

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

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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 and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 34/18 and 34/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the "Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Electronic Communications Networks", issued by the Kenya National Cohesion and Integration Commission and the Communications Authority of Kenya, and which entered into force in July 2017. The guidelines limit freedom of expression on political issues and may produce a direct impact on the work of civil society institutions, journalists and human rights defenders in ways that are incompatible with Kenya's obligations under international human rights law.

According to the information received:

General elections in Kenya are scheduled for 8 August 2017. In the period leading up to the elections, significant levels of hate speech and incitement to hatred have been reported, notably through social media. In an effort to regulate this, Kenya National Cohesion and Integration Commission and the Communications Authority of Kenya prepared the "Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Electronic Communications Networks" ("the guidelines"). A first version was circulated on 21 June 2017, and a final revised version was circulated in July 2017. This communication refers to the final version of the guidelines.

Guidelines Part I: Dissemination of bulk political messages

According to article 2, the guidelines apply to licensees, broadcasters, mobile virtual network operators (MVNOs), content service providers (CSPs) and mobile network operators (MNOs), and will also apply to collaborative arrangements with other stakeholders, including bloggers and social media service providers. Article 6 requires that any delivery of "political messages" must take place through licensed CSPs who have direct inter-operability agreements with an MNO or MVNO. "Political message" is defined in article 5.1.9 as "*content of political nature originated by Political Parties and other individuals to the general public*".

by SMS, MMS, premium messages, caller ring back tones, social media platform or any other similar medium that is capable of transmitting bulk content”.

Prior to sending such political messages, CSPs are obliged, under article 7, to send a request to an MNO/MVNO at least 48 hours before. Such requests must contain information about the exact content of the message, a signed authorization letter from the political party or individual sponsoring the message, certified copies of registration documentation of the political party or the identification documentation of the individual, and the intended time for dissemination of the political message. The MNO/MVNO has the right to refuse the transmission of a political message if it finds it violates the guidelines (article 7.3). If the MNO/MVNO is unable to ascertain this, they are obliged to refer the content to the National Cohesion and Integration Commission (NCIC) for further vetting (article 7.4).

The MNO/MVNO is obliged to vet the content of the message with the guidelines, and has the right to refuse the transmission of a proposed political message over its network if it finds that it is not in compliance with the guidelines. Failure to comply, will lead to regulatory actions by the Communications Authority (articles 11.4 and 11.5). Article 11.1 establishes that CSPs “shall take legal responsibility for the content of Political Messages”.

The guidelines part I prohibit the dissemination of three categories of political messages:

- Article 8.3 prohibits the dissemination of political messages that contain language deemed “offensive, abusive, insulting, misleading, confusing, obscene or profane”.

- Article 8.4 prohibits dissemination of political messages involving language that is “inciting, threatening or discriminatory” and that intends to expose someone to “violence, hatred, hostility, discrimination or ridicule on the basis of ethnicity, tribe, race, color, religion, gender, disability or otherwise”.

- Article 8.5 prohibits dissemination of political messages that contain attacks on individual persons, their families, ethnic background, race, religion or their associations.

In addition, so-called “bulk”, “premium rate content” and political ring back tones can only be communicated in English and Kiswahili languages (article 8.7), and can only be sent out between 8 am and 5 pm (article 9.2). Premium rate content is defined in article 5.1.11 as content that is “transmitted on customers on a subscription basis via SMS, MMS, voice calls and any other premium channel”.

Bulk content is defined in article 5.1.1 as “content transmitted on a one-to-many configuration via SMS, MMS, audio calls, ring back tones, and any other similar medium that is capable of providing bulk Messaging service”.

Article 8.2 requires that political messages bear the name of the political party or the individual disseminating the political message.

Guidelines Part II – on the use of social media for political content

Article 13.1 prescribes that all political social media content must use “language that avoids a tone and words that constitute hate speech, ethnic contempt, and incitement to violence, harassment, abusive, violence, defamatory or intimidating”. Article 13.4 prohibits political content that amounts to hate speech, while articles 13.2 and 13.3 require political postings to be “honest” and “truthful”. Persons who “knowingly spread undesirable political content” via social media networks shall, under article 13.9 be penalized according to the NCI Act, penal code and other relevant laws. This entails a minimum fine of SH 1 million or a prison term of up to three years, or both.

Article 13.7 establishes that social media service providers are required to “pull down accounts used in disseminating undesirable political contents on their platforms” within 24 hours.

Article 13.6 requires the administrator of the social media platform to moderate and control the content and discussions generated on their platform.

Before identifying the concerns raised by the guidelines, we would like to note that article 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded to by Kenya on 1 May 1972, protects everyone’s right to maintain an opinion without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers. Under article 19(3) of the ICCPR, restrictions on the right to freedom of expression must be “provided by law”, and necessary for “the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals”. Permissible restrictions on the internet are the same as those offline (A/HRC/17/27).

In addition, article 17(1) of the ICCPR provides for the rights of individuals to be protected, inter alia, against unlawful or arbitrary interference with their privacy and correspondence, and provides that everyone has the right to the protection of the law against such interference. “Unlawful” means that no interference may take place except in cases envisaged by the law which in itself must comply with the provisions, aims and objectives of the ICCPR. Articles 17 and 19 of the ICCPR are closely connected, as the right to privacy is often understood to be an essential requirement for the realization of the right to freedom of expression (A/RES/68/167, A/HRC/27/37, A/HRC/23/40, A/HRC/29/32).

