



fidh



Kenya's scorecard on security and justice : Broken promises and unfinished business

Report

July 2017 / N°696a



Cover Picture: Kenyan riot police officers hold batons as they detain a suspected supporter of the Kenya's opposition Coalition for Reforms and Democracy (CORD), during a protest on May 16, 2016 in Nairobi, outside the headquarters of the Independent Electoral and Boundaries Commission (IEBC). Opposition protestors led by former Prime Minister Raila Odinga gathered outside the Independent Electoral and Boundaries Commission building to demand the dismissal of IEBC commissioners, after alleged bias towards the ruling Jubilee Alliance Party.





TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS	4
EXECUTIVE SUMMARY	6
METHODOLOGY	8
INTRODUCTION	8
I. SECURITY SECTOR REFORM : INSTITUTIONAL PARALYSIS AT THE EXPENSE OF HUMAN RIGHTS	9
A. Legal and institutional framework	9
A.1. Legal Framework	9
A.2. Key institutions in the security sector	11
A.3. Structure of the security agencies	13
B. Persisting deficiencies within the security sector	13
B.1. Security agencies remain one of the main perpetrators of human rights violations	13
B.1.1 Human rights violations arising from counter-terrorism measures	14
B.1.2 Normalization and Digitization of Extra-judicial killings and executions	17
B.1.3 Policing protests	22
B.1.4 Lack of Transparency, Coordination and Accountability in Joint Security Operations	24
B.1.5 Increase in illegal firearms	25
B.1.6 Surveillance and digital security	26
B.1.7 Security challenges in the context of the 2017 general elections	28
B.2. Persisting weaknesses in the accountability process for security agencies	30
B.2.1 General accountability for human rights violations by security agents	30
B.2.2 Accountability of the police	31
B.2.3 Accountability of the military	37
B.3. Abuse of legislative processes to address security concerns and fight dissent	38
C. Security management and capacity	39
C.1. Infrastructure and capacity of security agencies	39
C.2. Budget allocations for security	40
C.3. Community policing	41
II. PROGRESS AND CHALLENGES IN ADVANCING JUDICIAL REFORMS AND ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS	43
A. Judicial reforms meant to strengthen the legal framework	43
A.1. Achieving judicial reforms in a hostile environment	44
A.2. Strained relationship	45
A.3. Underfunding the judiciary	46
A.4. Corruption and imprudent use of resources by the Judiciary	48
B. Victims of the 2007/2008 Post-Election Violence (PEV) still await for justice and reparations	48
B.1. Seeking justice through domestic courts	49
B.2. Failures of the proceedings before the ICC	51
CONCLUSION	57
RECOMMENDATIONS	58
Recommendations on the Security Sector	58
Recommendations on the Justice Sector	60
General and Crosscutting Recommendations	61



LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AP	Administration Police
APC	Armoured Personnel Carrier
ARV	Anti-Retroviral
ATPU	Anti-Terrorism Police Unit
BPU	Border Patrol Unit
CAJ	Commission on Administrative Justice
CCTV	Closed Circuit Television
COFEK	Consumer Federation of Kenya
COK	Constitution of Kenya
CORD	Coalition for Reforms and Democracy
CSO	Civil Society Organization
DCI	Directorate of Criminal Investigations
DPP	Director of Public Prosecutions
FIDH	International Federation for Human Rights
GSU	General Service Unit
HRDs	Human Rights Defenders
IAU	Internal Affairs Unit
ICC	International Criminal Court
ICT	Information Communication and Technology
IDPs	Internally Displaced Persons
IEBC	Independent Electoral and Boundaries Commission
IGP	Inspector General of Police
IMLU	Independent Medico-Legal Unit
IPOA	Independent Policing Oversight Authority
JTF	Judiciary Transformation Framework
KDF	Kenya Defence Forces
KES	Kenya Shillings
KHRC	Kenya Human Rights Commission
KICA	Kenya Information and Communication Act
KNCHR	Kenya National Commission on Human Rights
KNP	Kenya National Police
KPR	Kenya Police Reservists
KWS	Kenya Wildlife Service



MSJC	Mathare Social Justice Center
NASA	National Super Alliance
NCCC	National Coordination Consultative Committee
NCHRD-K	National Coalition of Human Rights Defenders
NGAO	National Government Administration Officers
NGO	Non-Governmental Organization
NIS	National Intelligence Service
NPS	National Police Service
NPSC	National Police Service Commission
ODM	Orange Democratic Movement
OHCHR	Office of the High Commissioner for Human Rights
OPSA	Outstanding Police Service Awards
PBO	Public Benefits Organizations
PEV	Post-Election Violence
PRWG	Police Reforms Working Group
RDU	Rapid Response Unit
SGBV	Sexual Gender Based Violence
SLAA	Security Laws (Amendment) Act
TFV	Trust Fund for Victims
TJRC	Truth Justice and Reconciliation Commission
UN	United Nations





EXECUTIVE SUMMARY

10 years after the 2007/2008 post-election violence (PEV) in Kenya, which led to the death of more than 1,000 people and to the forced displacement of over 600,000, the country is set to go into another general election on 8 August 2017. With less than a month to the polls, the political environment remains tense and there have been already worrying incidences of electoral related violence.

In the aftermath of the PEV, the deficiencies within the security and justice sectors were singled out as being part of the root causes of the violence. This compelled Kenyan authorities to initiate legal and institutional reforms within both sectors in order to prevent further violence. The new Constitution adopted in 2010 underpins the basis upon which such reforms have been initiated.

This new FIDH and KHRC report aims to offer an assessment of the Jubilee Administration's term in office in the past four years and five months and specifically its performance with regards to the human rights agenda in the security and justice sectors. The Jubilee Administration came into office in March 2013, when the Constitution was barely three years old, making it the government that was entrusted with the substantive realization and implementation of the expected reforms.

This report therefore assesses the extent to which these reforms have been actualized and implemented and their effectiveness. It notes where progress has been made as well as where there have been multiple attempts to weaken the institutions and mechanisms established under the Constitution.

While there have been some positive legislative developments by Parliament, the Executive arm of government has both under-performed and in some instances deliberately undermined the advancement, realization and enjoyment of human rights. Accountability and reparations for human rights violations and abuses has also not been realised to a generalised climate of impunity.

With respect to the security sector, the report shows that although oversight for the police has grown over the years since the 2007 elections, it is apparent that some within the current government are attempting to undo these advances, which raises serious concerns in the perspective of the forthcoming general elections.

A particular source of concern lies with the existence of "rogue security enforcement officers" in at least 26 counties out of the 47 counties in Kenya, who often work along with criminals, including in Nairobi, Kirinyaga, Lamu, Mombasa, Kisii, Bungoma and others. These associations and operations no doubt counter efforts aimed at ensuring the security of the population. Furthermore, the existence of militia groups and gangs not only contributes to insecurity but inhibits security operations and undoubtedly contributes to the violation of human rights and freedoms. These revelations make it all the more necessary to tighten the accountability measures against police excesses and actions.

As the 2017 elections draw closer, some are also concerned that there is decreased military oversight with a view to using the military during any political unrest the elections may cause. Police reforms have seemingly stalled and President Kenyatta has turned to the military in the face of increasing domestic threats within Kenya.





With respect to the justice sector, it is important to understand the strides the Judiciary has taken to establish itself and specifically how it is better prepared to take on the elections as compared to 2007 and 2013. The evolving constitutional relationships between the Judiciary, the Executive and Parliament are also examined with a close focus on the changes – intended or unintended – that have come about in the recent years as a result of the various reforms.

In addition to this, the report shows how the Jubilee Administration has on several occasions fought against accountability measures related to the PEV as well as those related to more recent grievous violations by the security sector. It examines in particular the role of the Judiciary in attempts to bring about justice and reparations to the victims who suffered from the 2007/2008 PEV. It shows how organizations seen to be in support of the International Criminal Court (ICC) as well as accountability and good governance broadly found themselves on the receiving end of the Jubilee Administration, immediately upon its inauguration. The report also highlights how the Government engaged in political, legal and social strategies to discredit, harass and intimidate human rights organizations. The most notable of these efforts has been the failure to operationalize the Public Benefits Organizations (PBO) Act despite a Court order instructing the same. Instead, the government has sought to introduce retrogressive amendments to the law which such as the introduction of legal restrictions to the funding and operations of civil society organizations.

During the forthcoming elections, President Uhuru Kenyatta and Deputy President William Ruto will seek to renew their mandates under the banner of the Jubilee Coalition. The greatest competitor to the Jubilee Administration is the National Super Alliance (NASA), a collation of five major political parties that have come together to support the presidential bid of Raila Amolo Odinga and his running mate Kalonzo Musyoka¹.

The report makes recommendations targeted towards specific institutions and government agencies and aims to set the reform agenda for the next administration. FIDH and KHRC hope that these recommendations, if adopted and implemented will be instrumental towards actualizing and implementing the pending reform that would move Kenya towards realizing its obligations to respect, promote, protect and fulfill human rights and fundamental freedoms.

1. <https://www.standardmedia.co.ke/article/2001237873/raila-odinga-it-is-nasa-unveils-flag-bearer> accessed 3 July 2017





METHODOLOGY

The Report was developed by a team of researchers who relied on both primary and secondary sources of information. The team reviewed and appreciated information that has been documented by other organizations - both state and non-state. It further conducted a total of 17 interviews with individuals and representatives of state and non-state organs. The report is enriched by the narrations of some of the interviewees, most of whom requested not to be named in the Report.

INTRODUCTION

The Jubilee Coalition government of President Uhuru Muigai Kenyatta and his Deputy, William Samoei Ruto got into power on 9 April 2013 following the March 2013 General Election. The election of Kenyatta and Ruto as President and Deputy President was upheld by the Supreme Court of Kenya in its decision delivered on 30 March 2013 regarding an election petition that had been filed by various parties including Raila Amolo Odinga who came second in the Presidential election and two individuals, Zahid Rajan and Gladwell Otieno. The election petitions challenged the integrity, transparency and credibility of the electoral process as well as the results and outcome of the 2013 General Election.

The Jubilee Administration came into power with a myriad of promises that were contained in its manifesto and other public messages. These promises were to be fulfilled within the 5-year term in office from April 2013 to August 2017. The Jubilee Coalition had 7 key pledges which included: a transformational leadership that would ensure the public service provides quality services and is accountable to people; a safe Kenya with expanded, equipped and modernized security agencies to ensure every Kenyan is guaranteed of their safety and that of their loved ones and their property; and social justice ensuring that the rights of all Kenyans are preserved through good governance, democracy, and respect for the rule of law and social protection and welfare for the disadvantaged.

Of particular note is that both President Kenyatta and his Deputy Ruto, came together on an anti-ICC campaign agenda, at a time when they were both facing criminal prosecutions for crimes against humanity before the International Criminal Court (ICC). It is therefore of importance to note that for the better part of their initial term in office, the President and his Deputy engaged in a robust national, regional and international agenda of discrediting the ICC and undermining not only the integrity of the Court but interfering with and discrediting the proceedings against them. These efforts contributed significantly to the collapse of the cases against them.

President Kenyatta and his Deputy Ruto came into office when charges for crimes against humanity arising from the 2007/2008 Post-Election Violence (PEV) had been confirmed against them by the ICC. The PEV resulted in more than 1100 deaths, 600,000 internally displaced persons, rape and other forms of sexual violence and other serious crimes. The PEV is of significant historical importance for Kenya and marks a turning point in the political, social and institutional history of the Country. The cause of the violence was attributed to the deficiencies in the security and justice sectors. The aftermath of the PEV and the recommendations of the Commission of Inquiry into the Post-Election Violence (CIPEV) were instrumental in pushing for key institutional and legislative reforms in a number of sectors, including the justice and security. The reforms were aimed at addressing the violations that had already occurred and their root causes in order to prevent future violence and violations. The major hallmark of these reforms remains the promulgation of a progressive Constitution on 27 August 2010.





In the last five years, Kenya has adopted several pieces of legislation, either as new laws or as amendments to existing laws. A number of the new laws have been on implementing the Constitution of Kenya 2010. This achievement is laudable, particularly with respect to legislation that enhances the protection and promotion of human rights such as the Access to Information Act, 2015, the Prevention of Torture Act, the National Coroners Service Act, the Legal Aid Act, The Victims Protection Act and the Protection Against Domestic Violence Act¹. Unfortunately, other legislative developments have had far reaching setbacks on the gains made on human rights and fundamental freedoms, such as the Security Laws (Amendment) Act and the Kenya Information and Communication (Amendment) Act.

The report largely centers its analysis based on the aspirations of the 2010 Constitution and examines the extent to which the Jubilee Administration has adhered to or veered off from them.

I. SECURITY SECTOR REFORM: INSTITUTIONAL PARALYSIS AT THE EXPENSE OF HUMAN RIGHTS

This section of the Report analyses the challenges pertaining to the security sector under the Jubilee Administration. It reflects on the legal structure that governs security and the actors within the security sector. It also gives an analysis of the government's responses to some of the major security incidences and challenges over the past five years and the effect that these responses have had on the enjoyment and realization of human rights and fundamental freedoms.

A. Legal and Institutional Framework

A. 1. Legal Framework

Prior to the promulgation of the Constitution of Kenya 2010, there had been calls for holistic reforms within Kenya's security sector. Notable reports had been published that characterized the clamor for reforms both in terms of the laws, regulations and policies as well as the practice and operating procedures within the security agencies. The most significant of these remains the Ransley report, which is largely viewed as the police reforms blueprint².

Chapter Fourteen of the Constitution of Kenya, 2010 (COK 2010) stipulates the principles of national security, in particular, that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. These principles, espoused under Article 238 of the Constitution, are paramount and form the basis for the government's security operations, security law reform as well as the recruitment of security and law enforcement officers.

The Constitution sets the national security organs as being the Kenya Defence Forces (KDF), the National Intelligence Service (NIS) and the National Police Service (NPS). These organs are primarily charged with the responsibility of promoting and guaranteeing national security in accordance with the Constitution.

1. Available at www.kenyalaw.org accessed 24 May 2017

2. Available at <https://www.scribd.com/doc/245815329/Ransley-Report#> accessed 24 May 2017





The National Police Service (NPS) Act, 2011 regulates the recruitment, conduct and functions of the police. The Act was amended in 2014 to give the president direct control in the appointment of the Inspector General of Police, thereby eroding the independence of the Office of the Inspector General. Further, the NPS Act was amended to expand the use of firearms to protect property as opposed to only the protection of life. The National Police Service Commission (NPSC) Act, 2011 provides for the powers and functions of the NPSC and the qualification and appointment of members.

The National Intelligence Service (NIS) is established under Article 239(6) of the Constitution and its functions, organization and administration are governed by the National Intelligence Service Act, 2012. The NIS Act requires the Service, in the discharge of its mandate, to observe and uphold the Bill of Rights and the national values and principles of governance under Article 10(2) of the Constitution. The NIS is required to comply with the constitutional standards of human rights and fundamental freedoms and to train its staff to respect rights, fundamental freedoms and dignity¹. The NIS is responsible for security intelligence and counterintelligence necessary to enhance national security.

Certain laws have had the effect of clawing back on human rights protection and enjoyment. These include the National Intelligence Service (NIS) Act 2012², the Prevention of Terrorism Act, 2012³ and the Security Laws (Amendment) Act, 2014 when viewed from the prisms of surveillance and counter-terrorism measures which are discussed in further detail in subsequent sections of the report. The NIS Act mandates the NIS to gather, collect, analyze and transmit security intelligence and counter intelligence with the aim of detecting and identifying impending and actual threats to national security.

1. Section 3, National Intelligence Act, available at www.kenyalaw.org

2. Section 36 provides that the right to privacy under Article 31 may be limited where a person is suspected to have committed an offence that would necessitate the investigation, monitoring or other interference with the person's communications. However, this limitation requires that a warrant must be obtained prior to such interference, monitoring or investigation.

3. This Act gives security agents extensive powers to limit fundamental freedoms and the right to privacy through surveillance.





