



## **KENYA NATIONAL COMMISSION ON HUMAN RIGHTS**

### **HIGH-LEVEL REGIONAL CONFERENCE ON JUSTICE AND GOOD GOVERNANCE**

*Combating impunity and upholding human rights as key contributions to peace and security*

**Windsor Golf Hotel & Country Club - Nairobi, Kenya  
Technical-Level Consultation 13-14 May 2019**

**SPEAKING NOTES FOR: GEORGE MORARA,  
COMMISSIONER AND VICE-CHAIRPERSON, KENYA  
NATIONAL COMMISSION ON HUMAN RIGHTS.**

**TOPIC: The Contribution of National Human Rights Institutions, Civil Society Organizations and Human Rights Defenders in the Fight against Impunity. Achievements, Challenges and Way Forward**

## INTERNATIONAL CONFERENCE ON THE GREAT LAKES REGION (ICGLR) MEMBER STATES:

### I. HUMAN RIGHTS: THE GLOBAL PORTRAIT

The *United Nations Paris Principles* provide the international benchmarks against which NHRIs are accredited by the Global Alliance of National Human Rights Institutions (GANHRI). They require the NHRIs to meet six main criteria in terms of:

1. **Mandate and competence:** a broad mandate, based on universal human rights norms and standards
2. **Autonomy from Government;**
3. **Independence guaranteed by statute or Constitution ;**
4. **Pluralism;**
5. **Adequate resources ; and**
6. **Adequate powers of investigation.**

Depending on how compliant NHRIs are with these criteria, they are accredited with A-Status (fully compliant), B-Status (partially compliant) or Not-accredited.

The Global Accreditation as of 9 May 2019 was as follows, based on the figures provided by the:

1. **Global Alliance of National Human Rights Institutions Membership: 124**
2. **Global number of ‘A Status’ NHRI...79, OF WHICH 21 (or 27%) are in Africa...And if we were to break this down further 6 of the 21 ARE MEMBERS OF THE ICGLR...Rwanda, Uganda, Tanzania, Kenya, Zambia and DRC.**
3. **Global number of ‘B Status’ NHRIs: 35, out of which 11 (OR 31%) are from Africa. And of these 11, 2 (or 18%) are from the ICGLRC Member States...Burundi and the Republic of Congo [see listing below].**
4. **C Status: None from the ICGLR..Benin and Magascar.**
  - **Angola..... Not listed**
  - **Burundi..... B Status**
  - **Central African Republic..... Not Listed**
  - **Republic of Congo..... B Status**
  - **Democratic Republic of Congo..... A Status**
  - **Kenya..... A Status**
  - **Uganda..... A Status**

- Rwanda..... A Status
- Republic of South Sudan..... Not listed.
- Sudan..... Not listed
- Tanzania..... A Status
- Zambia..... A Status

So, what would be a good starting point and may be a possible outcome resolution and goal for this meeting in particular and the ICGLR in general? Increase the number of Member States with ‘A Status’ NHRIs and encourage those outside the Paris Principles of Human Rights Framework to consider enlisting as Members within that Framework.

**Kenya’s Experience:** Membership and ‘Status A’ Accreditation have been extremely helpful in providing a platform for engagement at the HRC on the UPR Process through a highly consultative and participatory process bringing together the GOKs MDAs through the Department of Justice of the State Law Office, CSOs and we the NHRI. Our frontline partner has been the OHCHR-KENYA.

What this means is that there is collective ownership of the recommendations made to Kenya and similarly, a collective commitment on implementing the same, with an implementation matrix...Was the case when Kenya was first reviewed in 2010, it was the case after the 2<sup>nd</sup> review in 2015 and hope to keep it so even as Kenya gets ready for the third UPR reporting cycle slated for next year...the year 2020.

**Good example on achievements:** On-going work on the development of the National Action Plan and Policy on Business and Human Rights [Multi-sectoral undertaking bringing together public and private sector businesses, CSOs, ordinary wananchi and being led by the Office of the Attorney General (DOJ) and ourselves, the KNCHR and of course with the support of the OHCHR-KENYA and Norway, who have been gracious and generous enough to fund this work arising out of a recommendation they made to Kenya under the 2<sup>nd</sup> cycle of the UPR] under the Ruggie Guidelines of Respect, Protect, and provide a Remedy Framework...And which fits in well with Article 8 of the Great Lakes Protocol Against the Illegal Exploitation of Natural Resources calling upon ‘*Member States to insure respect for the protection of human rights at any time including in case of exploiting natural resources. They shall ensure that third parties do not infringe upon human rights or permanent sovereignty over natural resources on their territories*’.

