



## **ARTICLE 19's submission to the UN Universal Periodic Review of the REPUBLIC OF KENYA**

*For the consideration at the eighth session of the UPR Working Group, 3 – 14 May 2010*

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### **Executive Summary**

1. ARTICLE 19: Global Campaign for Free Expression is an international, non-governmental human rights organisation established in 1986 that works around the world to protect and promote the right to freedom of expression and information, including by making submissions to the UN on countries' performance in implementing established freedom of expression standards. ARTICLE 19 has observer status with ECOSOC.
2. With this submission, ARTICLE 19 seeks to make a constructive contribution to the preparation process of the UPR of the Republic of Kenya. Given the expertise of ARTICLE 19, this submission focuses on Kenya's compliance with its international human rights obligations in respect of freedom of expression and freedom of information, in particular:
  - **Insufficient guarantees of freedom of expression in the current Kenyan Constitution;**
  - **Lack of comprehensive protection of freedom of information;**
  - **Restrictive regulation of the media;**
  - Limits on freedom of expression through legislation on **defamation;**
  - **Harassment of journalists;**
  - Efforts to **restrict content on internet.**

These issues are described in detail, followed by ARTICLE 19's recommendations for action to address these areas of concern.

### **Insufficient constitutional guarantees of freedom of expression**

3. There are a number of concerns with the current state of Kenya's constitutional framework regarding freedom of expression ("FOE") and freedom of information ("FOI").
  - Article 79(1) of the Constitution, 1963 (as subsequently amended) provides that no person shall "be hindered" in the enjoyment of their right to FOE. This is an unduly negative formulation of the right which, as international law makes clear, may require positive state action, as well as an absence of interference, to protect fully. It is, for example, well established that states must take positive measures to prevent undue concentration of media ownership, to promote diversity of the media and to guarantee the right to access information held by public bodies.
  - Article 79(1) of the Constitution protects the right to hold opinions, to receive and communicate information and ideas, and to freedom of correspondence. This differs from international standards inasmuch as they also refer to the right to 'seek' information and ideas.
  - The restrictions on FOE permitted under Article 79(2) of the Constitution are broader than what is permitted under international law. Although international standards strictly require restrictions on FOE to be "provided by law", Article 79(2) of the Constitution permits restrictions of FOE where they are "contained in or done under the authority of

any law.” It is unclear whether this meets this strict standard of being “provided by law”. Additionally, Article 79(2)’s list of legitimate interests for restricting FOE is much longer than what is permitted under international standards (interests include *inter alia*, defence, public safety, public order, public morality and public health, protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, and regulating the technical operation of telephony and broadcasting. It also allows for restrictions on those working for local government authorities), effectively allowing for restrictions of FOE that go beyond those permitted under international law.

#### **Lack of comprehensive protection of freedom of information**

4. At present, Kenya is lacking a comprehensive protection of the right to FOI. There have been prolonged delays with the passage of the FOI Law: although the Law was first drafted in 2005, it was never tabled in Parliament; also, the latest draft of the Law from 2007 has still to be introduced to Parliament. When in 2007, ARTICLE 19 made the case for guaranteeing the right to access information in Kenya’s reformed Constitution, concerns about the conflict between access and national security prevailed. In the absence of the FOI legislation, most journalists endure problems of acquiring information. Adoption of the FOI legislation is of particular importance in Kenya, as is noted in the Waki Report by the Commission of Inquiry into Post-Election Violence (“CIPEV”). In this report, CIPEV recommended the passing of the FOI Law so as to enable state and non-state actors to have full access to information which may lead to arrest, detention and prosecution of the perpetrators of the unprecedented violence following the 2007 general elections.

#### **Restrictive regulation of the media**

5. To date there is no single media law in Kenya and clear and coherent legislation that adheres to international standards is lacking. The Kenyan legal system contains many laws, including the Official Secrets Act, the Public Order Act, the Defamation Act and an the Preservation of Public Security Act, that in one respect or another restrict or threatens freedom of expression. Most notably:
  - The **Books and Newspapers Act**, introduced in 2002 by the government of Daniel arap Moi, has not been repealed and continues to allow publications to be banned and vendors to be arrested.
  - The **Preservation of Public Security Act**, 1967, which had previously been used to allow the detention without trial of many journalists under emergency powers, was amended in 1997. The 1997 Act still permits the arrest and detention of journalists on grounds of ‘compromising public safety, public order, morality or internal defence’. This Act, if invoked by the government, can still severely restrict freedom of expression, association and personal liberties. It is a reminder of the oppressive laws in place during Kenya’s colonial era rather than reflective of the international standards and the guarantees contained in the African Charter on Human and Peoples’ Rights which Kenya has committed to uphold.
  - In October 2007, **the Media Act, 2007**, created the Media Council of Kenya (“MCK”) for the conduct and discipline of journalists and the media, and as a mechanism to provide self-regulation of the media. Unfortunately, it also created a mechanism for control through financing and appointments for MCK. The Act mandates a council of 15 members with the chair being appointed by the Minister of Information and Communications. It also limits who can be a reporter by defining a journalist as someone who "holds a diploma or a degree in mass communication from a recognized institution of

higher learning," and requiring all media practitioners to register with the council for accreditation.