A. 2. Key Institutions in the Security Sector

<p>National Security Council (NSC)</p>	<p>The Constitution establishes the National Security Council (NSC) which is the top security organ and exercises supervisory control over national security organs. The Council makes annual reports to Parliament on the state of Kenya's security. The National Security Council is the apex security body in Kenya. It is chaired by President Kenyatta and attended by the Deputy President, Interior Secretary, Foreign Secretary, Defence Secretary, Chief of Kenya Defence Force, Director General of NSIS, Inspector General of Police and the Attorney General¹.</p>
<p>National Police Service (NPS)</p>	<p>Article 243(3) of the Constitution stipulates that the National Police Service (NPS) is a national service and shall function throughout the country. Parliament is further mandated to enact legislation to give full effect to Article 243. The National Police Service consists of the Kenya Police Service (KPS), the Administrative Police Service (AP) and the Directorate of Criminal Investigations (DCI). The KPS is mandated to among others, maintain law and order, prevent and detect crime, apprehend offenders, enforcement of all laws and regulations². The functions of the AP Service include maintenance of law and order, preservation of peace, protection of life and property, provision of specialized stock theft prevention services among others³. The DCI is charged with criminal investigations, collecting and providing criminal intelligence, detecting and preventing crimes, maintaining criminal records among others⁴. Under the National Police Service there are special units or formations. These specialized units are the General Service Unit, Anti-Stock Theft Unit, Anti-Motor Vehicle Theft Unit, Tourism Police Unit, The Anti-Corruption Police Unit, Presidential Escort Unit, and the Anti-Terrorism Police.</p>
<p>County Policing Authority</p>	<p>Section 44 of the National Police Service Act (NPS Act) establishes the County Policing Authority, chaired by the County Governor and includes representatives of the National Intelligence Service, National Police Service and the Directorate of Criminal Investigations, County Assembly Members, the Chairperson of the County Security Committees and other members appointed by the Governor representing various interests.</p>

1. Article 240(3) of the Constitution of Kenya, 2010

2. <http://www.kenyapolice.go.ke/pages/links.html> accessed 2 July 2017

3. <http://www.administrationpolice.go.ke/2015-02-16-09-14-42/mandate.html> accessed 2 July 2017

4. <http://www.cid.go.ke/index.php/aboutus/our-functions.html> accessed 2 July 2017





County Policing Authority

The functions of the County Policing Authority include the development of proposals for police performance, monitoring crime trends and patterns in the county; providing feedback on the performance of the police service at the county level; ensuring policing accountability to the public; and ensuring compliance with the national policing standards. However, it is important to note that the Act does not confer any policing mandate upon the County Policing Authority¹.

National Police Service Commission (NPSC)

Article 246 of the Constitution establishes the **National Police Service Commission** (NPSC) whose mandate is to recruit, appoint and determine transfers and promote service officers within the National Police Service. The NPSC also has the mandate of disciplining and removing from office officers within the Service. Informally, the NPSC performs the human resource management functions for the National Police Service. The NPSC's **Internal Affairs Unit** is charged with receiving, investigating and recording complaints lodged against police officers and to promote uniform standards of discipline and good order. In so doing the Unit take or recommend such administrative disciplinary action or other legal measures to hold the officers to account. The **Inspector-General** has the mandate to establish and devolve the services of the **Internal Affairs Units** to conduct investigations into police misconduct.

The Independent Policing Oversight Authority (IPOA)

The Independent Policing Oversight Authority (IPOA) established under the Independent Policing Oversight Act, 2011 is mandated to oversee the conduct and actions of the police, to monitor and investigate policing operations and to review the internal disciplinary processes.

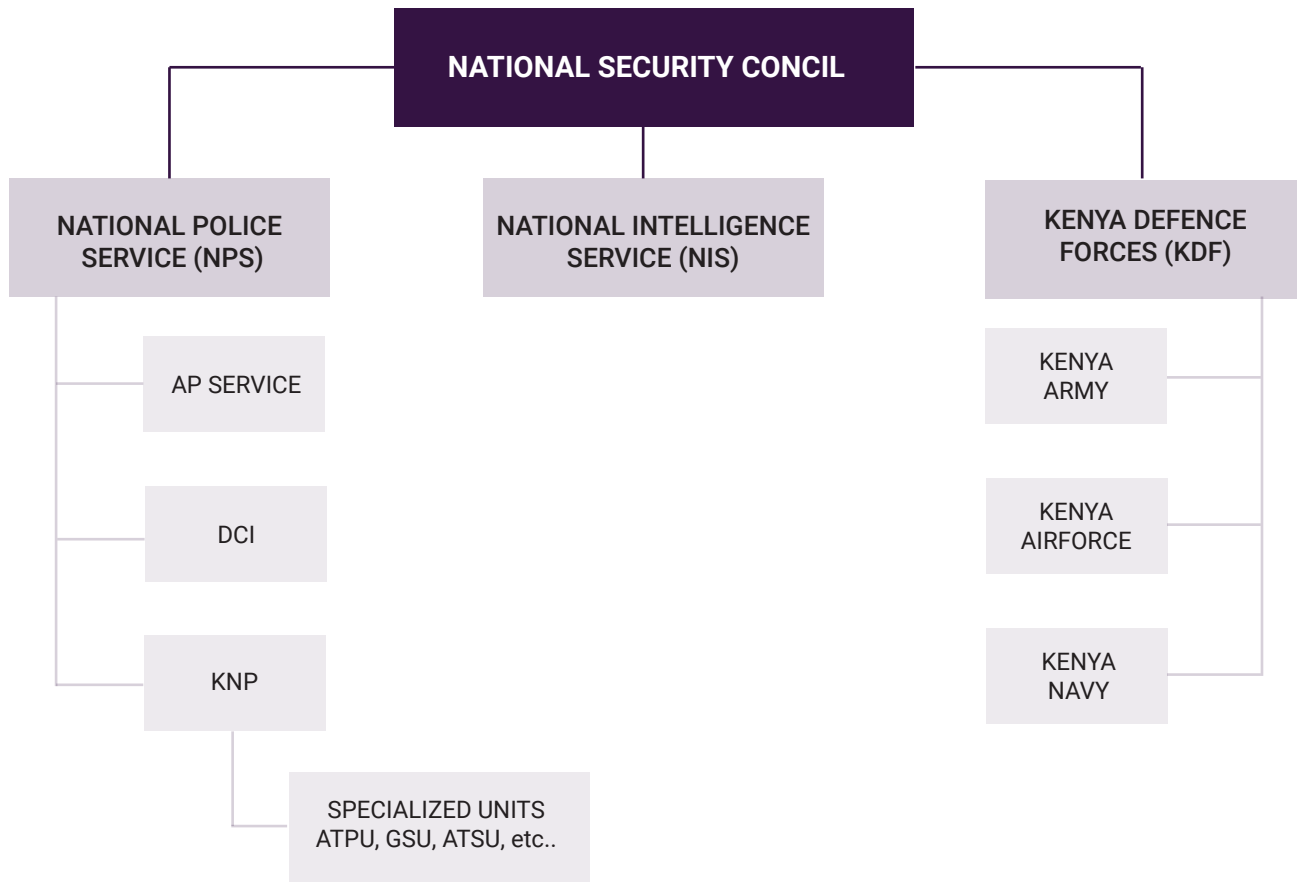
Kenya Defence Forces (KDF)

The **Kenya Defence Forces (KDF)** is governed by the Kenya Defence Forces Act include the Kenya Navy, Kenya Air Force and Kenya Army. As one of the three national security organs it is mandated with the primary role of defending the country from external aggression and threats to security of the country and its people. The KDF may be deployed to deal with internal security threats upon approval by the National Assembly².

1. Section 41 (13) of the National Police Service Act
2. Kenya Defence Forces Act available at www.kenyalaw.org accessed 24 May 2017



A. 3. Structure of the Security Agencies



B. Persisting Deficiencies within the Security Sector

B. 1. Security agencies remain one of the main perpetrator of human rights violations

Kenyan authorities have often sacrificed the rule of law and respect for human rights and fundamental freedoms within the context of addressing threats to national security. This has happened in selected cases of dealing with security threats on the ground or through legislative and policy directives. Over the years, security agents in Kenya have reportedly been the principal violators of human rights and oppression arising from their operations and generally low levels of accountability.

Since the promulgation of the COK 2010, there has been little progress to suggest that violations perpetuated by security agencies have reduced. An audit carried out by the Kenya National Commission on Human Rights (KNCHR¹) decried the documented allegations of human rights violations perpetrated by security forces ranging from acts of torture, arbitrary arrests and detentions, and extrajudicial killings. Oftentimes the security officers responsible are seldom held to account and the government is largely seen as being slow in investigating and punishing the suspected perpetrators.

This section of the Report analyses specific human rights violations committed by the security agencies over the past five years.

1. KNCHR (2015) Audit of the Status of Police Reforms in Kenya. Report available at <http://www.knchr.org/Portals/0/AllOtherReports/FINAL%20EDITED%20POLICE%20REFORMS%20REPORT.pdf> accessed 19 May 2017



B.1.1. Human Rights Violations Arising from Counter-Terrorism Measures

Kenya has experienced a number of terrorist threats and attacks, like most other countries in the world. The period that the Jubilee Coalition government has been in power has not been different. These attacks have been carried out by Al Qaeda, Al Shabaab, Boko Haram and ISIL¹. The Kenyatta government came into power when Kenya had already deployed its defence forces to Somalia in October 2011 with the aim of diminishing the capacity of Al Shabaab attacks on Kenya.

Since 2013, there have been at least two terrorist attacks per year in Kenya, mainly in the Coast, Northern Kenya and Nairobi, causing the death of at least 365 people. On 21 September 2013, 67 people lost their lives in an attack on Nairobi's Westgate Mall. In June 2014, Al Shabaab killed 14 people in Mandera; this followed another attack that the terrorist group had launched in December 2013 in which 36 quarry workers lost their lives².

Over 60 lives were lost in the Mpeketoni attacks in Lamu county, in November 2014, 28 people were killed in Mandera when a bus they were travelling in was attacked³. In April 2015, 148 students were killed in a terror attack at the Garissa University College. In November 2015, at least two people were killed in El Wak on the Kenya-Somalia border in Mandera by suspected Al-Shabaab militants⁴. In June 2016, Al Shabaab militants killed six people who included five police officers and injured four other people in another bus attack in Mandera⁵. In January 2017, suspected Al Shabaab terrorists killed a police reservist in Mandera town⁶. More recently, in May 2017 at least 3 police officers were killed by Al Shabaab in Liboi area in North Eastern border between Kenya and Somalia⁷. This list is in no way conclusive but is illustrative of the spate of terror attacks that the country has faced in the last 4 years.

Various state and non-state agencies have documented the government's response to these attacks and their human rights impact. For instance, KNCHR established a pattern of conduct by Kenyan security agencies amounting to grave violations of the law and human rights against individuals and groups suspected to be associated with terror attacks in various parts of the country mainly in Nairobi, Wajir, Mandera, Garissa, Lamu, Tana-River, Kwale, Kilifi and Mombasa counties. The counter-terrorism operations were being conducted by a combined contingent of Kenya Defense Forces (KDF), National Intelligence Service (NIS), Kenya Wildlife Services (KWS), County Commissioners, Deputy/Assistant County Commissioners, Chiefs and various units of the National Police Service including the Anti-Terrorism Police Unit (ATPU), Kenya Police Reservists (KPRs), Rapid Deployment Unit (RDU) of the Administration Police, Border Patrol Unit (BPU) and the General Service Unit (GSU)⁸.

1. KNCHR (2015) The Error of Fighting Terror with Terror

2. <http://www.theeastafrican.co.ke/news/36-people-killed-in-fresh-Mandera-massacre-Kenya/2558-2542106-4sgg8xz/index.html> accessed 25 May 2017

3. <http://www.nation.co.ke/photo/1951220-2532988-18noie/index.html> accessed 25 May 2017

4. <http://www.theeastafrican.co.ke/news/Kenyan-Muslims-shield-Christians-in-Mandera-bus-attack/2558-3005128-ywab8u/index.html> accessed 25 May 2017

5. http://www.the-star.co.ke/news/2016/07/01/al-shabaab-kills-six-in-attacks-on-mandera-buses_c1378963 accessed 25 May 2017

6. <http://www.nation.co.ke/counties/mandera/Boinnet-visits-Mandera/1183298-3785104-fx6gvnz/index.html> accessed 25 May 2017

7. <http://www.aljazeera.com/news/2017/05/kenya-police-officers-killed-al-shabab-bomb-attack-170524085550863.html> accessed 28 May 2017

8. KNCHR, The Error of Fighting Terror with Terror, 2015 available at <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf> accessed 28 May 2017





With specific regards to the involvement of the KDF in counter-terror measures, the KNCHR noted:

The Commission has recorded two hundred (200) cases of egregious human rights violations that include twenty-five (25) extrajudicial killings and eighty-one (81) enforced disappearances since 2014. These violations were widespread, systematic and well-coordinated and included but are not limited to arbitrary arrests, extortion, illegal detention, torture, killings and disappearances. KNCHR further heard multiple narratives of suspects being rounded up and detained for periods ranging from a few hours to many days in extremely overcrowded and inhumane and degrading conditions. Many were tortured while in detention sustaining serious physical injuries and psychological harm as a result¹.

Operation “Usalama Watch”

Operation *Usalama Watch*² was initiated by the government as a security operation to address terrorism. The operation was launched after two major terrorist attacks in March 2014 in Nairobi and Mombasa. Its aim was to identify and flush out foreigners linked to terrorism³.

On 5 April 2014, the Cabinet Secretary for the Ministry of Interior and Coordination of National Government, Mr. Joseph Ole Lenku, announced the deployment of 6,000 police officers to Eastleigh, thus rolling out the government’s “Usalama Watch” security operation, a massive crackdown on illegal immigrants⁴. The aim of the operation was to identify, arrest, and prosecute people suspected of engaging in terrorist activities in Kenya. The operation mainly focused on Mombasa and Eastleigh, Nairobi. The end result was a total of more than 4,000 people. They were unlawfully detained at various location including the Kasarani Sports Stadium in degrading conditions in blatant violation of the rights and fundamental freedoms of those detained⁵.

The detainees were held for days on end without access to family members or lawyers and in some cases without food or water. The operation was characterized by numerous reports of extortion, intimidation, physical and sexual assault and harassment from the security officers during the searches. About 307 individuals were deported to Somalia in clear violation of the UN principle of *non-refoulement*. Over 1,000 Somalis were relocated to refugee camps in the country⁶. Human rights organizations including the UNHCR were given very limited access to the screening and detention centers.

Operation *Usalama Watch* was characterized by security officers commission of numerous breaches of human rights and the law such as extortion, theft, looting and destruction of property, businesses and homesteads, arbitrary arrests and detentions, illegal deportations, torture, inhuman and degrading treatment and sexual harassment⁷.

1. Key Informant Interview with KNCHR, Nairobi, June 2017

2. Usalama is a Swahili word meaning Security

3. Supra, KNCHR report

4. See <https://www.standardmedia.co.ke/article/2000109301/60-detained-at-jkia-as-operation-operation-usalama-watch-hots-up> accessed 29 June 2017

5. See <https://www.hrw.org/news/2014/04/11/kenya-halt-crackdown-somalis> accessed 28 June 2017

6. <https://www.amnesty.org/en/latest/news/2014/05/kenya-somalis-scapegoated-counter-terror-crackdown/> accessed 28 May 2017

7. KNCHR (2014) A Country Under Siege: The State of Security in Kenya an Occasional Report (2010-2014)





Prior to the launch of Operation *Usalama Watch*, the Cabinet Secretary for the Ministry of Interior and Coordination of National Government, Mr. Joseph Ole Lenku, issued a directive in March 2014 ordering the immediate return of all refugees outside the designated refugee camps to their respective camps¹. It would then appear that the operations under the *Usalama Watch* were also intently geared towards ensuring that this directive was effected.

The KNCHR audit of Police Reforms notes that counter-terrorism operations in Nairobi, at the Coast and in North Eastern have been abusive and unfairly targeted ethnic Somali and Muslim communities. Most notable was the Usalama Watch in Nairobi and Mombasa that were characterized by harassment and detention of residents without charge and beyond the legal detention period. While these allegations have been levelled against the various units of the security forces, such as the National Intelligence Service (NIS), and the General Service Unit (GSU) the Anti-Terrorism Police Unit (ATPU) has been implicated as being the most notorious².

Inadequate Preparedness and Coordination to Respond to the Terrorist Threats, leading to Human Rights Violations.

Kenya Human Rights Commission and Human Rights Watch³ reported the slow response by security forces during the Lamu and Tana alleged Al Shabaab attacks in 2014 in which over 80 people died, including four security officers. Even when the security agencies responded to the attacks, their response often led to human rights abuses with villagers subjected to arbitrary arrests and detentions, killings, beatings, and loss of property. The organizations report the lack of preparedness by the security forces to respond to the attacks.

In 2014, the Independent Policing Oversight Authority (IPOA) reported that the NPS response to the Mpeketoni attacks was too 'slow and disjointed'. The nature of this response and that of follow up operations was as a result of various factors, such as the presence of high level senior commanders from the headquarters and the Executive, lack of a centralized command structure that affected coordination between the Kenya Police Service, the General Service Unit (GSU) and the Administration Police (AP), lack of harmony between the county government and county security apparatus, failure to act on intelligence and lack of specific intelligence, lack of adequate personnel and infrastructural capacity among others⁴.

The government's response, reaction and preparedness in these instances has been as diverse as the incidences themselves, raising questions as to the existence of an effective national counter-terrorism strategy and policy. Some of these strategies have been replicated with every terror incident while others have been case specific. In most instances, these responses have depicted a discriminatory approach that is largely laced with ethnic and religious profiling that disproportionately targeted certain individuals particularly those of Somali descent⁵.

Furthermore, the responses have often been mainly reactive and hinged on a clear absence of security intelligence to inform the strategies. This was particularly evident in the Westgate Attack. The preventative aspect of counter terrorism has been the weakest in Kenya's counter terror strategies. There have been instances where it was reported that there was sufficient intelligence that would have required the

1. Some refugees had left the designated refugee camps in Kakuma and Dadaab and were living outside the camps. the directive was to ensure that all refugees returned to their respective camps
2. Supra KNCHR Audit at page 38
3. KHRC and HRW, 2015, Salt to Injury, available at https://www.hrw.org/sites/default/files/report_pdf/insult_to_injury.pdf accessed 23 May 2017
4. IPOA Report Following the Mpeketoni Attacks available at www.ipoa.go.ke/other-documents accessed 23 May 2017
5. KNCHR Key Informant Interview, Nairobi, May 2017





My analysis of security in Kenya is that it is flawed and with different narratives to it. We have a very secretive security system but the secrecy is more to cover up the incompetence, wrong doing and errors and less to do with securing Kenyans. There is a general culture where security agencies feel irritated when called to account¹.

