

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:
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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; 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 34/18, 32/32 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 **recent attempt by Kenyan authorities to deregister and sanction the non-governmental organizations Kenya Human Rights Commission (KHRC) and the African Centre for Open Governance (AFRICOG)**, following their engagement and advocacy related to the credibility of the electoral process prior, during and after the national elections held on 8 August 2017. We would similarly like to highlight the information we have received concerning the **continued failure of the Kenyan authorities to fully implement the Public Benefit Organization Act (PBO), which came into force on 14 January 2013**. In addition, we would like to bring to your attention the information received concerning the alleged retention for several hours of Mr. Maina Kiai by immigration authorities at the airport of Nairobi, on 20 August 2017.

KHRC is a well-known Kenyan non-governmental organisation founded in 1992, working to foster human rights, democratic values, human dignity and social justice in the country. KHRC conducts advocacy through monitoring, documenting and publicising human rights violations. AFRICOG, for its part, is a non-profit organisation, registered as a company limited by guarantee under the Companies Act, dedicated to research and monitoring on governance and public ethics issues in both the public and private sectors. Its advocacy mainly aims at stimulating policy discussion on issues of anti-corruption and good governance in Kenya.

Maina Kiai is a prominent Kenyan human rights defender and former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. Mr. Kiai is also a board member both of KHRC and AFRICOG.

Concerns about the attempts of deregistering the KHRC by Kenyan authorities and the lack of implementation of the PBO Act were the subject of one previous communication sent to Kenya on 6 February 2017 (KEN 3/2017). We regret that to date we have not received any reply from your Excellency's Government.

The UN High Commissioner for Human Rights, Mr. Zeid Ra'ad Al Hussein, also expressed concern at the rising tensions in Kenya in the aftermath of the recent national election, through a press statement made public on 15 August 2017. In particular, the High Commissioner referred to the use of excessive force against demonstrators and the intention of the authorities of deregistering KHRC and AFRICOG. He further made a call for civil society actors and media to be allowed to work without hindrance or fear of retaliation.

According to the new information received:

Concerning the deregistration attempts against KHRC and AFRICOG

On 14 and 15 August 2017, the NGO Co-ordination Board ordered the deregistration of KHRC and AFRICOG, respectively, based on their alleged operation of illegal bank accounts, failure to fulfil tax liabilities, concealing the remuneration of board members, and employment of foreigners without valid work permits. The NGO Co-ordination Board similarly advised the Central Bank of Kenya to freeze their assets, and the Kenya Revenue Authority to initiate procedures against them for recovering accrued taxes. All these allegations were refuted by the two NGOs and challenged through their statements and during a press conference that was aired live on local television stations. Lastly, the NGO Board ordered the immigration authorities to deport all foreigners working for KHRC and AFRICOG.

In the morning of 16 August 2017, at around 10:30am, the Kenya Revenue Authority (KRA) together with police agents, attempted to enter into the premises of AFRICOG, without notice and with a defective search warrant. Later the same day, the Cabinet Secretary for Interior and Coordination of National Government instructed the NGO Co-ordination Board to suspend the de-registration of KHRC and AFRICOG for a period of 90 days, in order to allow for the organizations to engage in dialogue with the authorities and “address any outstanding non-compliance issue” before conclusive and final action is adopted. In this regard, the Cabinet Secretary directed the Principal Secretary of the Ministry of Interior and Coordination of National Government to form an inclusive and representative committee to review the compliance status of KHRC and AFRICOG.

It is of concern that these actions took place only a week after the national elections were held in Kenya. Both KHRC and AFRICOG were vocal throughout the electoral process, acting as monitors and demanding transparency from the authorities. According to allegations made public by the Executive Director of KHRC, the attempt to deregister the organisations may have had the intention of preventing them from issuing a legal petition challenging the result of the election.

Different attempts to take legal action against KHRC and AFRICOG have been taking place since October 2015, as recalled in our previous letter. These were the

object of a ruling by the High Court of Kenya (KHRC vs. NGO Coordination Board 495 of 2015), which on 29 April 2016, declared unconstitutional the removal of KHRC's registration for alleged financial and regulatory faults. According to the Court's ruling, the commencement of the deregistration process against KHCR and the freezing of its assets without notice or hearing prior to the decision, were contrary to the principles of due process and declared them null and void.

