

**Mandates of 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 and the Special Rapporteur on the situation of human rights defenders**

REFERENCE:  
AL KEN 3/2017

6 February 2017

Excellency,

We have the honour to address you in our capacities as 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 and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 25/2, 32/32 and 25/18.

We would like to bring to the attention of your Excellency's Government information we have received regarding the deteriorating and detrimental environment hindering the legitimate and peaceful activities of civil society organizations in Kenya, including non-governmental organizations advocating for the protection and promotion of human rights, as well as the measures aimed at cancelling the registration and freezing of the bank accounts of the Kenya Human Rights Commission (KHRC).

According to the information received:

**The Public Benefit Organization (PBO) Act**

On 14 January 2013, the Public Benefit Organization (PBO) Act, a legislation seeking to provide a framework for an enabling environment for NGOs was signed into law. Despite the progress brought by the adoption of the PBO Act, the authorities have, since its entry into force, taken measures that undermine its implementation by adopting an approach which seems to aim at systematically shrinking the space for civil society organizations to operate freely.

On 31 October 2016, the High Court of Kenya ordered the Cabinet Secretary to start the application of the PBO Act in 14 days stating that failure to do so would amount to abuse of his/her powers. However no further steps in this direction have reportedly been taken so far. In its ruling, the Court

At the same time, in October 2016, the Government issued a Directive, which was operationalized in December 2016, transferring matters of policy oversight and functionality of NGOs to the Ministry of Interior. This transfer and the non-application of the PBO Act are illustrative of a strategy by the Government to curtail the legitimate activities of NGOs in the run-up to elections.

The NGO Co-ordination Act of 1990 is therefore still regulating the operational space of civil society organisations, with broad and vague provisions leaving room for arbitrariness and abuses against NGOs.

### **Recent policies and declarations vis-à-vis NGOs**

On 29 October 2015, Kenya's NGO Coordination Board announced its intention to cancel the registration of 957 NGOs. The NGOs Coordination Board is a State agency belonging to the Ministry of Interior established under the NGOs Co-ordination Act of 1990 and is charged with the registration, co-ordination, facilitation and regulation of all NGOs and their activities in the country.

On 12 December 2016, during the Independence Day, the President publicly condemned what he referred to as foreign interference with the electoral process, especially through NGOs working in the field of civic education and the donors funding civil society activities.

On 6 January 2017, the Ministry of Interior and the Coordinator of National Government wrote to 47 county commissioners requesting them to shut down NGOs which were not properly licensed or which were implementing projects that were considered to be going beyond the scope of their registered activities.

The circular also required all foreign employees working for NGOs in Kenya to have a recommendation letter from the NGO Coordination Board and possess a valid work permit issued by the Directorate of Immigration Services.

The reasons behind these demands were, according to the circular, the alleged "nefarious activities of some NGOs" that "pose a serious threat to national security including, but not limited to: money laundering, diversion of donor aid, terrorism financing, etc."

## **The Kenya Human Rights Commission (KHRC)**

The Kenya Human Rights Commission (KHRC) is one of the organizations under a risk of losing its registration.

KHRC is an organization working to foster human rights, democratic values, human dignity and social justice within the country. The KHRC complies with the Paris Principles - a set of international standards which frame and guide the work of National Human Rights Institutions (NHRIs) - to be classified as a national human rights institution.

The KHRC has been the target of a smear campaign from the NGO Coordination Board over the past few months, constantly threatening the NHRI to lose its registration.

On 4 November 2016, the NGO Coordination Board issued an internal memorandum, by which the Board recommended to several government agencies to take measures against the KHRC. Among other recommendations, it instructed to the Central Bank of Kenya to initiate the freeze of KHRC's bank accounts, requested the Directorate of Criminal Investigation to commence criminal investigations against KHRC members and asked the Kenya Revenue Authority to commence measures to recover taxes that KHRC purportedly owes to the Government. The memorandum also recommended to the Institute of Certified Public Accountants to investigate the two audit firms working for KHRC.