## **II. HUMAN RIGHTS: THE CONTINENTAL PORTRAIT WITHIN THE CONTEXT OF NANHRI:**

1. Human rights are an integral part of the African Union itself. They are part and parcel of the African integration project being championed and implemented by the AU. Important continental human rights milestones include the adoption of the African Charter on Human and People's Rights and Agenda 2063, whose 7 pillars include Aspiration Number 3, which envisages an Africa of Good Governance, Democracy and Respect for Human Rights, Justice and Rule of Law.
2. The AU has set up mechanisms like the African Commission on Human and People's Rights and the African Court on Human and People's Rights to guarantee these rights.
3. Additionally, and in keeping with Resolution No. 48/134 of 20<sup>th</sup> December 1993 of the United Nations General Assembly, most African Governments and States (46 to be specific) have established National Human Rights Institutions, a fact which is clearly evident by the presence of my Commission here today as well as other sister Commissions from the region present in this esteemed high level conference.
4. So, as to harness the power of working together and learning from each other on matters of human rights, 44 of the 46 NHRIs have come together to form a continental organization called the Network of African National Human Rights Institutions. And NANHRI has in turn entered into a Memorandum of Understanding with the African Union Commission on the need to create an opportunity for continuous interaction between the Members of the Permanent Representatives Committee and the National Human Rights Institutions, especially through High Level Policy Forums and Deliberations on the nexus between Human Rights and Development.

**Point to consider: Is there a platform for continuous interaction between ICGLR and NHRIs? Is that platform even necessary? And if it is, what can we do to create it?**

### **III. HUMAN RIGHTS: NANHRI AND THE EAC NHRIs**

- 1. Example of Regional Human Rights Work:** The Network of National Human Rights Institutions (NANHRI), in collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) with financial support from Swedish International Development Cooperation Agency (SIDA) implemented a five year Programme (2012-2016) aimed at enhancing the capacity of NHRIs in the East African Community (EAC) to effectively fulfil their mandate in the promotion of human rights and good governance.
2. The basis for this programme was a baseline survey (conducted in 2013) on the role of NHRIs in conflict management, resolution and peace building within the EAC region whose findings revealed that NHRIs face enormous challenges due to the high number of conflicts in the region, low levels of expertise and resources to develop and implement effective programmes to address conflict and promote peace building. In addressing these challenges, the EAC NHRIs adopted an Action Plan (2013–2016) aimed at the development and implementation of strategies for sustainable systems in conflict prevention, management and peace building.
3. This Programme provided opportunities for EAC NHRIs to meet, share experiences and monitor progress in implementation of the action plan. A wide array of milestones achieved: from the establishment of Early Warning Early Response Systems (EWERS); conducting independent elections monitoring and issuing of the general elections report; initiating exchange visits amongst themselves to share best practices;
4. As a way forward, after the end of the 5 year plan, the EAC NHRIs unanimously agreed to extend the implementation of the action for another three years (2017-2020) given the fact that prevalence of human rights violations in conflict and post-conflict states remains an issue of concern. The overall goal is to make EAC NHRIs active partners in supporting the Member States in achieving SDG 16... to promote peaceful, just and inclusive societies.

**NB: I see convergence already on areas of focus and issues of concern between what NHRIs in the Region and ICGLR: Conflict over resources, lack of sufficient early warning response systems, lack of capacity for NHRIs, which can leverage on the extensive expertise of the GLR in these areas to build their capacity.**

### **IV. HUMAN RIGHTS: THE NATIONAL PORTRAIT AS PAINTED BY THE KNCHR USING THE ICGLR, CONTINENTAL AND GLOBAL HUMAN RIGHTS TOOLS**

1. Governance, Justice Law and Order Sector (GJLOS): HR is intentional and integral in development planning with KNCHR assigned specific deliverables within this sector-wide government planning.
2. Work with Parliament [Senate and the National Assembly] for a Human Rights respecting State. Especially on developing human-rights compliant legislation.
3. Engagement with County Governments [15 out of 47] to promote Article 43 Rights [ECOSOC RIGHTS] under the Framework provided by Articles 19 and 28 of the CoK 2010. Seats well with Article 29 of the GLR Protocol on Democracy and Good Governance calling for Decentralization and Popular Participation among the Member States
4. Elections and Good Governance...Challenges abound 2007-08 and 2017...(900 cases of SGBV in 2007/08; 201 in 2017...**Challenges:** Upfront, knee-jerk denial of the violations by the police, even without the benefit of any investigations into the alleged violations...Reservations on Maputo Protocol [**Article 14 (2) (c)**]...Remove this; Continue work with the CS Interior and IGP of the NPS on developing guidelines on policing peaceful assemblies (**Luanda Guidelines of 2014 and to operationalize Article 37 of the COK 2010. Danger!! Private Member's Bill in Parliament proposing to transfer criminal responsibility to organisers of public processions/demonstrations..We have put in an advisory strongly advising against this approach and I have no doubt the AG is with us on this one**) and continue multi-sector engagements with the CS Interior on Extra-Judicial killings until we put a complete stop to this..EJKs ...Punish violators of sexual and gender based violence in both peace-time but more so in conflict-time to deter recurrence...Combat impunity. Ensure that survivors of SGBV promptly get justice. **I THINK THE PROTOCOL ON DEMOCRACY AND GOOD GOVERNANCE IS AN EXCELLENT REFERENCE POINT AND HAS BEEN EMPHASISED IN THIS MEETING ALREADY, BRIDGING THE GAP BETWEEN INTENT AND IMPLEMENTATION WILL GREATLY ENHANCE THE ELECTORAL ENVIRONMENT IN KENYA FOR THE BETTER..**
5. Also, since HR is about shared norms and standards, there is need to continue fostering partnerships at the National Level, the Regional level within EAC and the GLR as well through NANHRI [AFRICA] and GANHRI [GLOBAL].