- **The Communications (Amendment) Act, 2008**, passed in December 2008 and effective from 2 January 2009, contains a number of provisions that run contrary to international standards. The Information and Communications Minister also has powers to search and seize broadcast equipment, in addition to the right to intercept and disclose telephone calls, emails and letters. The Act also gives a government-controlled Communications Commission ("CCK") the power to license and regulate broadcasting services and to prescribe the nature and content of media broadcasts. Moreover, the penalties for press offences - fines and imprisonment - provided by the Act could lead to an unjustified restriction on the right to freedom of expression.

### **Limits on freedom of expression through legislation on defamation**

6. Defamation remains a criminal offence in Kenya even after Sections 56, 57 and 58 (Sedition Laws) of the Penal Code were repealed by the Statute Law (Miscellaneous Amendments) Act 1997. Journalists continue to be charged with sedition or seditious libel under laws relating to defamation (under the Penal Code, Chapter 63, Article 194), despite assurances by the Attorney General in a 2005 case that the relevant law would no longer be used. This statement was contradicted, however, by the March 2007 conviction of Mburu Muchoki, the editor of the independent newspaper *The Independent*, who was jailed for his inability to pay a US\$8,600 fine (the editor eventually received a presidential pardon and was released from prison). Earlier, *The Independent* had published an article accusing the father of Martha Karua - the Minister of Justice and Constitutional Affairs and close friend of the presiding judge - of being involved in an abortion scandal.
7. The Penal Code also offers special protection to the President, Cabinet Ministers and Parliament. However, international human rights courts have consistently held that public officials should tolerate more, not less, criticism than ordinary citizens. Vigorous debate about the functioning of public officials and the government is an important aspect of democracy. To ensure that this debate can take place freely, uninhibited by the threat of legal action, the use of defamation laws by public officials should be circumscribed as far as possible. The maximum fine for civil defamation is 20,000 Kenyan Shillings (US\$269) but courts have been known to award fines 25 times this sum.
8. Despite the isolated instances of criminal defamation, the possibility of criminal prosecution for defamation remains problematic as it has the potential to threaten FOE by having a chilling effect on free speech. A conviction under Kenya's Defamation Act could result in a prison term of up to two years and/or a fine. This sanction undoubtedly has the potential to chill speech and intimidate journalists, thereby unduly restricting freedom of expression.

### **Attacks against and harassment of journalists**

9. Even though the press is relatively free in Kenya, tensions between the government and the media remain and take the form of threats, insults and legal challenges resulting in the imposition of fines. Journalists investigating corruption are rarely subject to physical harm, but threats are sometimes made, as are attempts to bribe them, contributing to a culture of self-censorship. There has also been a case where a journalist was murdered and no effective investigation took place. The most notable examples of attacks and harassment follow:
  - In recent years, there has been an increase of incidents of harassment by the Kenyan security forces of journalists and media outlets. In some cases, this harassment has been neither spontaneous nor subtle. *The Standard Group*, which owns *The Standard* and the Kenya Television Network ("KTN"), had its newspaper offices raided by armed police in

March 2006 and its March editions set on fire and equipment damaged. The government has since used the media's dependence on advertising to control and influence the content of newspapers critical of authorities and the administration. In 2007, the government decided to withhold State advertising from *The Standard* Group.

- Between January and March 2008, a number of journalists and human rights defenders were subjected to threats, including death threats, by armed groups which accused them of "betraying the tribal cause" for commenting on the elections and speaking out against some of the post-election violence (on post-election violence, *see below*).
- In March 2008, military personnel involved in the joint police-military operation in the Mount Elgon area arbitrarily arrested, harassed and physically ill-treated journalists reporting on events.
- In October 2008, Andrew Mwangura, a former journalist and a Seafarers Assistance Programme official, was arrested by police and detained for a total of nine days. He was charged with "spreading false information" after he gave press interviews contradicting the official government version of the destination of a Ukrainian cargo ship seized by pirates off the Somali coast in September. Although the proceedings against Mwangura were ceased in May 2009, the case represents an example of political pressure on journalists.
- In January 2008, Francis Nyaruri, a reporter for the private *Weekly Citizen*, went missing. His decapitated body was found two weeks later, on January 29, in the Koderia Forest, Nyanza Province, western Kenya, showing signs of a violent death. Nyaruri had written stories accusing senior police officers of fraud in a construction project and had reportedly been threatened by the state security agents in the South Western town of Nyamira in response to the articles. There has been no proper and effective investigation into the murder and the status of any credible investigation is still unknown. Although two suspects were taken into police custody in May 2008, they were later released without explanation. It has been claimed that these arrests were only made to pacify the clamour that the state security agents may have been involved in the murder.