Corruption is one of the factors that inhibit effective counter-terrorism operations in Kenya. For instance, during Operation Usalama Watch, some criminals who had allegedly been deported to Somalia got back into the country after paying a fee to security agents².

B.1.2. Normalization and Digitization of Extrajudicial Killings and Executions

Extra-Judicial Killings and Executions have bedeviled security forces and the legacy of the Kenyatta and his predecessors' regimes. Even more worrying is the fact that killings by the police without justification seem to have been normalized and generally accepted as a normal state of affairs in dealing with insecurity or to curb crime. Under the Jubilee administration, 141 persons were killed by the police in 2015 while 204 were killed in 2016 and a further 80 persons as at 28 June 2017³. There has also been a pattern that suggests that these killings almost often target youthful persons from low income areas. The rising cases of extrajudicial killings and summary executions have been the subject of concern with the African Commission on Human and People's Rights (ACHPR) which recently issued a Letter of Appeal on 26 May 2017. The Letter expressed concern over the "widespread patterns of extrajudicial killings implicating the police in Kenya and the equally unsettling lack of investigation and prosecution of such cases of extra-judicial killings⁴."

In the last couple of months, extrajudicial executions have taken a new angle and moved to an all new level. In April 2017, there emerged the existence of a number of Facebook accounts and pages that are believed to be run by police officers. Most of these Facebook pages concern low-income areas in Nairobi like Dandora, Kayole, Huruma and Mathare and are aptly named in Kiswahili as *Hessy wa Dandora*, *Hessy wa Kayole*, *Hessy wa Huruma* and *Hessy wa Mathare*. The Pages are characterized by posts warning specific suspected criminal gang members in the areas, complete with their photos, names and areas of operation to change their ways and surrender to the police, failure to which they will be killed. Hours or days later, the "killer police" post bloody pictures of the suspects gunned to death, sometimes with another eerie warning to fellow suspected gang members. Most of these pages are operated under the Hessy names or under different crime watch pages such as Kayole Crime Free⁵, Kayole My Kingdom: together we can make it a safe place, or Crime Free Dandora⁶.

It is alleged that the Facebook pages and accounts were started in an attempt by the police to engage the members of the public on policing and addressing crime in the informal settlement areas. It is believed that an Administration Police (AP) officer based at the Soweto AP camp⁷ working with a Nairobi blogger, is behind the *Hessy wa Kayole* and *Hessy wa Huruma* Facebook accounts.

1. Interview with KM, a Journalist who writes on topical issues in Kenya, Nairobi, June 2017

2. Key Informant Interview, GM, Nairobi, June 2017

3. <http://www.nation.co.ke/newsplex/deadly-force-database/2718262-3402136-ms1o0nz/index.html> accessed 25 May 2017

4. <http://www.achpr.org/news/2017/06/d290> accessed 30 June 2017

5. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0hUKEwiRxbDgjaTUAhXLJMAKHxaODpoQFghAMAQ&url=https%3A%2F%2Fwww.facebook.com%2FKayole-crime-free-423372491364227%2F&usg=AFQjCNHUnR58a1mWm7nri__6tDg8usebiQ&sig2=qGn8H00Hhov2cV9uTe6x-g accessed 4 June 2017

6. <https://www.facebook.com/CRIME-Free-Dandora-na-HESSY-1884782698463484/> accessed 4 June 2017

7. An Administration Police Camp (post) in Soweto Slum in Kayole, Nairobi





In an interview with The Star Newspaper¹, the AP Officer revealed that he had been shot in the leg in April 2017 and while away from duty due to the injury, he decided to create the accounts, to brief his colleagues and share intelligence with them, at a time when there was “a lot of pressure from top cops in Nairobi over rising crimes in Kayole”. He disclosed that his unconventional method received initial resistance from the Directorate of Criminal Investigation and the Regular Police officer since it contravened the police service regulations “but with time, they slowly came to terms with it². Reading through the comments on the postings of the execution of the suspected criminal gang members reveals a society that is generally accepting of the mode of execution as being normal and necessary in order to end crime in these areas.



« Morning, I remember warning this guy by the name JOSEPH MUREGE after he disappeared with passenger's money in one of the Dandora matatus (a public transport minibus). This young man has totally refused to reform. (addressing the suspect) I said you have a gun but your friends defended you. Last week you stole a lady's phone at gun point in CBD (Central Business District). Just the other day, on Sunday you stole a phone from another lady. What do you want now? You come from a very well off family, you lack nothing but you can't stop your evil actions. You want us to plead with you, right? It's ok. »

1. http://www.the-star.co.ke/news/2017/06/02/i-created-hessy-wa-dandora-to-engage-public-on-crime-cop_c1572167 accessed 4 June 2017
2. Supra





Hessy Wa Dandora
May 11 at 8:33am · 🌐

Sasa huyu ndiye tunataka, My sister we will look for you till we find you...
Your best chance at survival is surrender, Tunakungoja hapa kinyago
police post, surrender your firearm within 48 hrs ama penye askari
watakupata utanyamba moshi
#SaferKenya
#Hessy



«Now this is the one we want. My sister we will look for you until we find you... Your best chance at survival is surrender. We are waiting for you here at Kinyago Police Post, surrender your firearm within 48 hours or you will emit smoke where police find you.»

Hessy Wa Dandora
May 9 at 5:31pm · 🌐

Musa is now past tense, tafadhali ukiskumwa ndonyo (jela) ukitoka reform
ama ukule copper for supper



«Musa is now past tense, please when you are sent to prison, reform when you come out (of prison) or else you will bite a bullet for supper.»





«Morning members!! I would wish to inform you something about this guy by the name SKILE, he was ambushed in his house last week around Saika area and a loaded gun was recovered in his house: this is the same guy that was arrested last year with a fake gun, taken to court and after a short while, he was bonded by December last year, alter on he refused to attend court proceedings: he kept himself busy by terrorizing innocent Kenyans after purchasing a real gun in late December last year, since that time, he has managed to kill more than five (5) people including a man that was shot dead at Civo area a few months ago: all the robbery incidents that have been taking place within Kariobangi South Kariobangi North, Dandora, Kayole and many more places were being conducted by him and another guy by the name SHERIFF from Kayole- Klrima area. I tell you this is one of the reasons this guys are shot dead by the police officers because there's no way someone will be arrested then his/ her family members or sympathizers bail him/her out. And yet when the get out (of prison on bail) they continue with their business as usual. Am telling you this for free, those who know him should tell his family members or his friends that WE ARE WAITING FOR HIM TO GET OUT (of prison) AGAIN!!!!!!»



Hessy Wa Kayole added 2 new photos.
May 31 at 8:24am · 🌐

Morning members !! I would wish to inform u something about thiz guy by the name SKILE, he was ambushed in his house last week around Saika area and a loaded gun was recovered in his house: this is the same guy that was arrested last year with a fake gun, taken to court nd after a short while, he was bonded by December last year, later on he refused to attend court proceedings: he kept himself bzy by terrorizing innocent Kenyanz after purchasing a real gun in late December last year, since that time, he has managed to kill more than Five(5) pple including a man that was shot dead at Civo area afew months ago: all the robbery incidents that has been taking place within Kariobangi South /North, Dandora, Kayole, nd many more places were being conducted by him nd another guy by the name SHERIFF from Kayole-Kirima area, i tell u thiz is one of the rezons thiz ghys are shot dead by police officers coz there's no way someone will be arrested then his/her family members or symphatizers bails him/her, na akitoka anaendelea na shughuli zake kama kawaida: am telling u thiz for free, wale wanamjuwa waeleze family members wake or his friends that TUNAMNGOJA ATOKE TENA !!!!!!!



Security officers seem to have become more emboldened and public with their extrajudicial, blatant and brutal killing of suspects. The police is alleged to publicly announce the list of people that they intend to kill, indicating that some of the executions are planned and premeditated. Upon carrying out the execution, the pictures of the dead persons are shared on social media platforms 'to warn others'. There appears to be a practice that is either commanded and/or condoned by senior security officers. On 31 March and 1 April 2017, a video footage of an alleged plain clothes police officer showed how he openly killed two suspected criminals in Eastleigh, Nairobi on suspicion of being members of the *Super Power Gang*, an outlawed criminal gang. The video, which went viral on social media platforms, showed the police officer shoot the suspects at close range more than once each, even where it was clear that the two were unarmed and had surrendered. The Nairobi Police Commander, Japheth Koome downplayed the video and dismissed it as having been acted out and stated that he was "even more motivated and had no regrets" and would be ruthless with criminals. The Inspector General of Police, Joseph Boinett ordered investigations into the incident².

1. Mathare Social Justice Center, Who Is Next? A Participatory Action Research Report Against the Normalization of Extrajudicial Executions in Mathare, 2017 available at <http://www.matharesocialjustice.org/who-is-next/> accessed 6 June 2017

2. http://www.the-star.co.ke/news/2017/04/01/video-cops-caught-on-camera-killing-suspected-eastleigh-gang-members_c1536104 accessed 4 June 2017





The research team did not establish whether the investigations were concluded and what the outcome was.

The executions and the subsequent postings reveal some common features. The persons killed are usually shot severally at close range with a clear intention to kill as opposed to subduing them for purposes of arrest, interrogation and possible prosecution; majority of those killed are young people usually between the age of 17 and 23, with most of them being male; all the executions take place in the low-income areas where most of these young suspected criminals live; a fake or real gun and or bullets are allegedly always “planted” on the victim after the shooting and a photo of the same taken and posted online.

The police unfairly target the young people. This is a war on young people. The venue [of the killings] changes but the mode of execution is the same. The government is afraid of young people and is out to kill the youth. The government says they have 50% of the jobs reserved for the youth but they actually mean they have 50 bullets for the youth¹.

The Mathare Social Justice Center (MSJC²) estimates that at least one poor, young male is executed every week in Mathare. Based on press reports, MSJC puts the numbers of those executed over a period of three years between 2013 and 2015, at 803. Further, MSJC has independently documented over 49 cases of extrajudicial executions in Mathare since 2015³. Following the launch of the MSJC report documenting these executions, the administrative coordinator, Stephen Kinuthia reported being targeted and harassed by police officers.⁴

One respondent observed that the informal settlement residents argue that the police are protecting the residents and therefore most of them laud the police for ‘dealing’ with the criminal gangs that terrorize and harass the residents⁵. Another respondent informed the research team that the criminal gangs often work together and are financed by some politicians mostly because of their poor economic backgrounds. He noted that extra-judicial execution should be addressed from different angles by interrogating certain factors such as family backgrounds and economic status of the victims while also focusing on the preventative angle⁶. It is evident that the community and family members may know of the criminal activities of certain persons but are hesitant to turn them in because they know that the police will kill them without due process. Some of the police executioners are known to the residents such as “Rashid”, “Benteke” and “Oti” among others, yet no action is taken against them⁷.

According to a key informant, the police often argue that they kill the suspects because if they take them to court they will be released on bail or even acquitted and go back to their communities to continue with their criminal activities⁸. One respondent faulted this argument on the basis that the police are poor in evidence gathering and lackluster when they do it and thus present cases whose evidence does not meet the prosecutorial threshold to sustain a conviction. IPOA reported in 2013 that over 60% of the cases brought to court do not meet the evidentiary threshold⁹.

1. Interview with Mungai, a youth from Mathare, 30 May 2017

2. MSJC is an initiative by young members of the community to promote social justice in Mathare. More information available at <http://www.matharesocialjustice.org/about-msjc/> accessed 26 May 2017

3. Mathare Social Justice Center, Who Is Next? A Participatory Action Research Report Against the Normalization of Extrajudicial Executions in Mathare, 2017 available at <http://www.matharesocialjustice.org/who-is-next/> accessed 6 June 2017

4. See <http://www.matharesocialjustice.org/eje-campaign/the-second-arrest-and-harassment-of-msjc-administrative-coordinator-kinuthia-mwangi/&sa=D&ust=1498727621651000&usg=AFQjCNGQPRnJkS54945WUYv2-CDYPKsEQg> accessed 30 June 2017

5. Interview with a member of the PRWG, Nairobi, 30 May 2017

6. Interview with a Mathare resident, Nairobi 30 May 2017

7. Key Informant Interview, Nairobi, 30 May 2017

8. Key Informant Interview, PRWG, Nairobi, 28 May 2017

9. Key Informant Interview, Nairobi, 28 May 2017





The respondent noted that the police have formed the habit of blaming the judiciary for their failures and inability to investigate, prosecute and prevent crime.

B.1.3. Policing Public Protests

The last five years have seen several human rights and fundamental freedoms trampled upon. One of the most notable has been the freedom of assembly, demonstration, picketing and petition under Article 37 of the Constitution. Security agencies have on several occasions used excessive force to disperse peaceful protesters. The intervention by security agencies in public protests have been characterized by death, serious injuries, abuse of firearms, a predisposition that the protesters are violent, poor communication, coordination, control and command, abuse of the rights of arrested persons, displays of partisanship in policing decisions such as whether or not ban political demonstrations or rallies, the absence of medical aid as part of public order management and the failure to interdict officers deemed culpable of rights violation or improper conduct. These have been the findings of state agencies such as IPOA¹ and the Commission on Administrative Justice² and the KNCHR³.

In January 2015, police violently dispersed a group of protesters which included primary school children, parents and teachers of Langata Road Primary School and civil society members. The group was peacefully protesting against the grabbing of the school's play field. More than 100 police officers, armed with guns and teargas canisters, were deployed to the school before the protest began to "safeguard the life and property while ensuring the safety of the schoolchildren." Police fired tear gas at the protesters resulting in a stampede in which five children and one police officer were injured⁴.

In mid-2016, the Coalition for Reforms and Democracy (CORD⁵) organized a series of public protests and demonstrations- the "anti-IEBC demonstrations- calling for the disbandment of the Independent Electoral and Boundaries Commission (IEBC). IPOA monitored and investigated the operations of the police during these demonstrations and the extent of compliance with national, regional and international norms. IPOA established that the police used excessive force on vulnerable persons including women, children, persons with disabilities and subjected the protesters to police brutality and harassment, arbitrary arrests and unlawful detentions⁶. During the protests, the police used water cannons, lodged tear gas canisters and physically beat protesters with batons⁷.

In November 2016, the police used live bullets, water cannons and tear gas at a group of civil society members and human rights activists who were demonstrating against the reports of massive corruption within the government⁸.

1. See <http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf> accessed 28 May 2017
2. <http://www.ombudsman.go.ke/wp-content/uploads/2016/04/Investigation-Report-on-use-of-excessive-force-by-police-officers-and-improper-conduct-by-other-public-officers-during-the-Langata-Road-Primary-School-Demonstration.pdf> accessed 30 June 2017
3. See <http://knchr.org/KNCHRcallsforrespectoftheBillofRights.aspx> accessed 30 June 2017
4. INCLC, *Lethal in Disguise: The Health Consequences of Crowd-Control Weapons*, p 46 available at <http://www.khrc.or.ke/publications/113-lethal-in-disguise-health-consequences-of-crowd-control-weapons/file.html> accessed 28 May 2017
5. CORD is a coalition of political parties that unsuccessfully contested the General Election in 2013
6. IPOA, *Monitoring Report on Police Conduct During Public Protests and Gatherings: A Focus on the Anti-IEBC Demonstrations, February 2017* available at <http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf> accessed 28 May 2017
7. <http://www.aljazeera.com/indepth/inpictures/2016/05/kenya-police-crack-protesters-160517081225671.html> accessed 25 May 2017
8. See <https://www.youtube.com/watch?v=pSkmEb30IOc> and <https://www.standardmedia.co.ke/article/2000222121/police-disperse-anti-corruption-protesters-using-live-bullets> accessed 24 May 2017





A member of the civil society working with a leading national human rights organization who was part of the organizers and also took part in the protest narrated her experience to the research team:

There was heavy infiltration of the protest by armed police officers who wore the branded T-Shirts right from the beginning¹. When the police started firing, people fled in different directions. Several people were stuck in the tunnels and toilets at the Park since the police had blocked every exit. I witnessed the police hit people with their batons and even kick some with their heavy boots. A number of people sustained injuries. A female human rights defender was hospitalized after sustaining injuries from a tear gas canister that exploded in her face. A few people were arrested and taken to different police stations and later released.

The interviewee went on to say that police targeted individuals who were wearing the red branded anti-corruption t-shirts. Police detained the witness based on the shirt, as well as those near the witness. The witness continued narrating her experience to the research team:

It was clear to me that the police were under strict instructions to prevent the protest from taking place. One of the police officers told us that the protest was meant to be violent from the onset and that the police had decided it was never going to take off. Prior to this there were apprehensions that my organization was under digital surveillance and that the police were monitoring the planning and communication on the protest. The police had too much information on the protest.

I have taken part in other protest such as the one against extra-judicial executions. I think that the anti-corruption protest had the interest of the state because we were calling for the resignation of the President for failure to deal with massive corruption and theft of public resources².

