

**Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the rights to freedom of peaceful assembly and of association**

REFERENCE: UA KEN 3/2016

26 May 2016

Excellency,

We have the honour to address you in our capacity as Vice-Chair on individual complaints of the Working Group on Arbitrary Detention; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the rights to freedom of peaceful assembly and of association, pursuant to Human Rights Council resolutions 24/7, 26/12, 25/2, 25/18, and 24/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **alleged violent repression of protests throughout the country by the Coalition for Reforms and Democracy (CORD) seeking removal of the commissioners of the Independent Electoral and Boundaries Commission (IEBC)**.

According to the information received:

Since early 2016, several demonstrations have been organized by the Coalition for Reforms and Democracy (CORD) seeking removal of commissioners of the Independent Electoral and Boundaries Commission (COPRD) before the upcoming elections. It is alleged that on 25 April, 9 May and 16 May and 23 May protestors marched across various city streets to the Independent Electoral and Boundaries Commission (IEBC) offices to call for the resignation of the commissioners. During all the protests following those which took place on 25<sup>th</sup> of April, the opposition clarified that they only had peaceful intents.

Opposition leaders have supposedly vowed to hold protests every Monday until the current Independent Electoral and Boundaries Commission (IEBC) commissioners are removed from office or resign. CORD maintains that the electoral body is tainted and lacks the credibility to conduct a free and fair election next year. They particularly condemn the conduct of the Commission over the last elections, where there was alleged widespread failure of electronic verification mechanisms and allegations of result manipulation while these mechanisms were out of order.

It is also alleged that, on 16 May, the police and military forces violently repressed several demonstrations in Kisumu, Nairobi, Kisii and Machakos, by using live bullets, tear gas and water cannons to break up protests. It has been reported that the Police chased protestors with batons, whips, kicked and repeatedly hit men and women lying on the floor without offering any resistance. As a result, serious cases of injuries have been reported: 10 protestors were admitted in Nairobi Women's Hospital, two of them with bullet wounds. A number of people, in particular women, who were allegedly hurt, were not participating in the protests: some were working in a building next to the area where protests were being held, and others were pedestrians walking across the area. There are also reports of beatings as well as arrests and detention of 15 protesters by security forces following the protests in the various cities across the country, some being charged with illegal participation in protests. These included human rights defenders, civil society activists, journalists, and ordinary citizens, including schoolchildren.

Before the protests, senior officials, reportedly from the Interior Cabinet Secretary and the police, warned protesters that they would be met with force. Prior to the protest of 16 May 2016, Interior Secretary Joseph Nkaiserrey allegedly warned opposition leaders and their supporters to prepare for a strong police response should they proceed with their planned street protests. Mr Nkaiserrey said police would use tear gas to disperse the protesters should they become "rowdy". He also reportedly added that all those taking to the streets should prepare for a "special bath".

In addition, on May 23, demonstrations occurred in several cities across the country. Allegations have been raised at the fact that the Police used excessive force, including the firing of live bullets and tear gas in order to disperse demonstrators. In Kisumu, at least one person –an innocent bystander - was reportedly killed after having been shot by the police and 11 individuals were reportedly injured, including 8 who were transferred to the hospital (one of them was shot as he was running away and three of them were beaten with batons). In Siaya, two individuals were allegedly shot dead by the Police and six were injured and transferred to Kisumu. In Mombassa and Kakamega, demonstrations were prevented by the police. In Kakamega, three persons were allegedly arrested. In Nairobi, the protests were allegedly forbidden around the Anniversary Towers. In

Meru, the protests were halted by the police even before the demonstrators could approach the IEBC offices.

It appears that tensions have increased after allegations that some politicians were accused of planning to infiltrate *agents provocateurs* to foment violence at the demonstrations. The Police had warned protesters on the day of the protests that they were not authorized in the absence of notification of the demonstrations.

Grave concern is expressed regarding the alleged violent repression, including the lethal use of live ammunition, of largely peaceful protests against the IEBC, which has reportedly led to several deaths, injured protesters, arrests and detentions. Further concern is raised as over the past years, a pattern of restrictions to the right to assemble in Kenya, including criminalization of protestors and use of excessive force against them, seems to have been identified.

While we do not wish to prejudge the accuracy of these allegations, we would like to refer your Excellency's Government to the international principles and norms applicable to the present case, namely the rights to life, freedom of expression and opinion and freedom of peaceful assembly as set forth respectively in articles 6, 19 and 21 of the International Covenant on Civil and Political Rights (ICCPR), acceded by Kenya on May 1 1972, and articles 4, 9 and 11 of the African Charter on Human and People's Rights (ACHPR), which Kenya ratified on 23 January 1992.

With regards to the allegations of excessive use of force by law enforcement officials, we wish to draw your Excellency's Government's attention to Articles 3 of the Universal Declaration of Human Rights, 6 (1) of the ICCPR and 4 of the ACHPR, which respectively guarantee the right of every individual to life and security and provide that these rights shall be protected by law and that no one shall be arbitrarily deprived of his life.