#### **The media and election crisis in 2007-2008**

10. On the onset of this section, ARTICLE 19 recognizes serious failures within the media themselves during the 2007-2008 election crisis and riots. The Kenyan media censored themselves to a significant extent and did not deal adequately with the politically motivated violence and ethnic divisions. The reasons included inadequate editorial oversight and lack of experience in coverage of conflict situations. The precedent of the role of the RTLM in the Rwandan genocide during the 1990s left much of the Kenyan media fearful of exacerbating their country's fragile post-election situation. As a result, they did not always provide information of public interest to Kenyan society. For instance, they failed to recognise early warning signs that many election messages contained an intrinsic ethnic and regional mindset. The media failed to adequately engage with and question politicians involved in ethnic politicking, and did not report outright the allegations of election-rigging for fear of exacerbating the violence. Lastly, many media outlets tended to be politically affiliated, and there were widespread allegations that journalists at the grassroots were bribed, intimidated or partisan.
11. However, during the crisis, the Government introduced severe restrictions on the media that have had a long standing impact on the freedom of expression in the country. In January 2008, the Information Ministry officials announced the ban on live coverage the day after the results were announced, saying news reports and commentary might incite further violence. News media generally observed the ban, broadcasting the message "Save our country" on a screen ticker. Yet critics said some journalists were unnecessarily complacent

in covering the crisis, ignoring both the incidence and causes of violence. Journalists worked in a climate fraught with fear. In numerous interviews, prominent reporters and editors complained that they received death threats by text message and e-mail throughout January – February 2008. Most threats were believed to have come from Kikuyu militants and state security agents. Three journalists were seriously injured in the period around the election. In January, photographers Hezron Njoroge of *The Nation* and Robert Gicheru of *The Standard* were shot while covering riots in the Kibera slums of Nairobi, *The Nation* reported. Both were hospitalized but recovered. Clifford Derrick, a reporter and cameraman working for the Kenya Television Network, was brutally assaulted while trying to cover alleged vote-rigging in Nairobi. Ruling party militants were believed to be behind the attack, which led to Derrick's hospitalization for severe kidney injuries, according to local journalists and Kenyan human rights organizations. The attack, which occurred on December 26, 2007, was not widely publicized for several weeks.

### **Internet**

12. The use of the information and communication technologies is relatively unrestricted in Kenya. The government does not employ technical filtering or extensive censorship, and citizens are generally able to access a wide range of viewpoints. However, the government engaged in *ad hoc* efforts during 2008 to limit access to some content, including material related to corruption. In May, there were reports that some government departments were blocking access to the Kenyan Anti-Corruption Commission's online whistleblower reporting facility. During the post-election violence in early 2008, there were also indications that the government was willing to monitor and censor both internet and mobile-based content that it felt was "inflammatory." Moreover, the adoption of the Communications (Amendment) Act, 2008, has raised concerns that online censorship and surveillance might also increase in the coming years.

### **Recommendations:**

13. ARTICLE 19 calls upon the Human Rights Council to address these violations of the right to freedom of expression in Kenya and recommends that the Kenyan Government use the opportunity of the Universal Periodic Review to:
  - Review the Constitution and to amend it accordingly so that it protects the right of FOE, including the right to FOI, in compliance with international and regional human rights standards. Protection for the right to FOE should be positive in nature and should protect the right to seek, as well as to communicate and receive, information and ideas. The guarantee should permit only restrictions on the right to FOE that are provided by law, and that are necessary in a democratic society to protect a limited list of stated interests, which do not go beyond those permitted under international law.
  - Adopt and implement comprehensive legislation on FOI. The Government should coordinate with civil society in implementing such legislation so as to ensure the bill's compliance with international law and best standards.
  - Amend the Media Act, 2007, so as to ensure optimal independence of the Media Council of Kenya. Also, any provisions requiring registration or educational requirements for journalists should be omitted from the Act as they contravene international law.
  - Review the whole system of media regulation and bring it in line with binding international human rights standards. This includes ensuring the independence of the CCK from government, and addressing the powers of the CCK to impose content restrictions.
  - Decriminalize defamation completely.
  - Ensure that all cases of harassment against the media are investigated fully and that perpetrators are actively prosecuted whenever possible.