The Observatory for Human Rights Defenders noted in its 2017 report that the police often use excessive and disproportionate force against peaceful protesters which results in human rights violations and harm owing to the “irresponsible and reckless crowd control approaches by the police³”.

1. See <https://www.google.com/url?q=https://youtu.be/WibLmPaD4qc&sa=D&ust=1498727621656000&usg=AFQjCNH3Y3uq3EHL8q-I-MM2lhZ4NLUSEQ> accessed 30 June 2017

2. Key Informant Interview, Nairobi, 23 May 2017

3. The Observatory KENYA – 2017 elections: broken promises put human rights defenders at risk available at <https://www.fidh.org/en/issues/human-rights-defenders/kenya-2017-elections-broken-promises-put-human-rights-defenders-at> accessed 30 June 2017





B.1.4. Lack of Transparency, Coordination and Accountability in Joint Security Operations

The Jubilee administration's responses to insecurity incidences over the past five years have been largely characterized by a trend in which human rights and fundamental freedoms appear to be suspended and thus paving the way to significant instances of human rights violations. In addition to this, the government has also adopted a trend of invoking military interventions to quell the insecurity by deploying the Kenya Defence Forces to compliment the local police officers, without paying due regard.

An operational disjuncture existed within the security agencies characterized by the poor sharing of information and lack of action on security intelligence. In addition, during the period under review, there were instances where security was compromised by the confusion in the command structure between the Kenya Defence Forces and the National Police Service¹.

In February 2017, while attending a peace rally in Sibilo in Baringo County in the midst of the insecurity incidences, the Deputy President William Ruto allegedly issued shoot-to-kill orders to police officers and police reservists in the area to shoot indiscriminately at anyone who was found stealing livestock, regardless of whether they were armed or not^{2,3}. This was a clear violation of the Constitution as regards the use of official power and the respect and protection of human rights.

As at December 2016, bandit attacks in the North Rift- Samburu, Baringo, West Pokot and Elgeyo Marakwet counties, had caused the death of at least 962 people and hundreds more maimed and displaced⁴. The attacks are not only targeted at the communities that have livestock but to the security personnel in the area as well. In October 2014, 24 Administration Police Officers and three General Service Unit officers were killed in Kapedo, Baringo County by suspected bandits and two months later a retired senior sergeant was shot dead by bandits who also set ablaze his vehicle⁵.

Despite the increase in the number of police, the security operations have sometimes been devoid of clear strategy and proper planning, often being reactive as opposed to being proactive in preventing imminent insecurity. In October 2014, it emerged that the government had deployed a significantly large number of new police recruits to Kapedo, Baringo County to recover stolen livestock. Most of the officers had never been involved in a security operation and were thus ill-prepared and ill-equipped to deal with the attack. In an attempt to deal with the situation, the government quickly deployed the Kenya Defence Forces (KDF) to complement the police⁶.

This move was unconstitutional and in violation of Article 241(3)(c) of the Constitution that provides that the KDF may only be deployed to any part of the Country with the approval of the National Assembly. In this particular instance, the National Assembly⁷ had not authorized the deployment. This was followed by calls for the withdrawal of the KDF from local area leaders⁸.

1. Key Informant Interview, KNCHR, Nairobi, May 2017

2. http://www.the-star.co.ke/news/2017/02/24/ruto-issues-shoot-to-kill-order-after-daring-bandits-disrupt-his_c1513643 and

3. <http://www.nation.co.ke/news/Ruto-orders-police-to-shoot--kill-bandits/1056-3826656-1518ri6z/> accessed 21 May 2017

4. See <https://www.standardmedia.co.ke/article/2000225690/bandits-deadly-raids-leave-trail-of-death-destruction> accessed 30 June 2017

5. https://www.youtube.com/watch?v=_3x95pjW30k accessed 30 June 2017

6. <https://www.standardmedia.co.ke/article/2000225690/bandits-deadly-raids-leave-trail-of-death-destruction> accessed 23 May 2017

7. Article 241 (3) (c) provides that the Kenya Defence Forces "may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly

8. <http://www.nation.co.ke/counties/Kapedo-Baringo-KDF-Troops-Conflict/1107872-2516526-118h8a8/index.html> and http://www.the-star.co.ke/news/2017/03/23/sh100-million-payout-for-baringo-kerio-valley-banditry-victims_c1530889 accessed 23 May 2017





This particular reactionary measure was adopted more than once¹ by the government where the military has been deployed to deal with internal security incidences as opposed to addressing the root causes and ensuring that the police officers are adequately equipped and prepared to avert and respond to insecurity incidences.

In most instances, the national government has often deployed other security forces to different areas to supplement the police. For instance, in March 2017, President Uhuru Kenyatta, deployed the military to work with the police in disarming and recovering illegal arms and restoring law and order in the North Rift- Baringo, Elgeyo Marakwet, Pokot and Laikipia Counties². This followed a spate of violence, largely characterized as banditry among the communities in the North Rift region. The insecurity incidences resulted in several injuries, multiple deaths and displacement of thousands from their homes³. Correspondingly, security operations mounted in response to this state of insecurity have also been characterized by human rights violations that re-victimize already besieged communities⁴.

B.1.5. . Increase in Illegal Firearms

The proliferation of illegal arms is a major contributor to insecurity in the country. There are a number of factors that lead to this such as the porous borders, corrupt police officers who hire out their firearms to criminals as well as the absence of a proper inventory of firearms within the police force and police reservists and the country at large⁵. A 2012 report cited estimates of 210,000 illicit firearms in civilian hands in the Country⁶. The 2016 Annual State of the National Security Report to Parliament placed the number at over 650,000⁷.

Kenyan security agencies face a major challenge in ascertaining the exact number of firearms allocated to each officer due to the absence of a proper, fool-proof inventory system. In some instances, a security officer is issued with more than one firearm. This lacuna has given leeway for wanton use of firearms with little room for accountability. A police officer informed members of the Police Reforms Working Group (PRWG) that there are instances where the firearm cannot necessarily be traced to a particular officer who fired it. The officer cited the recent Eastleigh shooting where the alleged officer in the video used more than one firearm and several bullets to shoot two young men in a clear case of extrajudicial execution (see above, p. 23). It is also in the public domain that some rogue police officers hire out their guns to criminal gangs⁸.

1. <http://www.chrips.or.ke/constitution/just-when-kenyas-military-needs-more-civilian-oversight-a-proposed-bill-calls-for-less/> accessed 30 June 2017
2. <http://www.nation.co.ke/news/President-Kenyatta-deploys-KDF-to-Baringo/1056-3853520-dpvy59/> accessed 21 May 2017
3. KNCHR (2017) Press Statement: Prevailing Insecurity in the North Rift Region. Available here: <http://knchr.org/Portals/0/PressStatements/KNCHR%20Baringo%20Update%20Press%20Statement%20-%202nd%20March.pdf?ver=2017-03-02-142644-793>
4. http://www.the-star.co.ke/news/2017/03/08/baringo-security-cops-accused-of-torching-houses-extorting-cash_c1519763 accessed 28 May 2017
5. Key Informant Interview, PRWG, Nairobi, 25 May 2017
6. <http://www.smallarmssurvey.org/fileadmin/docs/C-Special-reports/SAS-SR16-Kenya.pdf> accessed 1 July 2017
7. <https://www.standardmedia.co.ke/article/2000198259/650-000-illegal-firearms-in-circulation-in-kenya-report-reveals> accessed 1 July 2017
8. http://www.the-star.co.ke/news/2017/04/01/video-cops-caught-on-camera-killing-suspected-eastleigh-gang-members_c1536104 and <https://www.standardmedia.co.ke/article/2000191734/female-cop-in-kilifi-under-probe-for-allegedly-hiring-out-her-gun-to-criminals> accessed 21 May 2017





B.1.6. Surveillance and Digital Security

Proposed legislative amendments to the surveillance laws to curb security issues had the effect of limiting the freedom of expression by criminalizing expression and thus imposing self-censure. The Kenya Information and Communication Act (KICA), 2013 and the Media Council of Kenya Act 2013 made significant claw backs on the constitutionally guaranteed freedom of expression.

The Kenya Information and Communication (Amendment) Act (KICA¹) and the Media Council Act 2013 infringed on media freedom and exposed the media to undue state control in addition to imposing excessive fines on media houses and journalist for professional misconduct thus undermining their independence². Further the Act limited the right to freedom of expression by providing that this right does not extend to the spread of propaganda for war, incitement to violence, spread of hate speech or advocacy of hatred constituting ethnic incitement and vilification of others or incitement to cause harm or on the basis of any ground of discrimination under Article 27 of the Constitution. The Act, by nature of the ambiguity and lack of clarity of what constitutes any of these grounds for limitation, makes the provision so broad and prone to potential abuse, effectively unjustifiably limiting the right to freedom of expression.

In 2015, Geoffrey Andare moved to the Constitutional Court to challenge the constitutionality of Section 29 of KICA and to get a declaration that it was unjustifiable, unconstitutional and a violation of Article 33 and 50(2)(n) of the Constitution on freedom of expression and the right to fair administrative action respectively. Section 29 of KICA criminalizes online publication of information that may be deemed unlawful by state authorities and is couched in very vague language. Justice Mumbi Ngugi, in April 2016 declared that Section 29 of the KICA is unconstitutional³. Due to the extremely vague terms in that section of the law, authorities have used the law to unfairly target and prosecute bloggers and online publishers who, if convicted, would be liable to a fine not exceeding KES 50,000 or to imprisonment for a term not exceeding three months or both.

Kenyan law prohibits digital surveillance and infringement on privacy. Article 31 of the Constitution, safeguards the right to privacy which includes the right to privacy of communication and can only be limited in accordance with Article 24 of the Constitution. Section 31 of the KICA outlaws unlawful interception of communications by service providers. The right to privacy is further guaranteed under regional and international treaties that Kenya has ratified.

Surveillance by state agencies has definitely impacted on the enjoyment of human rights and fundamental freedoms as well as the work of organizations working towards their promotion, protection and fulfillment in Kenya. Human rights organizations have documented the effects of surveillance directives under the Jubilee Administration.

The NIS has been accused of breaching fundamental rights and the freedoms of individuals in Kenya. Of particular mention was the revelation by Privacy International⁴ that the NIS is able to track and intercept information from any mobile phone and can even bypass mobile service providers to access individuals' data, a clear violation of the right to privacy. The Security Laws Amendment Act, requires that the security agencies obtain a court order before surveillance, therefore indicating some aspect of judicial oversight⁵.

1. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/KenyaInformationandCommunications_Amendment_Act2013.pdf accessed on 25 May 2017

2. Article 19 Individual Submission to the UPR 21 (2015) <https://uprdoc.ohchr.org> accessed 25 May 27

3. <http://kenyalaw.org/caselaw/cases/view/121033/> accessed 25 May 2017

4. Privacy International (2017) Track, Capture, Kill: Inside Communication Surveillance and Counterterrorism in Kenya, available at <https://www.privacyinternational.org/node/1366> accessed 25 May 27

5. Interview with Article 19 officer, Nairobi, May 2017





The National Coalition of Human Rights Defenders (NCHRD-K) has received reports of possible surveillance of human rights defenders (HRDs) by state security organs.

While there is no scientific evidence of such surveillance, HRDs are apprehensive of surveillance and tracking. About two years ago, there was a planned protest in Kibera (Nairobi) where most of the HRDs were reportedly called by police officers and cautioned against taking part in the protest. Very recently this year when there was the conflict in Laikipia County, a woman HRD in Samburu reported that she had received threats from an Officer Commanding Station (OCS) in Samburu threatening her for 'being too vocal on the conflict'. The Woman HRD believes that her phone calls were tapped and her communication was being tracked and surveilled¹.

In June 2017, the Administrative coordinator of the Mathare Social Justice Center (MSJC) reported that he was under police surveillance and had been arrested outside his house. This came a month after his organization released a report on EJE's in Mathare, Nairobi and his participation in a series of community dialogues² on extrajudicial executions and killings in Nairobi³.

The Security agencies have, over time over the past five years, tended to adopt a strategy that heavily relies on digital surveillance in the fight against insecurity but more so in their counter terrorism measures. This strategy saw the government invest significantly in surveillance technology that includes security cameras and a command center⁴ and accorded security agencies expanded authority to conduct digital surveillance⁵.

The Consumers Federation of Kenya (COFEK) noted that Kenya's security agencies have been "allocated a budget to conduct continuous, population-scale surveillance of the whole country⁶." This came with an order to mobile service providers to install a Device Management System that would allow the Communications Authority of Kenya to monitor activities on their networks. The Authority denied that the directive was to facilitate mass surveillance⁷. KHRC nonetheless instituted a case in March 2017 challenging the legality of this directive. This case is still pending in court⁸.

It has emerged that surveillance by state security agents contributes to enforced disappearances, unlawful arrests, torture, extrajudicial killings and other human rights abuses under the pretext of fighting crime⁹. In December 2014, Aljazeera documented confessions of security agents on state-sanctioned executions, particularly highlighting the assassination of the controversial Mombasa Sheikh Abubaker Shariff Ahmed (commonly known as Makaburi) on 1 April 2014¹⁰. The report illustrates state security agencies tracking and surveilling the communication, activities and movements of Makaburi over time before his execution.

1. Privacy International (2017) Track, Capture, Kill: Inside Communication Surveillance and Counterterrorism in Kenya, available at <https://www.privacyinternational.org/node/1366>

2. http://www.the-star.co.ke/news/2017/06/21/we-are-living-in-a-police-state-families-of-youth-slain-by-rogue-cops_c1579228 accessed 30 June 2017

3. <http://www.matharesocialjustice.org/eje-campaign/the-second-arrest-and-harassment-of-msjc-administrative-coordinator-kinuthia-mwangi/> accessed 30 June 2017

4. Government of Kenya, Urban Security Surveillance System available at <https://www.delivery.go.ke/flagship/commandcentre> accessed 9 June 2017

5. INCLC, Surveillance and Democracy: Chilling Tales from Around the World, available at <http://www.khrc.or.ke/publications/133-online-version-surveillance-and-democracy/file.html> accessed 22 May 2017

6. <http://www.cofek.co.ke/index.php/news-and-media/1707-exposed-how-kenyan-government-spies-on-phones?showall=&start=1> accessed 9 June 2017

7. BBC Africa, Kenya Denies Mass Mobile Phone Surveillance Plan, 17 February 2017 available at <http://www.bbc.com/news/world-africa-39005893> accessed 9 June 2017

8. <http://www.khrc.or.ke/images/docs/PressStatementonLegalityoftheCAKdirective.pdf>

9. The Star Newspaper, State Surveillance Facilitates Extrajudicial Killings, 16 March 2017 available at http://www.the-star.co.ke/news/2017/03/16/state-surveillance-facilitates-extrajudicial-killings-report_c1525350 accessed 23 May 2017

10. Inside Kenya's Death Squads available at <https://interactive.aljazeera.com/aje/kenyadeathsquads/index.html#article1> accessed 29 June 2017





B.1.7. Security Challenges in the Context of the 2017 General Elections

Kenya is set to hold its second General Election under the 2010 Constitution on 8 August 2017. Elections in Kenya have, since the re-introduction of multiparty politics in 1992, raised security concerns and unfortunately seen some of the worst insecurity incidences. The violence that ensued in 2007-2008 was significant in creating the much needed urgency for pending institutional and legislative reforms within the broader transitional justice agenda in Kenya. Security in electoral governance is one of the main issues that civil society groups working on elections under the banner of *Kura Yangu Sauti Yangu*¹ have identified as needing a high level political discussion on preparedness to ensure peaceful and credible elections in August 2017².

The resultant commissions of enquiry such as the Kreigler Commission, the Ransley Commission and the Waki Commission provided recommendations that continue to form the blueprint and reference points for the reform agenda in Kenya- be it on elections, security sector or the broader transitional justice issues of institutional reforms, accountability and reparations for human rights violations. The reform agenda therefore presents an undisputed nexus between elections and security in the country.

One of the major events in the electoral cycle is the process of nomination of candidates also known as the party primaries. With the merger of a number of political parties with the President's Jubilee Party, it became evident quite early in the process that the party primaries would be hotly contested with aspirants coveting nomination by the major parties across the political divide.

In a proactive move, in March 2017, the police mapped out the hotspots where electoral violence could erupt in the Country. Prior to this, in January 2017, the government acquired equipment, including the armoured personnel carriers and heavy-military trucks, that was seen as part of its preparation to deal with any eventual electoral violence³. The police identified 30 possible political hotspots which included parts of Kiambu, Kisumu, Nairobi, Rift Valley and Coast regions. The potential pre-election and post-election threats were identified as hate speech, zoning, incitement, engaging in organized gangs, and disruption of opponents' campaign rallies, refusal to accept results, disruption of vote counting, vandalism, arson and calls for mass action^{4 5}. In light of this, security agents were deployed to various polling centers and were largely successful in averting security incidences.