We would like to refer your Excellency's Government 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, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer article 6 point a), which provides for the right to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms; article 6 (b) and c) which provide that everyone has the right to freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms, and to study, discuss, form and hold opinions on the observance of these rights.

The full text of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

While we acknowledge that Kenya does not wish to see repeated the violence and ethnic tensions that coincided with the elections in 2007, we are concerned that the guidelines fall short of international human rights standards. We would like to present the following particular issues of concern raised by the guidelines:

i) Vague and overbroad criteria for limiting expression

The guidelines apply vague and overbroad criteria for restricting expression. In particular, the concept "political messages" is ambiguous and not suitable for limiting speech. Similarly, the wordings in article 8.3, such as "offensive, confusing, misleading, obscene" lack sufficient clarity and can be arbitrarily or discriminatorily applied and enforced.

The above criteria would seem not to meet the strict requirements of article 19(3). In particular, they do not clarify or indicate the scope or object of what they seek to prohibit.

Under the requirement of legality in article 19(3), it is not enough that restrictions on freedom of expression are formally enacted as domestic laws and regulations. Instead, restrictions must also be sufficiently clear, accessible and predictable, in order to "enable an individual to regulate his or her conduct accordingly". Moreover, a law "may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution". On the contrary, it must provide "sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not" (CCPR/C/GC/34). We are concerned that the above-mentioned articles lack sufficient clarity and therefore do not comply with the requirement of legality under article 19(3).

Moreover, while restrictions on freedom of expression may be established to protect the listed objectives under article 19(3), they must be "necessary" to

protect such objectives. This implies an assessment of proportionality of those restrictions. A proportionality assessment ensures that restrictions must “target a specific objective and [do] not unduly intrude upon other rights of targeted persons”. Finally, the restriction must be “the least intrusive instrument amongst those which might achieve the desired result” (CCPR/C/GC/34). In this connection, We reiterate the principle enunciated in Human Rights Council Resolution 12/16, which calls on States to refrain from imposing restrictions which are not consistent with article 19(3), including on discussion of government policies and political debate; reporting on human rights; government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities and expression of opinion and dissent.

In this regard, the Human Rights Committee has affirmed that any “restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [of article 19]. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government”.

The guidelines do not clearly formulate the purposes for which limitation on political expression should take place, and are therefore potentially overbroad. Instead, MNOs, MVNOs and CSPs, as well as the Communications Authority, appear to exercise largely unfettered discretion over the determination of limitation of expression. This combination of ambiguity and discretion creates a significant risk that legitimate expression may be prohibited.

ii) Prior restraint

The procedural requirements in article 7 requesting a minimum of 48 hours for flagging messages for review create in effect prior restraint and may amount to prior censorship. Such prior restraint prevents transparency and dissemination of real time information (A/66/290).

iii) Discriminatory scope

The language requirement in article 8.7 limiting the dissemination of political messages through bulk or premium rate content to only those messages written in English or Kiswahili languages effectively prohibits the dissemination of political messages in other languages and is therefore discriminatory in scope.

In this connection, we highlight that the right to freedom of expression under article 19 of the ICCPR applies to “everyone”, and does not distinguish among

languages. Moreover, the non-discrimination provision in article 2 of the ICCPR prohibits discrimination on the grounds of language.

iv) *Identity disclosure requirements*

While we recognize the obligation to protect against hate speech that constitutes incitement to hostility, discrimination or violence under article 20 of the ICCPR, we are concerned at the prohibition of anonymous expression in articles 7 and 8.2, which would allow authorities to identify persons, eradicating anonymous expression.

The existing power held by law enforcement agencies to disclose the identity of anonymous internet users, by requiring a court order, is sufficient to ensure accountability of those using anonymous handles to spread hatred. In other words, there is no need for default identity disclosure norms such as those prescribed by the guidelines. The identity of anonymous internet users should only be ordered by courts- who are better placed to make the assessment of the right to anonymous expression and the protection against hate speech.

One of the important advances facilitated by the Internet is the ability to anonymously access and impart information and to communicate secretly without having to be identified (A/HRC/29/32). Restrictions on anonymity facilitate State surveillance by simplifying the identification of individuals accessing or disseminating prohibited content, making such individuals more vulnerable to other forms of State surveillance. This also allows for the collection and compilation of large amounts of data by the private sector, and places a significant burden and responsibility on corporate actors to protect the privacy and security of such data (A/HRC/23/40).

v) *Lack of redress mechanism*

Finally, we are concerned that the guidelines lack a clear redress mechanism for parties whose content may unlawfully be removed, blocked or filtered (articles 7.2- 7.4). Any legislation restricting the right to freedom of expression and the right to privacy, as well as any determination to restrict content, must be undertaken by a body which is independent of any political, commercial or unwarranted influences in a manner that is neither arbitrary nor discriminatory (A/HRC/17/27).

While recognizing the need to prevent violence in the period leading up to the elections, we are concerned that the guidelines restrict freedom of expression, including access to information, in a context where this right, including the public's right to information, is of particular importance. Furthermore, we are concerned that this may hinder the work of journalists, civil society institutions and human rights defenders, and may stifle reporting on political issues, as well as having a deterrent effect on the public's

exercise of their right to freedom of expression on political issues, in particular issues deemed controversial or critical.

In view of the above comments, we would like to call on your Excellency's Government to take all steps necessary to revise the guidelines, ensuring their compliance with Kenya's obligations under international human rights law.

We would appreciate receiving a response within 60 days.

Finally, we would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>

While awaiting a reply, we urge that all necessary interim measures be taken to remedy the concerns expressed in this communication.

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.

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and expression

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