
Reference to international human rights law

Concerning the allegations mentioned in this letter, it is necessary to recall the following relevant articles of the International Covenant on Civil and Political Rights, which Kenya acceded to on 1 May 1971 and which is part of Kenya's constitution under Article 2 of the said Constitution:

- Article 19 which stipulates that everyone has the right to hold opinions without interference and the right to freedom of expression, including 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 their choice.

- Article 21 which stipulates the right of peaceful assembly and lists the criteria for imposing restrictions to this right.

- Article 22 point 1) and 2) which provide that everyone has the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests, and that the only possible restrictions are those prescribed by law, necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

In particular, the Human Rights Committee has indicated that when a State imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalled that such restrictions must be constructed with care and must strictly comply with paragraph 3 of article 19 of the ICCPR, as these should not produce a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others (General Comment 34, CCPR/C/GC/34, 2011).

We also recall 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 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 article 13, point b) and c) of this Declaration provide for the right to solicit, receive, and utilize resources for the purpose of peacefully promoting and protecting human rights and fundamental freedom.

General Assembly resolution 68/178 and Human Rights Council resolution 25/7 are also of relevance as these emphasize that States must adhere to international human rights in any measure taken to counter terrorism.

In addition in his report on best practices (A/HRC/20/27) the Special Rapporteur indicated that the right to freedom of association obliges States to take positive measures to establish and maintain an enabling environment. It is therefore crucial that individuals exercising this right are able to operate freely.