A security officer attached to the Mbita MP was killed in Homa Bay County during the ODM⁶ nominations on 24 April 2017⁷. On 25 April 2017 during the Jubilee Party nominations in Starehe Constituency, within Nairobi County, one man was attacked and stabbed by a mob for putting posters of a rival aspirant on top of those of another aspirant, upon escaping he was hit by a *matatu* and later died from the injuries.⁸

1. Translated as "My Vote, My Voice", Kura Yangu Sauti Yangu is a citizen movement spearheaded by a number of like-minded civil society organizations to proactively support Kenya's preparations for the 2017 elections with a view to ensuring that the country minimizes the risks related to dysfunctional electoral systems and practices which the country has experienced in the recent elections. More information available at <http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/537-kura-yangu-sauti-yangu-press-statement-on-the-national-dialogue-on-the-2017-elections.html> accessed 26 June 2017

2. <http://www.khrc.or.ke/images/docs/PressStatementontheNationalDialogueFramework.pdf> accessed 7 June 2017

3. <https://www.crisisgroup.org/africa/horn-africa/kenya/248-kenyas-rift-valley-old-wounds-devolutions-new-anxieties> accessed 29 June 2017

4. See <http://www.nation.co.ke/news/Refusal-to-accept-poll-results-an-offence-/1056-3857458-15bvs5m/index.html>

5. <http://www.nation.co.ke/news/Refusal-to-accept-poll-results-an-offence-/1056-3857458-15bvs5m/index.html> accessed 7 June 2017

6. Orange Democratic Movement (ODM) is one of the major political parties in Kenya

7. http://www.the-star.co.ke/news/2017/04/24/mbita-mp-bodyguard-killed-in-chaotic-homa-bay-odm-nominations_c1549201 accessed 7 June 2017

8. KHRC Elections Monitor interview, Nairobi, May 2017. This was also reported in the media see <https://www.standardmedia.co.ke/article/2001237735/one-person-stabbed-to-death-another-injured-in-jubilee-nominations-in-pangani-nairobi> accessed 27 May 2017





Political parties held their party primaries in April and May 2017. The nomination process across the board demonstrated a general lack of preparedness and coordination by the political parties. The nomination process across the political divide witnessed a myriad of electoral and other offences committed including massive voter bribery, intimidation, harassment destruction of property and voting material, gender based violence and the general use of violence¹.

The incidences of intimidation and violence targeted at marginalized communities, with evidence of hate leaflets in areas like Nakuru and Kakamega counties², is reminiscent of the political environment that preceded the 2007/2008 post-election violence. These occurrences, against the backdrop of an already charged electoral environment, have caused concerns and warnings of possible electoral violence³. Although the KNCHR report, *“The Fallacious Vote”*⁴ noted that there was commendable police presence in most of the polling centers, there were reports of incidences of violence in areas that the Commission’s monitors were deployed.

One victim of the 2007/2008 post-election violence told the research team:

I feel scared. I am worried. There is a déjà vu feeling that the 2007/2008 violence is about to happen again. There is a sense of anxiety that things will happen at a larger magnitude and we will not be able to deal with the consequences⁵.

Over and above the concerns surrounding the security of election related equipment and material during the Mass Voter Registration exercise by the IEBC⁶, InformAction reported other concerns that indicate “projected election-related fears and misgivings” for instance due to perceived safety levels, some citizens were strategically transferring to voting stations that they perceive to be safer for them⁷.

Already there are reports of early migration of citizens to areas perceived to be safer⁸. This situation is worsened by the fact that the security agencies are arming in preparation to exert force to combat violence during the elections⁹.

Further to these, there have been reports of an increase in the number of illegal gangs and the proliferation of illegal firearms. In December 2016, the government gazetted a total of 90 illegal criminal groups, some of whom were funded by politicians and colluded with police officers¹⁰. Among those that were identified are groups like “Superpower” and “Gaza gangs” whose members have been extrajudicially executed by security agencies as previously illustrated by this Report. The Mungiki¹¹ group that was implicated in the post-election violence in 2007 seems to have rebranded as Eminants of Mungiki and was also included

1. KNCHR Key Informant Interview, 28 May 2017

2. In the Mid-Rift and Western parts of Kenya, respectively.

3. <http://www.nation.co.ke/video/1951480-3907142-1h6w71z/index.html> accessed 27 May 2017

4. KNCHR, *The Fallacious Vote: A Human Rights Account of the 2017 Political Parties Primaries*, May 2017 Available at [http://www.knchr.org/Portals/0/OccasionalReports/Party Nominations Report KNCHR.pdf?ver=2017-05-15-110816-540](http://www.knchr.org/Portals/0/OccasionalReports/Party%20Nominations%20Report%20KNCHR.pdf?ver=2017-05-15-110816-540) accessed 27 May 2017

5. Interview with a Sexual and Gender Based Violence Survivor of the 2007/2008 Post-Election Violence, Nairobi 5 June 2017

6. Independent Electoral and Boundaries Commission is a constitutional body responsible for the conduct and management of elections and referenda in Kenya

7. Election Watch: Report 3 available at <http://informaction.tv/index.php/news-from-the-field/item/583-election-watch-report-3> accessed 27 May 2017

8. See <https://www.theelephant.info/future/2017/07/06/election-2017-a-silent-panic-in-kenya/> accessed 9 July 2017

9. See <http://www.nation.co.ke/news/Joseph-Boinnet-issues-chilling-warning-to-violence-perpetrators/1056-4018244-14icqavz/index.html> accessed 18 July 2017

10. <https://www.standardmedia.co.ke/article/2000228362/interior-cabinet-secretary-joseph-nkaissery-reveals-90-deadly-criminal-gangs-in-kenya> accessed 7 June 2017

11. Mungiki is an outlawed ethnic religious group that was responsible for various crimes and human rights abuses during the 2007/2008 PEV including arson, forceful circumcision, rape, destruction of property, maiming among others. The Mungiki group was used by politicians to perpetrate the violence.





A female candidate for Member of County Assembly (MCA) in Nairobi, told the research team that she had received threats to her life and had been advised to consider getting some youth to protect her during her campaign activities. She stated further:

An aspirant can easily spend more than KES 20,000 to get police escort as opposed to the official KES 2,500. I am not sure that the police are prepared for the election. In the ward where I am vying, there are security apprehensions with the fight for the MCA seat and yet this is a small ward about 4 square kilometers. Aspirants must also get “approval” from the Mungiki group and guarantee them that the aspirant, once elected will not ‘interfere with their interest’. A few weeks ago there is an aspirant with a disability who was accosted by members of the Mungiki group. There are too many guns and gangs for hire during this election period. I am not sure that the police are prepared to deal with this¹.

One respondent felt that the Women’s Situation Room² set up by UN Women and other groups is

Elitist and cannot address the concerns of the women on the ground, avert threats or enable women to know how to deal with any violations if they happen. There is need for rapid response. You cannot have eminent women sitting in a five-star hotel in Nairobi attempting to address the situation on the ground through phone calls. The resources should be used to train women on the ground on rapid response and empowering aspirants to view and ensure they address the issues of women at the grassroots level³.

B. 2. Persisting weaknesses in the accountability process for Security Agencies

B.2.1. General Accountability for human rights violations by Security Agents

Historically, Kenyan state authorities have responded to security issues by creating specialized units to deal with a particular security concern. Some of these specialized units include the Anti-Terror Police Unit (ATPU), the Anti-Stock Theft Unit, Tourism Police Unit, Anti-Corruption Police Unit among others⁴. The approach by the police has been to deploy the specialized units to deal with an insecurity incident within their line of specialization and if they are unable to contain the issue to call for reinforcement from the other units. This has sometimes led to instances where it becomes impossible to apportion responsibility to the units and therefore leading to unaccountability for violations that may result during the security operations. Further, the fact that the military does not have an independent civilian oversight mechanism, unlike the police, makes them operate with impunity which again hinders seeking accountability over their actions. Nevertheless, the National Assembly plays an oversight role over the military, whereas the court martials deal with internal accountability of the military officers. These mechanisms are however opaque and do not offer sufficient avenues for public scrutiny and participation.

Another challenge that hinders the accountability for abuse of the law and human rights abuses by the security agents is the admissibility of digital evidence in legal proceedings, despite the fact that security agents have been captured on camera committing human rights violations.

1. Interview with JM an MCA Aspirant, Nairobi, 8 June 2017

2. A peace-building project that empowers women to be the leading force for democratic and peaceful elections. See <http://www.un.org/africarenewal/magazine/april-2015/women%E2%80%99s-situation-room-africa%E2%80%99s-unique-approach-reducing-electoral-violence> accessed 9 June 2017

3. Key Informant Interview, Nairobi, 8 June 2017

4. <http://www.kenyapolice.go.ke/pages/search/71-background.html> accessed 3 July 2017





Whereas there have been notable achievements in the documentation¹ of the conduct of security agents that has resulted in human rights abuses, the pursuit for accountability for these abuses has been challenging. In most instances, victims, families and witnesses have been reluctant to come forward and provide evidence to support the pursuit for accountability for fear of retaliation. On the other hand, the security forces and key among them the KDF have been uncooperative with other agencies such as the KNCHR in terms of availing the required information that would enable the KNCHR in following crucial leads².

B.2.2. Accountability of the Police

In 2007 and 2008 the eruption of widespread violence led to the death of 1,300 people, displaced 663,921, left thousands more with long term injuries, and destroyed 78,254 houses³. This violence led to the creation of a Commission of Inquiry into the Post-Election Violence (known as the Waki Commission). The Waki Commission established that over 400 of those deaths could be attributed to police actions. In addition to these the police and other security agents were found culpable of other crimes including rape and other forms of sexual violence, which constitute crimes against humanity⁴. This violence combined with continued cases of police excesses and extrajudicial killings by the police has led to the institution of police oversight by the government as a key reforms agenda entrenched in the Constitution of Kenya.

Police oversight as envisioned in law is two-pronged. The Independent Policing Oversight Authority (IPOA) provides external civilian-led oversight whereas the Internal Affairs Unit (IAU) within the National Police Service Commission (NPSC) offers internal oversight of police conduct. Moreover, the NPSC is mandated to carry out vetting of police officers and to take or recommend necessary measures to ensure accountability and removal from the service of officers whose conduct is found to be in violation of the Constitution, other relevant laws as well as the police standard operating procedures and regulations⁵.

The Independent Policing Oversight Authority (IPOA)

The Statutory body charged with the mandate of civilian oversight of policing in Kenya, is the Independent Policing Oversight Authority (IPOA), established under the Independent Policing Oversight Act, 2011⁶. Specifically, IPOA is required to investigate police misconduct, monitor, review and audit investigations and actions by the NPS Internal Affairs Unit (IAU), investigate deaths and serious injuries caused by the police, review the functioning of internal disciplinary process, monitor and investigate policing operations and deployment and conduct inspections of police premises⁷.

As at December 2016, IPOA has completed investigations of a paltry 465 of the total 8,232 complaints received since its inception⁸. This means that about 94% of the complaints made to the Authority remain unaddressed. IPOA concedes that this backlog was occasioned by the fact that as soon as IPOA was established, complaints were already being made before the set up and operationalization of the secretariat.

1. Several state and non-state organs have released reports that document these. These include the KNCHR, IPOA, CAJ and Non-Governmental Organizations
2. Key Informant Interview, KNCHR Vice-Chair, Nairobi May 2017
3. Government of Kenya, Ministry of State for Special Programmes. (2012), Progress on Resettlement of Internally Displaced Persons as at 6th January, 2012.
4. See Waki Report available at http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf accessed 30 June 2017
5. <http://www.npsc.go.ke/index.php/about-us/functions-of-the-commission> accessed 28 May 2017
6. IPOA has a board of 8 members who serve on part-time basis. The inaugural board was sworn in in June 2012. IPOA activities are implemented by a secretariat comprising of the management and staff. According to its Strategic Plan 2014-2018, IPOA gets funding for its core activities from the National Treasury while development partners offer funding and technical assistance for specific interventions. (see <http://www.ipoa.go.ke/wp-content/uploads/2017/04/IPOA-Strategic-Plan-2014-2018.pdf>). Complaints are made to IPOA through letters, email, telephone or online.
7. <http://www.ipoa.go.ke/ipoa-mandate/> and IPOA Act 2011 available at <http://kenyalaw.org/lex//actview.xql?actid=CAP%2088> accessed 28 May 2017
8. As at December 2016, 24% of these complaints were of deaths occasioned by the police





The IPOA also faced other challenges in its operations such as reduced budgetary allocation from the government as well as high staff turnover. According to the IPOA performance report, 40% of the complaints were concentrated in Nairobi¹. As at May 2017, there were over 60 police officers facing criminal prosecution and two convictions². In 2016 two police officers were found guilty of manslaughter and were sentenced to 7 years' imprisonment³.

IPOA boasts of performing better than its counterparts globally since in the first 4 years of their existence they have been able to institute prosecutions as contrasted to other independent police complaints authorities of England and New Wales and South Africa⁴. IPOA is therefore perceived as a trailblazer in global relative terms as well as in comparison to local constitutional and independent offices such as the KNCHR and the Commission on Administrative Justice (CAJ). IPOA has shared best practices and offered strategic consultations to Egypt, Ghana, Zimbabwe, Sierra Leone, Lesotho and Tanzania on civilian oversight mechanisms⁵. In 2014, IPOA, together with partners and other stakeholders commenced the Outstanding Police Service Awards (OPSA) to recognize and celebrate outstanding police officers' performance in service delivery and human rights.

IPOA's continued work has led to increasing scrutiny of the police, which was not present during the 2007 and 2008 post-election violence. However, the IPOA has faced a number of challenges. First, the success of the IPOA is dependent on total cooperation from the police they are investigating. Often the police fail to provide adequate cooperation for IPOA to prosecute police officers allegedly responsible for committing crimes. In March 2016, IPOA released a report stating that police deliberately bungle some of their investigations in order to protect fellow police officers⁶. Over and above this, accessibility to IPOA has been a challenge for most people. Until 2017 the Authority largely operated from its Nairobi headquarters before it opened offices in Mombasa, Kisumu and Garissa⁷.

Secondly, under the Jubilee Administration, there have been multiple attempts by parliament to strip IPOA of some of their ability to investigate. In 2013 the Parliament unsuccessfully proposed amendments to the National Police Service Act and the National Police Service Commission Act that would have weakened civilian oversight over police abuses, and increased executive control over the police⁸. Again in 2016, an amendment was brought to allow police to withhold information they believed to be privileged from IPOA⁹. The pressure from human rights organizations on the legislature prevented the bill from being adopted and passed by Parliament.

The performance of IPOA, which had previously been seen as a weak institution, especially given that it is not a constitutional commission per se, may have been the motivation behind the proposed amendments to the IPOA Act to curtail its powers. In 2016, the National Assembly proposed to amend Section 7(1)(a) (vii) of the IPOA Act to curtail the powers of the Authority to summon a serving or retired police officer to appear before it and to produce any document, thing or information relevant to the function of IPOA.

1. <http://www.ipoa.go.ke/wp-content/uploads/2017/04/IPOA-Performance-Report-July-December-2016.pdf> accessed 28 May 2017

2. Key Informant Interview, Tom Kagwe, IPOA, Nairobi, May 2017

3. see <http://www.ipoa.go.ke/kwekwe-mwandaza-conviction-a-case-of-misuse-of-firearms/> accessed 30 June 2017

4. Key Informant Interview, IPOA, Nairobi, May 2017

5. Interview with IPOA official, Nairobi, May 2017

6. *Ibid.*

7. <http://www.ipoa.go.ke/wp-content/uploads/2017/04/IPOA-Performance-Report-January-June-2016.pdf> accessed 28 May 2017

8. Lefkow, "Dispatches: Kenya Stifles Media, Restricts Police Oversight." Human Rights Watch, 09 December 2013, available at <https://www.hrw.org/news/2013/12/09/dispatches-kenya-stifles-media-restricts-police-oversight> accessed 02 June 2017

9. Kagwe, "Privileged Information' Is a Direct Assault on IPOA Functions." The Star, Kenya. 18 February 2017, available at http://www.the-star.co.ke/news/2017/02/18/privileged-information-is-a-direct-assault-on-ipoa-functions_c1507557 accessed 08 June 2017





The proposed amendment sought to introduce a requirement to comply with a procedure for producing a "privileged document" and thus limiting the documents, things or information that can be shared with IPOA- a clear contravention of Article 35 of the Constitution as it would limit the Authority and the public the right to information¹. The amendments were withdrawn by the government on 9 February 2017².

The independence of IPOA had previously been threatened in late 2015 when the National Assembly proposed amendments to Section 14 of the IPOA Act to give the President powers to remove the Chairperson or any member of the Authority from office without the requirement for a recommendation by a suitable tribunal. This was a clear onslaught on the security of tenure of the IPOA Board as guaranteed under Section 4 of its constitutive Act that clearly states that IPOA is not subject to any person, authority or office and further provides for an elaborate and stringent procedure for the removal of the members and chairperson of the Board. On a broader spectrum, the proposed amendment would have negated the constitutional values and principles by concentrating state power in the presidency and seeking to control and limit the functions of independent offices³. The proposed amendments were later withdrawn by the Leader of the Majority Party in Parliament in October 2016⁴.