Concerning the lack of full implementation of the PBO Act

Despite its entry into force on 14 January 2013, and notwithstanding a ruling by the High Court of Kenya on 31 October 2016 urging the authorities to abide by it, the full implementation of the Public Benefit Organization Act remains pending. Among other things, the PBO Act places the regulation of NGOs and civil society organizations under the authority of the Ministry of Planning and Devolution. However, this function remains to date in charge of the NGO Co-ordination Board, which is an agency working under the authority of the Ministry of Interior and Coordination of National Government. Concerns have been voiced by a number of actors in this regard, which claim that this has left the regulation of NGOs in hands of biased authorities.

Concerning the retention of Mr. Kiai at Nairobi airport

On 20 August 2017, Mr. Kiai was held for several hours at the airport of Nairobi, before boarding a flight abroad. According to the information available, he was told by airport officers that he needed to wait for special approval by the immigration authorities to leave the country. However, after speaking to the press and personally contacting the Director of Immigration, Mr. Kiai was allowed to board the airplane. Allegedly, no reason was given by any authority justifying his retention.

We welcome the instruction of Cabinet Secretary for Interior and Coordination of National Government to suspend the deregistration of KHRC and AFRICOG in order to allow for a space of dialogue with the authorities. However, we express concern at the systematic threat of deregistration that this organisations have undergone since 2015 by the NGO Co-ordination Board. We also express particular concern at the most recent notice of deregistration against KHRC and AFRICOG, which allegedly appears to come as a consequence of their activism monitoring and demanding transparency during the electoral process in Kenya. Furthermore, we would like to reiterate our concern for the failure of the Kenyan authorities to fully implement the PBO Act. Finally, we express concern for the retention of Mr. Maina Kiai at Nairobi airport on 20 August 2017, without any reason having been provided by the authorities.

While we do not want to prejudge the accuracy of these allegations, they appear to be, if true, in contravention of the rights to due process of law, to freedom of expression,

and to freedom of association, guaranteed by articles 14, 19 and 22 of the International Covenant on Civil and Political Rights, ratified by Kenya on 1 May 1972.

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 on the legal basis of the recurring attempts to deregister the KHRC and AFRICOG by the NGO Co-ordination Board, as well as on the measures adopted by your Excellency's Government to ensure that any legal procedure on the matter is conducted in compliance of all the relevant due-process guarantees and of articles 19 and 22 of the ICCPR.
3. Please provide information on the legal basis of the requests to impose assets freezes and financial sanctions against KHRC and AFRICOG, as well as the measures adopted to ensure that this procedures comply with the the gurantees of due-process as established in article 14 of the ICCPR.
4. Please explain the reasons why the Public Benefit Organization Act has not yet been fully implemented, and in particular why the authority for regulating NGOs and civil society organizations has remained under the Ministry of Interior and Coordination of National Government.
5. Please provide information on the allegations of the retention of Mr. Maina Kiai during several hours at the airport of Nairobi, before travelling abroad on 20 August 2017.

We would appreciate receiving a response within 60 days.

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.

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.

Michel Forst
Special Rapporteur on the situation of human rights defenders

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

Annalisa Ciampi
Special Rapporteur on the rights to freedom of peaceful assembly and of association

Annex

Reference to international human rights law

The above mentioned allegations appear to be in contravention of the rights to due process of law, to freedom of expression, and to freedom of association, guaranteed by articles 14, 19 and 22 of the International Covenant on Civil and Political Rights, ratified by Kenya on 1 May 1972.

Regarding the right to freedom of expression, we would like to refer to 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, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.

Concerning the right to freedom of association, we would like to recall that paragraph two of article 22 determines that only exceptionally can the right to freedom of association be limited, in cases where this is necessary in a democratic society and 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 addition, the Human Rights Committee has interpreted these provisions to require States imposing such restrictions to duly consider all less intrusive measures to achieve this purpose (see *Lee v Republic of Korea* (1119/02)).

In the same vein, we would like to make reference 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.”

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.

In particular, we wish to note that 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. 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.