The main reasons motivating the threats to shut-down of the KHRC were that the organization had failed to account for funds, including practicing tax evasion, it was supporting terrorism and was recruiting foreigners illegally.

On 6 January 2017, the NGO Coordination Board contacted KHRC through email threatening to initiate an investigation into allegations of a number of acts of mismanagement and offences allegedly perpetrated by the organization. The Board mainly accused the organization of financial and managerial misconduct.

On 13 January 2017, the management of KHRC met with the Minister of Interior who directed them to meet with the NGO Coordination Board. In a subsequent meeting on 16 January 2017, with the Head of compliance and legal team of the Board, KHRC sought to find out details regarding allegations of non-compliance in several areas with the aim of redressing any misconduct. The KHRC is awaiting an official response from the Board.

We express concern at the recent Government circular accusing a large number of NGOs of posing a threat to national security and for being involved in money laundering and terrorism financing. We further express concern regarding the possible shut-down of the Kenya Human Rights Commission and the freeze of its assets. Finally, we are worried at what appears to be a lack of political will to create a favourable environment for civil

society to work without hindrances, embodied by the continued prolongations of entry into force of the Public Benefit Organisation (PBO) Act. We wish to stress that these restrictions and actions are particularly alarming at a politically delicate time when the country prepares for elections.

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

As 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 be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment you may have on the above-mentioned allegations.
2. Please provide information about the justification and legal basis for delaying the implementation of the Public Benefit Organisation (PBO) Act despite the order of the High Court of Kenya to commence its implementation without further delay.
3. Please provide information about the legal basis for the threats against the Kenya Human Rights Commission (KHRC). In particular, please provide information about the legal basis for the threat of shutting down the KHRC and freezing their assets, and explain how these measures are compatible with Kenya's obligations under article 19 and 22 of the ICCPR.
4. Please provide information about the legal basis for the Circular sent on 6 January 2017 by the Ministry of Interior and the Coordinator of National Government and how this circular is complying with international legal standards, in particular, articles 19 and 22 of the ICCPR ratified by Kenya on 1 May 1972.
5. Please provide information about measures taken to bring legislation governing the functioning of non-governmental organisations into conformity with Kenya's obligations under international human rights law as well as measures taken to ensure that human rights defenders in the country are able to carry out their legitimate work in a safe and enabling environment without fear of retaliation, intimidation or harassment of any sort.

While awaiting a reply, we urge the authorities to immediately halt any kind of hindrance to the rights of association and freedom of expression of civil society organizations in the country and to implement the PBO Act to set the stage for a favourable environment for civil society in the country.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. 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.

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

## **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:

The above mentioned allegations appear to be in contravention of article 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR), accessed by Kenya on 1 May 1972, as well as articles 9 and 10 of the African Charter on Human and Peoples' Rights, ratified by Kenya on 23 January 1992, which provides for the right to freedom of expression and to freedom of association.

We would also like to refer to Human Rights Council resolution 24/5, and in particular operative paragraph 2 that “reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law.”

We would like to stress that, the Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, stated that “The right to freedom of association applies for the entire life of the association. The suspension and the involuntarily dissolution of an association are the severest types of restrictions on freedom of association. As a result, it should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient” (A/HRC/20/27, para. 75).

Furthermore, we would like to refer to 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, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right 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. Article 5 of the Declaration provides for the right to form, join and participate in non-governmental organizations, associations or groups.

Articles 5 and 6 reiterate the rights to meet or assemble peacefully; to form, join and participate in non-governmental organizations, associations or groups; to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms;

as well as 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. Article 9, paragraph 3 (c) provides for the right to provide legal assistance in defending human rights and fundamental freedoms. We would also like to refer to provisions in the Declaration as article 12, which provides that State must take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, de facto or de jure 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.