The KNCHR is an independent national human rights institution established under the Constitution. As a watchdog over the government on human rights issues it investigates and provides redress for human rights abuses. In its audit of the status of police reforms in 2015, KNCHR noted that the oversight and accountability mechanisms faced a number of challenges. For instance, IPOA was unable to effectively discharge its mandate due to poor collaboration and access to information from other agencies thus delaying their response which eroded public confidence. The police felt that IPOA had overstepped its mandate of oversight and advisory and delved into investigations and had caused fear among the police, hence affecting service delivery. In addition to this, NPSC felt that IPOA rushes to condemn the police without due regard to procedures and that IPOA is largely reluctant to carry out investigations. The audit further noted the seeming "overlap, conflict and competition between NPSC and IPOA".⁵

NPSC Oversight Mandate

The NPSC acts as the human resources arm of the Police Service. Since the establishment of the NPSC, some major structures have been put in place to ensure that the Commission is able to discharge its mandate in terms of the requisite policies and regulations. The NPSC has finalized various regulations such as the Recruitment and Appointment Regulations, Transfer and Deployment Regulations, Discipline Regulations among others. However, these regulations are yet to be fully implemented and thus their effectiveness are yet to be fully realized.

Notwithstanding this, a key informant from the NPSC decried the lack of proper and clear policies on consultations and decision making, which has seen the NPSC being dependent on the chair making nearly all the decisions or being consulted on virtually everything.

1. http://www.the-star.co.ke/news/2017/02/14/who-will-guard-the-cops-if-ipoa-cant-access-privileged-information_c1495241 accessed 30 June 2017
2. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjJq4rE8-3UAhULbxQKHeWSBfQQFggnMAA&url=http%3A%2F%2Fwww.parliament.go.ke%2Fthe-national-assembly%2Fhouse-business%2Fmotions-tracker%2Fitem%2Fdownload%2F3394_7557f5d4c415971eaa2c6de05d1cd796&usg=AFQjCNGxEj53yu16BREcEFDmIzE5S1DI1Q accessed 30 June 2017
3. Key Informant Interview, IPOA Board member, Nairobi, June 2017. See also <http://www.nation.co.ke/oped/Opinion/Kenyans-must-defeat-threats-against-police-oversight/440808-2906620-jkdo4m/index.html> accessed 30 June 2017
4. See http://info.mzalendo.com/hansard/sitting/national_assembly/2015-10-29-14-30-00 accessed 3 July 2017
5. KNCHR (2015) Audit of the Status of Police Reforms in Kenya: A Joint Report by the Kenya National Commission on Human Rights & Centre for Human Rights and Peace (The University of Nairobi)





There are some gaps that need to be addressed such as the appointment of a vice-chair and the replacement of two commissioners, at a personnel level, to make the total of nine commissioners as per the NPSC Act. The greatest challenge has been on the implementation of the policies as well as the adequate discharge of its mandate.

The Commission has been faced both internal and external challenges in the last five years. Unlike IPOA, the institution was unable to fundraise from other institutions outside of the government on the basis that they were a security institution. The NPSC has not been insulated from external influence. Whereas the Secretariat is free of influence, the same cannot be said of the commissioners. One incident of clear political influence on the decision of the commissioners was with regards to the removal and reinstatement of Deputy Commissioner of Police, Kingori Mwangi¹.

One respondent from within the NPSC cited the lack of strategic leadership and capacity gaps as some of the internal challenges that the Commission faces. The Commission lacks researchers while some officers are incompetent and lack vision. At the time of the interview, several officers at the NPSC had been sent on compulsory leave in "order not to interfere with the ongoing interview process for officers at the secretariat". The respondent further noted that the independence of the NPSC is hampered by the fact that most of the staff members at the secretariat level are seconded from other state departments and ministries such as the Attorney-General's office or Treasury. This poses a challenge because there is no opportunity or space to invest in the continuity of the institution because once the seconded staff leave there remains a capacity gap. As contrasted with other Commissions and Independent Offices that were established under the new constitutional dispensation, the NPSC should have invested in building the institution's infrastructure to secure its existence and sustainability. The NPSC commenced recruitment of independent officers in May 2017 in order to hire new staff as opposed to the officers who had been seconded from other state departments and ministries.

Police Vetting

The NPSC is mandated to vet police officers to establish their suitability to continue serving, based on their qualifications and conduct. The vetting process is conducted by the NPSC commissioners and co-opted members based on the discretion of the NPSC. The NPSC received information from the NPS as well as the members of the public on the officers being vetted. The decision of the NPSC is not final, it can be reviewed or appealed against².

Police vetting as a means of ensuring accountability for police action, including human rights abuses, has run into many hurdles and has not been as effective as was envisaged under the police reforms debate. Overall, the extent to which the vetting has achieved accountability for human rights violations or increased confidence in the police remains elusive. The vetting process was initially targeted to take 18 months. As at the end of May 2017, NPSC had only vetted 3,500 of the over 100,000 officers in the National Police Service. Although at least 500 of those vetted were recommended for dismissal, less than 30 have been effectively removed from the Service as at May 2017. The reasons for removal range from financial impropriety, human rights abuses, lack of integrity, unprofessionalism, rape and defilement³.

The vetting process has been criticized for having started without a clear criterion for vetting or even pilot testing in December 2013. The NPSC began the exercise without conducting proper public awareness to ensure that the public submitted information against the officers that were being vetted.

1. Interview with an officer at the NPSC, Nairobi, May 2017

2. See <http://www.npsc.go.ke/index.php/vetting-faqs> accessed 3 July 2017

3. NPSC Key Informant Interview, Nairobi, May 2017 also see <https://www.standardmedia.co.ke/article/2000122774/12-top-officers-axed-as-npsc-releases-vetting-results> accessed 3 July 2017





Further, whereas in the initial stages there was considerable public participation especially by CSOs and the media, the NPSC Chair stopped public sessions¹ in early 2017 ostensibly because “there were certain serious security concerns that may arise in the course of the vetting and which could compromise the country’s security and that of the officers²...”.

The process has also been faulted on account of being conducted by persons within NPSC whose credibility and integrity has been questioned therefore rendering them incapable of carrying out objective vetting³. For instance, some of the commissioners have been adversely mentioned in fraud while others academic qualifications are questionable. There are also specific questions regarding the appointment of the Chair of the NPSC, Johnston Kavuludi, who retired from public service in the 1990’s. The Chair was also adversely mentioned as being among the people being investigated for fraud⁴. Appointments based on patronage and alliances potentially pose problems-perceived or real- on the independence of the appointees⁵.

One of the ways in which the officers have been able to claw back on the gains is by going to court to challenge the outcome of the vetting process and have been reinstated as a result. In the opinion of some, the judicial decisions have been counter-productive to the reforms agenda and process⁶. For instance, an officer can be recommended for removal from service on the basis of evidence of committing the offence of defilement but the courts decide that the process was unfair since the officer was not given an opportunity to question the complainant or victim at the time of vetting⁷.

Over the past five years, IPOA has made over 300 recommendations to the NPSC Disciplinary Committee but these have not been acted upon. This is according to an internal audit carried out by the NPSC in 2016. Similar recommendations were made by the Ethics and Anti-Corruption Commission (EACC)⁸ and not acted upon. Despite the fact that disciplinary action was not taken as recommended, an insider within the NPSC in an interview with the research team opined that whereas, admittedly, the information shared by other agencies may not meet the evidentiary threshold for criminal sanction, the same would be sufficient to sustain and justify administrative action and would have particularly been useful in the vetting process.

The NPSC’s efficiency and delivery on its mandate of holding officers accountable has also been significantly hampered by its frosty relationship with other agencies such as IPOA. One respondent who works at the NPSC informed the research team that there have been instances where officers at the NPSC Secretariat have been threatened with disciplinary action and given show-cause letters by NPSC for even attending meetings convened by IPOA⁹.

1. These sessions are open to the public, media and civil society organizations thus allowing public participation and encouraging transparency in the process
2. http://www.the-star.co.ke/news/2017/04/20/no-more-public-police-vetting-till-after-election_c1546091 accessed 2 June 2017.
3. See <http://www.nation.co.ke/news/Credibility-of-police-vetting-doubtful/1056-3926226-p722uyz/index.html> accessed 3 July 2017
4. See <http://www.nation.co.ke/news/Kavuludi-panel-lacks-integrity/1056-2764264-h00khhz/index.html> accessed 3 July 2017
5. IPOA Key Informant Interview, Nairobi, May 2017
6. NPSC Key Informant Interview, Nairobi, May 2017
7. see <http://www.nation.co.ke/news/Six-sacked-police-chiefs-reinstated/1056-3477456-urmcqz/index.html> accessed 3 July 2017
8. EACC is established under the Ethics and Anti-Corruption Act, 2011 to prevent and combat corruption and economic crimes. <http://www.eacc.go.ke/default.asp?pageid=3> accessed 3 July 2017
9. Key Informant Interview, Nairobi, May 2017





Internal Affairs Unit

The Internal Affairs Unit is established under Article 87 of the National Police Service (NPS) Act. Its mandate is to receive and investigate complaints against the police; promote discipline; and keep a record of any complaint or investigation¹. The Unit is statutorily required to work with the IPOA in ensuring internal accountability of the police.

The Role of the Judiciary in Enhancing Police Accountability

Section 88 of the NPS Act holds police officers liable before criminal courts for criminal offences committed in the line of duty². This has allowed the judiciary to have legal right to punish police officers who are culpable of offences committed in the course of discharging their mandate. This judicial oversight was limited up until 2014 due to the use of police prosecutors in criminal cases³. Although the 2010 Constitution created the office of the Director of Public Prosecution in Article 157 as an independent office, the government did not begin phasing out all police prosecutors until five years after the creation of the office⁴. Ideally, this will help with the judiciary oversight as independent prosecutors should be more willing to prosecute police officers than police prosecutors were⁵.

Although oversight for the police has grown over the years since the 2007 elections, it is apparent that some within the government are attempting to undo these advances, which raises serious concerns in the perspective of the forthcoming August 2017 elections.

State of Police Reforms

Other aspects of the reform agenda that are critical to the transformation of the security sector are still lacking in totality or lagging behind. For instance, the National Police Scheme of Service⁶ is still lacking and this is inhibitive towards having objective assessment of the service. Further, although the Service Standing Orders⁷ have been completed they have not been adopted. Housing conditions for the police are still poor and inadequate. Despite the government's reports that they have put up new houses for the police, the practice is that these are allocated to the higher ranking officers. In addition to this, the police facilities – police stations and posts – are still in need of refurbishment and proper equipping and continue to fall short of the international standards. Some police stations such as Hola Police Station in Tana River County, lack basic amenities like water and electricity⁸.

Police reforms as envisaged, have been nipped in the bud through the myriad attempts at amending the implementing legislation which had the effect of diminishing certain constitutional gains, the most notable of these as previously noted in this report, were the amendments to the National Police Service Act and the omnibus Security Laws (Amendment) Act of 2014.

1. National Police Service, "Internal Affairs Unit." Internal Affairs Mandate. National Police Service, (2011) available at <http://www.nationalpolice.go.ke/2015-09-21-17-23-32/internaaffairs.html> accessed 8 June 2017

2. Act No. 11A of 2011, Revised 2015, Pg. 45.

3. Olingo, "DPP's Dilemma on Police Prosecution." The Standard. 04 April 2012, available at <https://www.standardmedia.co.ke/article/2000055491/dpp-s-dilemma-on-police-prosecution> accessed 08 June 2017

4. Onyango, "Kenya to Eliminate Police Prosecutors as Part of Judicial Reforms." Zegabi, 02 Jan. 2014 available at <http://www.zegabi.com/articles/6593> accessed 08 June 2017.

5. The Judiciary, Bail and Bond: Policy Guidelines, March 2015, available at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Downloads/COMBINED%20Bail%20and%20Bond%20Policy%20Guidelines-1.pdf accessed 22 May 2017

6. The Scheme of Service provides guidelines on the qualifications, recruitment and promotion process of the police into the different ranks of service. The Scheme of Service was expected to have been adopted in September 2016 but this is still pending. See also <https://www.standardmedia.co.ke/article/2000210503/police-commission-promotes-senior-officers-to-enhance-operations-ahead-of-2017-elections> accessed 3 July 2017

7. These are administrative orders required under the NPS Act for for the general control, administration, good order, direction and information of the Police Service

8. Interview with a CSO representative in the Police Reforms Working Group, Nairobi, May 2017





Police reforms will not happen without a total transformation and overhaul of the police. There are not just a few “rotten potatoes” but many “rotten potatoes” within the police service that must be totally removed from the system. The vetting process has demonstrated the magnitude of the problem and the cover-up of the same¹.

The existence of “rogue security enforcement officers” was confirmed by the KNCHR in its field work in 26 counties. State and non-State actors interviewed by the Commission confirmed the existence of rogue officers who often work with criminals in at least 11 of the 26 counties which included Nairobi, Kirinyaga, Lamu, Mombasa, Kisii, Bungoma and others². These associations and operations no doubt counter efforts aimed at ensuring the security of the population. Furthermore, the existence of militia groups and gangs³ not only contributes to insecurity but inhibits security operations and undoubtedly contributes to the violation of rights and freedoms. These revelations make it all the more necessary to tighten the accountability measures against police excesses and actions.

B.2.3 Accountability of the Military

In an attempt to establish some oversight over the military, the Legislature passed in 2012 the Kenyan Defense Forces Act, which in section 56 allowed the Judiciary to have jurisdiction over soldiers whenever a criminal or civil offense was committed. This was an important move towards Judiciary oversight in addition to the oversight mechanisms under the Parliament and the Cabinet Secretary for Defence.

Although there have been minimal strides since 2007 elections to increase oversight, there has been an attempt to remove all instruments of civil accountability for KDF. As of 2015 Parliament considered amending the 2012 Kenyan Defense Forces Act. If it had passed, the Defense Cabinet Secretary would no longer have been required to submit an annual report to the president and parliament on the expenditure and work of the ministry. The amendment bill also sought to delete the requirement that the Auditor General scrutinizes the financial records of the KDF. Parliament did not pass the bill.

The KDF Amendment Bill 2015 would have given express authority to the Chief of the Defence Forces to deploy KDF in civilian operations. The move shifts operational and command powers away from the Inspector General of Police (IGP) and the Defence Cabinet Secretary (CS), who both are the representatives of the people over the military. The bill did not pass as initially drafted. As discussed above pressure from human rights organizations⁴ led to changes in the bill. The KDF Amendment Act adopted in December 2016, stipulates that the Cabinet Secretary is required to inform the National Assembly whenever the KDF is deployed. Yet the Act also gives the Defence Council the ability to deploy troops in any place within Kenya that is affected by unrest or instability⁵. As the 2017 elections draw closer, some are concerned that the goal of decreasing military oversight is motivated to use the military during any political unrest the elections may cause. Police reforms have seemed to stall and President Kenyatta has turned to the military in the face of increasing domestic threats within Kenya⁶.

As stated above, the use of the military while dealing with domestic issues is disconcerting for the people of Kenya due to the past misdeeds of the KDF and their brutal nature.

1. IPOA Board Member, Nairobi, May 2017

2. Supra KNCHR Audit page 26

3. In December 2016, the immediate former Cabinet Secretary Ministry of Interior, the late Joseph Nkaissey gazetted over 90 illegal gangs including Gaza gang operating in Kayole Nairobi and Superpower operating in Eastleigh, Nairobi see <https://www.standardmedia.co.ke/article/2000228362/interior-cabinet-secretary-joseph-nkaissey-reveals-90-deadly-criminal-gangs-in-kenya> accessed 3 July 2017

4. <http://www.imlu.org/2011-06-30-23-44-4/2011-08-04-18-06-26/news/item/116-the-independent-medico-legal-unit-memorandum-on-kenya-defence-forces-amendment-bill-of-2015.html> accessed 3 July 2017

5. Act No. 44 of 2016, Republic of Kenya, available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2016/KenyaDefenceForces_Amendment_Act_44of2016.pdf pg.1128 accessed 7 June 2017

6. Analo, “New Law to Protect KDF from Scrutiny,” The East African, 8 August 2015.





As KNCHR reported in 2015 there were 120 cases of the KDF violating human rights, including 25 extrajudicial killings and 81 enforced disappearances in an attempt to crackdown on terrorism¹. Journalists for Justice documented the corruption occurring with the KDF while in Somalia. Evidence presented alleges that the KDF is engaging in the illegal sugar and charcoal trade, which is also helping to fund the terrorist group Al Shabaab that the KDF was sent to Somalia to deal with². Finally in one of KDF's most public interventions, during the terrorist attack at the Westgate Mall, Nairobi, CCTV³ footage showed KDF forces looting stores while conducting the rescue missions. Although President Kenyatta promised a commission of inquiry into these claims of corruption, the commission was never formed⁴.

B.3. Abuse of Legislative Processes to Address Security Concerns and Fight Dissent

The Jubilee Administration has used legislative and policy reform to address insecurity and terrorist threats and to fight dissenting voices. The most notable was the introduction of the Security Laws (Amendment) Act in 2014 which sought to amend various sections of more than 20 laws touching on security. The gist of the amendments was ostensibly to confer extra powers on security forces to enable them to counter terrorism and address the rising insecurity in the Country. Eight of the proposed amendments were a clear negation of constitutionally safeguarded rights and fundamental freedoms⁵. A ruling delivered by a five-judge bench of the High Court in Nairobi declared Section 12 of the Security Laws (Amendment) Act (SLAA), Section 66A of the Penal Code and proposed amendments to the Prevention of Terrorism Act violated the freedom of expression and the media contrary to Articles 33 and 34 of the Constitution. The SLAA was unconstitutional as its Section 16 and Section 42A of the Criminal Procedure Code violate the rights of an accused person to prior information of the prosecution evidence contrary to Article 49 of the Constitution.