Without expressing at this stage an opinion on the facts of the case and on whether the detention of the above-mentioned persons is arbitrary or not, we would like to appeal to your Excellency's Government to take all necessary measures to guarantee the right of anyone arrested and detained in connection with these events not to be deprived arbitrarily of their liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights, and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR).

We further would like to draw your attention 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 Articles 1, 2, 5, 6, 9, 12 and 17. We also refer to Human Rights Council resolution 13/13, which urges States to put an end to and take concrete steps to prevent threats, harassment, violence and attacks by

States and non-State actors against all those engaged in the promotion and protection of human rights and fundamental freedoms.

We would also like to refer to article XII (1) of the Declaration of Principles on Freedom of Expression in Africa, where public figures shall be required to tolerate a greater degree of criticism and any sanctions imposed for such criticism should not be so severe as to inhibit the right to freedom of expression.

Moreover, we would like to draw your Government's attention to the principles enunciated by Human Rights Council resolution 24/5, and in particular operative paragraph 2, which reminds States that it is their obligation of States to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline as well as to take 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, in his first thematic report to the Human Rights Council, the Special Rapporteur on the rights to freedom of peaceful assembly and of association called upon States to ensure that any restrictions on the rights to freedom of peaceful assembly and of association are prescribed by law, which is necessary in a democratic society, and proportionate to the objective pursued, and do not harm the principles of pluralism, tolerance and broadmindedness. Therefore, any restrictions should be subject to an independent, impartial, and prompt judicial review (A/HRC/20/27, paragraph 84 (d) and (e)).

Finally, we would like to draw your attention to relevant international principles and norms governing the use of force by law enforcement authorities. Under international law any loss of life that results from the excessive use of force without strict compliance with the principles of necessity and proportionality is an arbitrary deprivation of life and therefore illegal. Moreover, the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide an authoritative interpretation of the limits on the conduct of law enforcement forces. According to these instruments, law enforcement officials may only use force when it is strictly necessary and only to the extent required for the performance of their duties. The use of force and firearms must as far as possible be avoided, using non-violent means before resorting to violent means. Force used must be proportionate to the legitimate objective to be achieved. Should lethal force be used, restraint must be exercised at all times and damage and/or injury mitigated, including giving a clear warning of the intent to use force and to provide sufficient time to heed that warning, and providing medical assistance as soon as possible when necessary. Principle 9 of the Basic Principles further stipulates that intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life. Moreover, the Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, in particular principle 9, recall the duty to conduct thorough, prompt and impartial investigations of all suspected cases of extra-legal, arbitrary and summary executions. A failure to investigate and bring

perpetrators of such violations to justice could in and of itself give rise to a separate breach of the ICCPR.

We would also like to draw your attention to General Comment No. 3 On The African Charter On Human And Peoples' Rights, which highlights that the primary duty of law enforcement officials is to protect the safety of the public (para. 27) and, in the context of assemblies, even if acts of violence occur during such events, participants retain their rights to bodily integrity. Therefore, force can only be used in accordance with the principles of necessity and proportionality, and firearms may never be used simply to disperse an assembly (para. 28).

The full texts of the human rights instruments and standards recalled above are available on [www.ohchr.org](http://www.ohchr.org) or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the above-mentioned rights in compliance with international instruments.

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 any comment you may have on the above mentioned allegations.
2. Please provide details on the measures taken by the police, before resorting to force, to manage peaceful assemblies on 25 April, 9 May, 16 May and 23 May 2016. Please explain the type of equipment provided in order to enable the police to manage peaceful assemblies without recourse to the use of firearms.
3. Please provide the details, and when available the results, of any investigation, medical and judicial, or other inquiries carried out in relation to the deaths, injuries, arrests and detention of any of the protestors in the context of the abovementioned peaceful protests. If no inquiries have taken place, or if they have been inconclusive, please explain why.
4. Please provide the full list of names of persons arrested and their places of detention. Please also provide information concerning the legal grounds for the arrest and detention of the protesters, as well as their current legal status, such as the charges brought against them, indicating how these are in compliance with international norms and standards.
5. In the event that the alleged perpetrators are identified, please provide the full details of any prosecutions which have been undertaken. Have penal, disciplinary or administrative sanctions been imposed on the alleged perpetrators?

6. Please provide information about the directives issued by the Government to law-enforcement personnel concerning the precise circumstances in which the use of lethal force is authorized, and indicate how these directives comply with the international human rights obligations of Kenya under the ICCPR, as well as the requirements of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

7. Please provide detailed information concerning measures to ensure that everyone, including human rights defenders, can exercise their rights to freedom of peaceful assembly and expression in Kenya without fear of harassment or retaliation, including the ability to peacefully express views critical of the human rights situation and of the governance.

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.

We would like to stress that after having transmitted an urgent appeal to the Government, the Working Group on Arbitrary Detention may transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such appeals — which are of a purely humanitarian nature — in no way prejudice any opinion the Working Group may render. The Government is required to respond separately for the urgent action procedure and the regular procedure.

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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Vice-Chair on individual complaints of the Working Group on Arbitrary Detention

Christof Heyns  
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David Kaye  
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