## V. OTHER EXAMPLES OF IMPUNITY AS A THREAT TO THE ENJOYMENT OF HUMAN RIGHTS (KENYA).

1. ***Non-redress for human rights violations of corruption and economic crimes:*** throughout colonial and post-colonial regimes in Kenya, human rights violations and economic crimes have been committed by state and non-state actors without redress for victims of violations and accountability. Attempts to redress corruption and other economic crimes have not yielded much due to, in some cases, the politicization of the whole accountability process. In addition, reports of truth seeking Commissions like the TJRC and other Commissions are either not fully acted upon or are never made public.<sup>1</sup>
  
2. ***Disobedience of court orders by public/state officers***-the courts in Kenya have made pronouncements key towards promoting and protecting human rights which have been totally disregarded by state/public officials. Key examples include:
  - a) The order of the High Court to Parliament to enact legislation on the **two third gender principle**. The High Court has pronounced itself on two occasions giving orders to Parliament to enact the legislation that will oversee implementation of articles 27 (8) and 81 (b) of the Constitution of Kenya. <sup>2</sup> Disobedience of Court Orders puts the country in an awkward position, further calling into question, Kenya’s commitment to the implementation of the GLR Protocol on Good Governance and Democracy, specifically Article **6 on Women’s Vote**: *“Member States shall take appropriate steps to guarantee that women are accorded the equal right to vote and be elected, to participate in the formulation and implementation of government policies and to hold public office and carry out public functions at all levels of decision-making”*.
  
  - b) The order of the high court to operationalize the **Public Benefits Organizations** Act. The High Court has on two occasions pronounced itself on the persistent failure to operationalize the Act as being a violation of the Constitution

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<sup>1</sup> Ibid page 6

<sup>2</sup> Center for Rights Education and Awareness versus Attorney General and Another (2015) eKLR; Center for Rights Education and Awareness and 2 Others versus Speaker of National Assembly and 6 Others (2017) e KLR

and has directed the state to operationalize the Public Benefits Organizations Act. Despite the court directive and orders, the Act is yet to be operationalized. In the case of *Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning*<sup>3</sup> (KNCHR appearing as *Amicus Curiae*) High Court Petition Number 351 of 2015, the petitioners challenged the failure of the Ministry of Devolution to appoint a date for the coming into operation of the Public Benefit Organization Act and further sought order of mandamus to compel the Cabinet Secretary in charge of Devolution and Planning to appoint and gazette a date for the coming into operation of the Act. The court found that the failure by the Cabinet Secretary to appoint a commencement date for the Public Benefits Organizations Act is inconsistent with the Constitution. The Court issued an order of mandamus compelling the Cabinet Secretary in charge of Devolution and Planning, within the fourteen days of issuance of the order, to appoint a date of coming into operation of the Act. The order was not complied with and instead the function of regulation of Non-Governmental Organization was transferred from the Ministry of Devolution and Planning to the Ministry of Interior and Coordination of National Government. The transfer is irregular as section 2 (1) of the Public Benefits Organizations Act places regulation of Public Benefits Organizations under the Ministry of Devolution and Planning. The Commission views the transfer of the function as scheme to frustrate and circumvent judicial orders through exercise of administrative powers. The Commission together with Civil Society Organizations subsequently moved to court seeking orders that the Cabinet Secretary in charge of Ministry of Devolution and Planning and the Cabinet Secretary in Charge of Ministry of Interior and Coordination of National Government be cited and held in contempt of court orders. The court found that the Cabinet Secretaries had wilfully disobeyed a valid court order and ordered the National Government to comply with the judgment within 30 days of the date of service, failure of which the Cabinet Secretary in charge of Ministry of Interior and Coordination of National Government would be committed for contempt. Despite the court order, the National Government has not operationalized the Act to date.

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<sup>3</sup> (2016) e KLR available at <http://kenyalaw.org/caselaw/cases/view/128172/>



- 3. In the Miguna Miguna Case (Petition No 51 of 2018):** Government agencies defied over ten (10) court orders with regard to production and issuance of travel documents to the petitioner.

**...THE END...**