The Kenya Defence Forces (Amendment) Act 2016⁶, positively amended some errors in the Kenya Defence Forces Act more so on the definition of torture and other forms of cruel, inhuman and degrading treatment and also provided clarity on the deployment of the KDF only with the approval of the National Assembly. However, some of the other clauses sought to water down the accountability framework envisioned under the KDF Act and the Constitution. Civil Society Organizations noted the sweeping powers that the original bill had given to the President with respect to security operations in addition to the lack of accountability and clear chain of command and powers. Further, the Bill had also proposed the use of auxiliary reserve forces without due regard to the separation and thus creating room for legal ambiguity and uncertainty, which would further weaken the accountability measures⁷.

1. Kenya National Commission on Human Rights, "Fighting Terror with Terror." Press Release: 15 September 2015 available at <http://www.knchr.org/Portals/0/PressStatements/Press%20statement%20on%20Error%20of%20fighting%20terror%20with%20terror.pdf> accessed 7 June 2017

2. Journalists for Justice, (2015) "Black and White" p. 3-4

3. Closed Circuit Television

4. "Commission of Inquiry That Never Was," Daily Nation, 20 September 2014, available at <http://www.nation.co.ke/news/Commission-of-inquiry-that-never-was/1056-2460374-4rowhx/index.html> accessed 08 June 2017

5. Ruling available at <http://www.klrc.go.ke/images/images/downloads/SLAA-ruling.pdf> accessed 25 May 2017

6. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2016/KenyaDefenceForces_Amendment_Act_44of2016.pdf accessed 25 May 2017

7. See IMLU Memorandum on the Proposed KDF Amendment Act available at <http://www.imlu.org/2011-06-30-23-44-4/2011-08-04-18-06-26/news/item/116-the-independent-medico-legal-unit-memorandum-on-kenya-defence-forces-amendment-bill-of-2015.html> accessed 25 May 2017





C – Security Management and Capacity

C.1. Infrastructure and Capacity of Security Agencies

The Ransley Report recommended the establishment of a well-trained and equipped police service. In early 2017, President Kenyatta reported that his government had invested heavily in training more police officers, improved the terms of service and welfare of the officers by expanding police housing units and establishing a health insurance scheme for police officers.

Furthermore, the President also noted that the government had installed surveillance systems in Mombasa and Nairobi¹.

The Jubilee Administration reports having made “strategic investment in the security sector to maintain peace and security in the country to meet the modern day challenges of security including terrorism and cybercrime. Police mobility, better equipment, security cameras and a command centre have been the hallmarks of this investment.” According to the government, this investment has improved national security and reduced crime incidences, enhanced aerial surveillance, enhanced physical security of the police officers through provision of body armour and advanced operational equipment. The government also projects increased efficiency in the resolution of cases through using forensic science and having a fully functional, independent and operational IPOA². It has deployed KDF in Somalia and South Sudan as part of peacekeeping initiatives and internally in areas such as the “Boni Forest in support of the National Police” and other hot spots to deal with various crimes³. The Government cites among its achievements over the past five years the enhanced mobility and improved service delivery, enhanced patrols leading to crime reduction.

The President’s Delivery Unit reports the acquisition of 3,672 vehicles for the National Police Service, 492 vehicles for the National Administration Police, 5,000 motorbikes, 3 choppers and 30 Armoured Personnel Carriers and the setting up of 204 new police stations over the past five years. However, there is no indication of the locations of these new police stations. In addition to this the government, reports the existence of “a forensic laboratory to introduce modern investigative techniques to the police force” which was to be ready by April 2017⁴.

The government reports indicate that the number of police officers has increased bringing the police-citizen ratio to 1:390, way above the UN recommended ratio of 1:450⁵. The Jubilee Administration has recruited, trained and deployed an additional 36,000 police officers and 1,739 police reservists and has also recruited 10,000 police recruits set to undergo training. This brings the total number of police to 119,165 officers and 9,348 reservists in service. In addition to this, the government has completed an additional 250 housing units for the police with an additional 1,600 units which were set for completion in May 2017 and additional 78 prison staff houses constructed⁶.

1. <https://www.delivery.go.ke/ministryprojects/1> accessed 8 June 2017

2. *Ibid*

3. Raychelle Omamo, Cabinet Secretary, Ministry of Defence available at <https://www.delivery.go.ke/ministryprojects/2> accessed 8 June 2017

4. *Ibid*

5. See <https://africacheck.org/reports/is-there-1-police-officer-serving-every-390-kenyans-as-kenyatta-said/> accessed 29 June 2017

6. *Ibid*





The Government was able to, for the first time, provide group medical and life insurance cover for police officers. Currently, 119,165 police officers and Kenya Prisons Officers are beneficiaries of this flagship initiative. This has ensured access to medical services and has been viewed as a morale booster for police officers. This is laudable as a step in the right direction in seeking to ensure that police officers enjoy their rights to the highest attainable standards of health as guaranteed under Article 43 of the Constitution¹.

The group medical and life insurance under the administration of AON Minet commenced in October 2016. Barely a month after this, the police officers started complaining that they were unable to access services from health facilities under the cover². These challenges were acknowledged by the Inspector General of Police Joseph Boinett³. This left police officers exposed and without access to health care insurance since the previous cover under the National Hospital Insurance Fund (NHIF) had been stopped⁴. A respondent from the security sector decried the inefficiency and frustrations of the new scheme and termed it a fraud in terms of the procurement process⁵, delivery and the benefits offered⁶.

While the government lauds its efforts on the security sector front, most of these flagship and hallmark achievements have been shrouded with doubt as to the actual impact of the achievements on the ground. Moreover, the process of acquisition and the quality of the equipment have been the subject of public scrutiny following reports of their malfunction and endangering the lives of security officers. Security personnel complained of the safety of the APCs and requested for a testing of the APCs durability and efficiency. The media reported that a group of General Service Unit (GSU) officers asked the suppliers to get into the vehicle but they declined indicating that they “would not endanger his life by getting into the APC...because it was not safe⁷...”. Despite this, the Government defended the quality of the vehicles claiming that they meet the international standards⁸.

Whereas the government has been able to surpass the UN recommended police to civilian ratio, there is hardly any tangible evidence on the impact that this has had in terms of actual service delivery and improved security in the country. Respondents from the security sector and individuals working on security sector reforms raised concerns as to the lack of information on the deployment of the additional police officers, many of whom are believed to have been assigned to offering personal security for government officials.

C.2. Budget Allocations for Security

While oversight has continued to grow, there has also been greater allocations to Kenya's security forces during that time. The Kenyan Defence Force (KDF) has been expanding over the years since the 2007 elections due to security threats along the Kenyan border.

1. Supra

2. <https://www.standardmedia.co.ke/business/article/2001231728/buck-passing-hurts-new-kenya-police-medical-cover> accessed 8 June 2017

3. <http://www.capitalfm.co.ke/news/2016/10/boinnet-assures-police-medical-cover-will-effective/> accessed 8 June 2017

4. <https://www.standardmedia.co.ke/article/2000221998/new-medical-scheme-not-working-for-us-police-say>

5. <https://www.standardmedia.co.ke/article/2000206587/police-accused-of-fraud-in-sh1-7-billion-insurance-battle> accessed 8 June 2017

6. Interview with an official of the National Police Service Commission, Nairobi, May 2017

7. <https://www.standardmedia.co.ke/article/2001241799/8-killed-as-armoured-vehicle-runs-over-explosives-in-lamu> accessed 8 June 2017

8. <http://allafrica.com/stories/201706060684.html> Immediate former, Security Minister of Interior, the late Joseph Nkaissey appearing before the Parliamentary Committee on Administration of National Security on 6 June 2017





In attempts to battle Al Shabaab, the government has increased the budget for the KDF over KES 91 Billion (\$870 Million)¹.

Over the years the budget allocation for security has continued to increase and has tripled in a span of 4 years. In the 2013-2014 fiscal year the security budget allocation was KES 89.4 Billion, it increased in 2014-2015 to KES 90.7 Billion, in 2015-2016 there was a major increment to KES 223.9 Billion and in 2016-2017 the allocation rose to KES 265 Billion².

In addition to the increase in budgetary allocation towards security, there have been concerns over the lack of transparency, questionable procurement processes and prudent expenditure in the security sector³. The Auditor General's report of 2014/15 deemed KES 4,617,843,750 expenditure by the State Department of Interior to have been wasted while in Defence KES 1,102,678,054 was deemed as wasted⁴.

C.3. Community Policing

Community policing has been defined as the voluntary participation of persons within a locality in the prevention of crime and the maintenance of peace and order in manner that ensures the police collaborate with that community and have interventions that are responsive to their needs⁵. In Kenya, community policing forums and committees as envisaged under Part XI of the National Police Service Act were aimed at providing an opportunity for the police to liaise with communities in order to establish and maintain partnerships with the communities, promote cooperation between the police and the community in meeting the policing needs of the community, improve the rendering of police service to the community and improve transparency and accountability of the police to the community.

In 2013, Parliament passed the National Government Coordination Act⁶ which gave rise to the National Government Administration Officers (NGAOs) essentially retaining most of the elements of the provincial administration that had been scrapped under the new constitutional dispensation. The NGAOs basically constitute officers from the level of chiefs up to that of county commissioners. This structure has bred confusion in terms of the policing structure in the country and more so as regards community policing⁷. In 2014, President Kenyatta gave county commissioners executive powers including on security. This sparked controversy as it was largely viewed as an unconstitutional move to reinstate the old provincial administration order that had been repealed by the new Constitution⁸. The structure has further caused tensions between the police and the county commissioners in instances where the county commissioners summon police officers in their counties. The chain of command is also distorted leaving police officers confused as to whether to respond to their county commander of police or to the county commissioners⁹.

1. Mutahi, "Just When Kenya's Military Needs More Civilian Oversight, a Proposed Bill Calls for Less." African Arguments, 09 May 2017, available at <http://africanarguments.org/2015/10/01/just-when-kenyas-military-needs-more-civilian-oversight-a-proposed-bill-calls-for-less/> accessed 28 April 2017

2. <http://www.capitalfm.co.ke/news/2015/06/security-sector-gets-lion-share-in-budget-allocation/> accessed 24 May 2017

3. <http://www.nation.co.ke/news/Auditor-General-questions-Sh3-8bn-expenses-at-Interior-ministry/1056-2942920-bgi5bu/index.html> accessed 29 June 2017

4. See Auditor General's Report http://www.oagkenya.go.ke/index.php/reports/cat_view/2-reports/9-national-government-and-state-corporations/69-government-ministries at pp. 24-26 accessed 29 June 2017

5. See Section 2 of the NPS Act, 2011

6. Available at www.kenyalaw.org accessed 20 May 2017

7. <http://www.chrips.or.ke/wp-content/uploads/2017/05/Strengthening-Community-Policing-in-Kenya-Brief.pdf> at p.4 accessed 29 June 2017

8. <https://www.standardmedia.co.ke/article/2000121313/president-uhuru-kenyatta-gives-more-powers-to-county-commissioners> accessed 29 June 2017

9. Interview with IPOA Official, Nairobi May 2017. The official informed the research team that County commanders summon police officers and require them to respond in the same speed and manner that a county commander would respond when summoned by the President.





This makes it difficult to coordinate security at the county levels, especially when dealing with certain issues such as terrorist attacks which occur at the county levels.

According to the Independent Policing Oversight Authority (IPOA), the police officers cannot be expected to report to the NGAOs, “a non-entity” in the country’s policing structure. Respondents from IPOA faulted the Draft Guidelines on Community Policing¹ for failing to acknowledge the essence of policing and for purporting to define certain entities as government policing agencies and thus assign policing functions to entities whose mandate is not on policing such as the judiciary, Kenya Fisheries, the NGAOs among others. The order of the entities puts the NGAOs at the top of the list, with the National Police Service coming in 4th. This further demonstrates the convoluted approach to community policing which is further exacerbated by the inaccurate definition of policing in general and community policing. The Community Policing Act was enacted in 2015 but has never been operationalized².

The varying definitions and views on community policing could potentially open up room for misinterpretation that the community needs to ensure their own security. This misconception could see a rise of vigilantes and illegal gangs and groups in the community which can carry out security patrols and arrest and punish offenders³. This could potentially lead to incidences of human rights abuses and a general lack of accountability and oversight over these groups.

-
1. 2015 Draft Guidelines for Implementation of Community Policing- Nyumba Kumi, Usalama Wa Msingi available at <http://www.communitypolicing.go.ke/docs/draft4.pdf> accessed 29 June 2017
 2. A member of the Police Reforms Working Group informed the research team that the former Cabinet Secretary for Interior, Joseph Ole Lenku had gazetted the commencement date for the Act. However, the Gazette Notice was recalled by the immediate former Cabinet Secretary for Interior, the late Joseph Nkaisery
 3. CHRIPS, (2017) Strengthening Community Policing in Kenya available at <http://www.chrips.or.ke/wp-content/uploads/2017/05/Strengthening-Community-Policing-in-Kenya-Brief.pdf> accessed 20 May 2017





II. PROGRESS AND CHALLENGES IN ADVANCING JUDICIAL REFORMS AND ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS

A. Judicial Reforms meant to Strengthen the Legal Framework

Since the enactment of a new Constitution in 2010, the Kenyan Judiciary has been working to rehabilitate itself and reclaim its legitimacy in the eyes of the public as the third branch of government. As against the legacy of eroded public confidence and legitimacy the Judiciary has worked to create new legal norms, battle corruption, and deal with increased violations by the security forces. In recent years the relationship between the Judiciary and the other arms of government has come under increased strain with Parliament and the Executive displaying outright hostility towards the judiciary¹. The integrity of the judicial system has also been characterized by continued struggle for resources and streamlining the legal process in Kenya. In 2011, Kenya had only 53 judges and 330 magistrates for a population of 41.4 million. There was a massive backlog of almost 1 million cases². In 2010, 43 percent of Kenyans who sought services from the judiciary reported paying bribes, with the average size of the bribe being KES 11,046 according to Transparency International. In 2014, the average size of a bribe in the Judiciary dropped to KES 7,885.

In response to these issues, the Judiciary has pushed for the enactment of better laws to support its work and promised to reform of its own system. The biggest reform process being the Judiciary Transformation Framework (JTF), adopted in May 2012. It identified four pillars of reform: "people-centered" delivery of justice; improving organizational culture and professionalism; ensuring adequate infrastructure and resources; and making better use of information technology. This dedication to reforms has led to greater transparency and a streamlining of legal education and court cases but has fallen short in other areas^{3 4 5}. Public polls show there has been a steady decline in support of the Judiciary. Perception polling conducted by IPSOS from November 2013 to April 2015 found that the number of Kenyans expressing "a lot of confidence" in the Supreme Court fell from 28 to 21 percent, and 21 percent to 12 percent for other courts⁶. The 2016 survey by Ipsos Synovate indicates that 23 percent of the population had lost faith in the whole judicial system.⁷

1. Wambugu and Chinga, "High Court Rules Judiciary Is Not under Parliament's Control." International Law Office. International Law Office, 01 July 2014, available at <http://www.internationallawoffice.com/Newsletters/Litigation/Kenya/Njoroge-Regeru-Company/High-Court-rules-judiciary-is-not-under-Parliaments-control> accessed 15 May 2017

2. Maya, "How Kenya Cleaned Up Its Courts." Foreign Policy. Open Government Partnership, 09 July 2016, available at <http://foreignpolicy.com/2016/07/09/how-kenya-cleaned-up-its-courts> accessed 02 May 2017

3. Mwenda, "Judicial Corruption Would Throw Kenya into a Major Crisis." The Star, Kenya, 06 February 2016, http://www.the-star.co.ke/news/2016/02/06/judicial-corruption-would-throw-kenya-into-a-major-crisis_c1288137 accessed 29 May 2017

4. Maya, "How Kenya Cleaned Up Its Courts", (2016).

5. Ngirachu, and Wanzala. "JSC Sends Shollei Packing over Sh2 Billion Scandal." Daily Nation, 18 October 2013 available at <http://mobile.nation.co.ke/news/JSC-sends-Gladys-Shollei-packing/1950946-2038778-format-xhtml-bsv16r/index.html> accessed 29 May 2017

6. *Ibid*

7. Blasto, "A quarter of Kenyans have no faith in the Judiciary" Business Daily, 12 July 2016 available at <http://www.businessdailyafrica.com/news/A-quarter-of-Kenyans-have-no-faith-in-the-Judiciary/539546-3292144-jh59w0/index.html> accessed 8 June 2017





As the 2017 elections draw close, it is important to understand what strides the Judiciary has taken to establish itself and specifically how the Judiciary is better prepared to take on the elections as compared to 2007 and 2013. The evolving constitutional relationships between the Judiciary, the Executive and Parliament are also examined with a close focus on the changes – intended or unintended – that have come about in the recent years as a result of the various reforms.

This report also examines the Judiciary's successes and failures as it attempts to bring about accountability and justice in Kenya, specifically in regard to the operations of security agencies, as well as the victims who suffered from post-election violence (PEV) in 2007/2008.

Legal Framework

The adoption of a new Constitution in 2010 and the resultant reforms initiated including a robust legislative reform to supplement the new constitutional dispensation has been influential in defining and influencing the changing character of the Judiciary and its relations with the executive, Parliament and the general public.

The 2010 Constitution provides for access to justice as one of the fundamental rights in the Bill of Rights¹. The Constitution also provides the solid framework within which the new judiciary with express independence and autonomy is established. Articles 161 and 160 set out the framework for the establishment of the judiciary and the principles for the exercise of judicial authority. The Constitution also greatly emphasizes the need for citizens to access justice².

The Judicial Service Act, 2011³ operationalizes Chapter 10 of the Constitution of Kenya 2010, which deals with Judiciary. The Act provides the framework for judicial services and administration of the Judiciary; makes further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff. It also provides for the regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice, and other related processes.

Since the adoption of the Constitution, new laws have been adopted to strengthen the operation of the judiciary as well as open up access to justice avenues for citizens. A few of the laws that have been adopted are the Legal Aid Act⁴, Access to Information Act⁵, Witness Protection (Amendment) Act 2016⁶, the Judiciary Fund Act⁷, Victim Protection Act of 2014⁸, among other laws.

A.1. Achieving Judicial Reforms in a Hostile Environment

As discussed above, the Judiciary Transformation Framework has been the foremost reform process adopted by the Judiciary in recent years.

1. Article 27 of the Constitution of Kenya

2. Article 48 of the 2010 Constitution of Kenya

3. The Judicial Service Act No. 1 of 2011

4. The Legal Aid Act No. 6 of 2016.

5. The Access to Information Act no. 31 of 2016

6. The Witness Protection (Amendment) Act, No. 45 of 2016

7. The Judiciary Fund Act No. 16 of 2016

8. The Victim Protection Act No. 17 of 2014.





In 2011, when Chief Justice Willie Mutunga appointed under the new Constitution, issued a report card on his 120th day in office, he summed up the state of the judiciary at the time to have been an institution so frail in its structures, so thin on resources, so low on its confidence, so deficient in integrity, so weak in its public support that to have expected it to deliver justice was to be wildly optimistic¹. To address this situation, Chief Justice Mutunga introduced the Judiciary transformation agenda, which was viewed as the much needed change process to service delivery by the judiciary.

Judicial reforms ran into challenges as soon as the Jubilee government took over in 2013. The leadership at the Judiciary was pro-reform, the Jubilee leadership interpreted this to mean they were their opponent².

Despite the challenges experienced, including internal corruption the Judicial reform has created concrete success as the Judiciary has hired more than 200 new judges and magistrates and established 20 new court stations since 2011 to help alleviate the backlog of cases. That was estimated at nearly a million cases and as of 2014 had been cut down to 311,000 cases³. All the while the court has handled more than 21,000 suggestions and complaints. By implementing these reforms, the court has become more streamlined and better equipped to handle the issues in the future.

A.2. Strained Relationships

Since the Jubilee administration ascended to power the incidences of the Executive and Parliament deliberately interfering with the Judiciary's reform process have increased. In certain instances, Government has refused to accept the outcome of court proceedings that result in injunctions or declarations against unconstitutional acts of the Government.

The independence of the JSC came under serious threat in August 2013, when there was a fallout with the executive after the JSC decided to send the then Chief Registrar of the Judiciary, Gladys Shollei on compulsory leave to facilitate investigations and inquiry over complaints and allegations of financial impropriety in the management of the resources of the Judiciary. A day after the JSC's decision, Parliament through the Committee on Justice and Legal Affairs, summoned the JSC to discuss circumstances surrounding the suspension of the Chief Registrar. While the JSC declined to meet the Parliamentary Committee, Parliament did not relent, it proceeded to entertain a petition for the removal of six commissioners who were members of the Finance and Administration Committee of the JSC. This was despite a court injunction stopping the deliberation of the petition pending the hearing of a case filed by JSC. The petition was transmitted to the President after a resolution by Parliament. The President proceeded to appoint a tribunal to investigate the conduct of the six commissioners with a view of their removal, the court later nullified the appointment of the tribunal⁴. The Executive is viewed as continually behaving in a manner that puts it in collision with the Judiciary.

In January 2014, in an effort to address the shortage of judges to deal with the huge backlog of cases, the JSC sent a list of 25 judges it had interviewed, recommending their appointment. The President failed to appoint the judges until June 2014, when without explanation as to the criteria used selected only 11 judges from list for appointment. It was claimed that the President was still vetting the remaining 14 nominees.

1. Progress Report on the Transformation of the Judiciary the first hundred and twenty days, 19 October 2011, available at <http://kenyalaw.org/kenyalawblog/progress-report-on-the-transformation-of-the-judiciary/> accessed on 23 May 2017

2. Interview with MKO a former employee of the judiciary held on 7 June 2017

3. *Ibid*

4. High Court Petition 518 Of 2013 Judicial Service Commission vs Speaker of the National Assembly & others available at <http://kenyalaw.org/caselaw/cases/view/96884/> accessed 7 June 2017





One of the 11 judges appointed was Margaret Muigai, the wife of Attorney General, Githu Muigai. This was viewed as an affront to the Constitution, which had deliberately removed the excessive powers of the President in controlling judicial appointments. The Law Society of Kenya sued the President over the unconstitutionality of the decision to choose who to appoint, but before the court issued a decision, the remaining judges were appointed in May 2015.

The decision by Chief Justice Willy Mutunga to retire one year early – in 2016 - to allow sufficient time for the appointment of a successor before the August 2017 Election, created an appetite for the Executive branch to manage the succession in its favour. In December 2015, Parliament passed amendments to the Judicial Service Act, that would have required the JSC to forward to the President three names from which to choose a Chief Justice, as opposed to one name as stipulated by Article 166 (i) of the Constitution. In January 2016, the Law Society filed a suit challenging this amendment resulting in the court stopping implementation of the law through its decision rendered in May 2016.

With the evident hostility by the Executive and Legislature towards efforts to purge corruption in the Judiciary, the implicit message to judicial officers was that if you had political support, you could negotiate around efforts to be held accountable for corruption. This was evidenced in how the Executive handled the allegations of corruption against Justice Tunoi of the Supreme Court in 2016, by initially refusing to appoint a tribunal to investigate the corruption claims that had been raised in relation to the handling of an election petition resulting from the 2013 election filed by Ferdinand Waititu – the main competitor – against the current Governor of Nairobi County, Evans Kidero.

Another form of interference with the independence of the judiciary has been the outright contempt for judicial decisions by Parliament and the Executive. On 21 March 2017, during an election campaign tour, President Kenyatta while addressing residents of Nyamira County expressed that he had “given one of their sons” a job in reference to the appointment of the new Chief Justice David Maraga¹, who is from that region. The Chief Justice and the Judicial Service Commission issued public statements dismissing the President’s assertions².

A.3. Underfunding the Judiciary

The integrity of the legal system depends on it being properly funded. The 2010 Constitution sought to address the past challenge of the judiciary lacking control over the resources needed for its operations. The repealed Constitution did not provide for a specific fund for the Judiciary, leaving the determination of the budgetary allocations solely to the discretion of the legislature. Article 173 of the 2010 Constitution, specifically provides for a Judiciary Fund. The budget setting process also requires that Parliament receives the projected annual budgets from the Judiciary before determining budgetary allocations.

Despite the adoption of these reforms aimed at safeguarding the independence of the Judiciary by empowering it to control its resources, in the recent years there has been considerable concern over the judiciary’s budget being sufficiently safeguarded from unreasonable pressures from the legislature.

1. For the speech by the President see <https://www.youtube.com/watch?v=ELhQESW6W-4> accessed 8 June 2017

2. JSC tells off Uhuru for linking Maraga’s CJ post to Kisiis, the Star, 10 April 2017, available at http://www.the-star.co.ke/news/2017/04/10/jsc-tells-off-uhuru-for-linking-maragas-cj-post-to-kisiis_c1541556, also see CJ David Maraga says he’s not Jubilee reward to Kisii Community, Daily Nation, available at <http://www.nation.co.ke/news/david-maraga-jubilee-kisii/1056-3884926-10k3e0oz/index.html> accessed on 8 June 2017





While the Judiciary's budget has increased over the years, the amounts provided have fallen short of the resources needed by the Judiciary to implement the functions assigned to it by the Constitution. The table below shows the amount required to fulfill those functions and the amount allocated by the legislature. Although the budget grew, so did the gap between the funds requested for and the funds allocated.

Funds	Requirement as proposed by the Judiciary	Allocation made by the Legislature	Percentage cut
2011/12	KES. 4.597 billion	KES. 4.371 billion	5%
2012/13	KES. 14.99 billion	KES. 12.157 billion	19%
2013/14	KES. 22.075 billion	KES. 16.9 billion	23%
2014/2015	KES 26.211 billion	KES 14.163 billion	46%

Source: Kenyan Judiciary Annual Report 2013-2014, Kenyan Judiciary Annual Report 2014-2015

In the years following, the budget has increased to KES 15.7 billion in 2015-2016¹ and KES 15.8 billion in 2016-2017². Yet these still fall short of the resources needed to fully fund the requirements that the Judiciary has for the implementation of the transformation programme that will enable the provision of an effective and efficient system of justice for all citizens.

Increasingly, Parliament has politicized the budgeting process. The establishment of the judiciary fund that was to aid in creating autonomy in the management of the funds allocated to the Judiciary, has been a long drawn process, with the bill to operationalize the fund being adopted in 2016³, several years after it had been envisioned by the 2010 Constitution. Parliament has also publicly threatened to address its discontentment with the Judiciary by slashing its budgets⁴.

One respondent who spoke to the research team expressed concern over the impact of public attacks against the Judiciary and judges over decisions:

It is imperative that the increased hostility against the courts for their decisions is likely to influence how judges think when making decisions, they have to consider whether their decisions would upset Parliament or the Executive.

1. Okulo, "Cabinet Approves Sh2.17 Trillion 2015/2016 Budget." The Star, Kenya, 17 October 2015, available at http://www.the-star.co.ke/news/2015/04/24/cabinet-approves-sh217-trillion-20152016-budget_c1123937 accessed 08 June 2017

2. Budget Highlights for 206-2017. Rep. 2017 ed. Nairobi: Kenya National Treasury, 2017.

3. The Judiciary Fund Act No. 16 of 2016

4. The injunctions by the courts to the Budget Committee of the National Assembly from hearing a petition seeking the removal of Auditor General and the impeachment proceedings against Governor Wambora, had parliament and senate retaliate.





A.4. Corruption and imprudent use of resources by the Judiciary

Controlling corruption within the judiciary has also posed a great challenge for the top leadership at the judiciary. Despite the implementation of the JTF, several high level corruption incidences have been reported against the administration, as well as the judges. The corruption scandals have contributed to the erosion of confidence against the judiciary.

An employee of the Judiciary informed the research team, that the funds allocated for improving the Information Communication Technology (ICT) was the greatest target for corruption. Yet the most critical areas that were envisaged for the success of the JTF was efficiency and integrity which were to be addressed by introduction of an efficient ICT system, that could enable digital capture of proceedings, thereby collapsing the turnaround time for judges.

One of the areas that remains unachieved under transformation framework is the automation and digitalization of court processes and proceedings, the corruption involved here is immense. The corruption networks that thrive on controlling information management of physical files have been at the forefront of undermining the ICT reforms as its success would run them out of business¹.

The research team was also informed that the establishment of mobile courts to serve the marginalized areas was one of the failed projects of the transformation framework. The costs involved in maintaining the mobile courts were so high and did not necessarily translate into an increase in the cases filed.

Most of these courts had ended up dealing with petty offenders. The people in the marginalized areas had over the years found alternative avenues of addressing violations, where elders were accorded more respect than the formal justice system. I would recommend a value for money audit be conducted to ascertain if it was still necessary to use the huge amounts of resources for the mobile courts².

By December 2015, Chief Justice Willy Mutunga had established a total of 51 mobile courts across the Country with 33 of those being opened in that financial year³. The Judiciary has also continued to push for the adoption of a framework for the use of alternative justice systems, that would see the number of cases adjudicated by the courts drop.

B – Victims of the 2007/2008 Post-Election Violence (PEV) still await for justice and reparations

The ICC opened an investigation in Kenya in March 2010 after Prosecutor Luis Moreno-Ocampo obtained permission from the judges. This followed Kenya's failure to establish a domestic tribunal to prosecute perpetrators of the widespread and systematic violence that occurred after the results of the 2007 elections were disputed.

1. Interview with PMM an employee of the Judiciary held on 22 May 2017.

2. Interview with MKO held on 7 June 2017.

3. See Opening Remarks by the Chief Justice at the Launch of the Wamunyu Mobile Court, 10 December 2015. Available at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/CJ%20Speeches/cj%20speech%20at%20the%20launch%20of%20wamunyu%20court%20%2010%20%20%20Dec%202015.pdf accessed 8 June 2017





In 2011, the pre-trial chamber confirmed charges against four of the six individuals whom the prosecution considered as the most responsible for crimes adjudged as amounting to crimes against humanity committed during the 2007/8 post-election violence (PEV). Two cases were then pursued, the first against Uhuru Kenyatta and Francis Muthaura accused of five crimes against humanity: murder, deportation or forcible transfer of population, rape, persecution and other inhumane acts, and the second against William Ruto and Joshua Sang accused of three crimes against humanity: murder, deportation or forcible transfer of population and persecution.

To date, there has been almost no criminal accountability for the atrocities committed during the post-election violence, or meaningful reparations for the victims. At the national level most of the atrocities have remained uninvestigated, despite the continued call for justice by a cross section of Kenyans. Parliament failed to establish a domestic mechanism to investigate and prosecute the post-election related cases. In 2012 new efforts led by the Judicial Service Commission for the establishment of a special division within the High Court to aid in the prosecution of PEV cases, were unsuccessful. In October 2012, the JSC sub-committee looking into the establishment of the special division of the High Court produced its first report, which proposed the establishment of a division within the High Court to handle not only PEV related cases but also transnational cases¹. Further consultations were held with stakeholders but an updated report was never issued. The office of the Director of Public Prosecutions (DPP) publicly opposed the establishment of the division indicating that his office did not have case files that could be prosecuted and for transnational crimes they would continue prosecuting them in the lower courts as had been the case². The general political overtures by the jubilee government have been against any form of accountability for the PEV.

The prosecutions commenced by the International Criminal Court (ICC), were set to proceed for trial in 2013 when two of the accused persons, Uhuru Kenyatta and William Ruto, galvanized support to be elected to the Presidency and Deputy Presidency of Kenya, with their organizing platform being messaged around the purported unfairness of the ICC prosecutions. Soon after the two took over power they scaled up the massive attacks against the Court with the ultimate goal of ensuring the trials against them would be closed prematurely.

It is against this background that the analysis below on efforts to secure justice for PEV victims is made.

B.1. Seeking justice through domestic courts

Since 2007/2008 thousands of complaints have been filed and yet very few have been adjudicated. It has been 10 years since the violence and many victims are waiting for justice, while many more will never find it.

In February 2012, the Director of Public Prosecutions (DPP) established a multi-agency taskforce to review the over 6,000 case files that had been handled by the police on the PEV crimes. The taskforce was mandated to conduct its work within six months. The only public information issued by the multi-agency taskforce was a press release issued on 17th August 2012 indicating that of the 6,081 files received from the police the multi-agency taskforce had reviewed 4000 files. In March 2015, three years after the issuing of the interim report through the August 2012 press release, the taskforce allegedly transmitted another report to the President.

1. Judicial Services Commission, "Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya" (JSC Report), 30 October 2012

2. Kiplagat, "Most PEV cases cannot be prosecuted Tobiko" The Star 06 February 2014, available at http://www.the-star.co.ke/news/2014/02/06/most-pev-cases-cannot-be-prosecuted-tobiko_c892628 accessed 9 June 2017





To date the multi-agency taskforce report to the President has not been published. An analysis of the figures provided by the taskforce in 17th August 2012 and the March 2015 report to the President reveal great inconsistencies in the data provided¹.

The creation of the taskforce is viewed by many as a smokescreen for continued inaction by the government in holding perpetrators of the post-election violence to account, largely meant to create an impression that complementarity efforts were underway and to justify the government's willingness to address PEV cases away from the ICC.

Constitutional Petitions Filed by Victims of the Post-Election Violence

Three constitutional petitions have been filed in the High Court challenging the government's failure to prevent, investigate, prosecute and provide reparations to victims of sexual violence, police shootings and forced displacement.

a) Petition by Victims of Sexual Violence

The Constitutional petition relating to SGBV² was filed in February 2013 by eight (8) survivors – 6 female and 2 male – who were brutally gang-raped and forcibly circumcised by state security officers and civilians during the PEV. They are seeking truth, justice and reparations from the state. The survivors are supported by a consortium of four NGOs namely, the Coalition on Violence against Women, the Kenyan Section of the International Commission of Jurists, Independent Medico-Legal Unit, and Physicians for Human Rights

The survivors seek to hold various state offices particularly the Office of the Attorney General, Office of the Director of Public Prosecutions, Inspector General of the National Police Service, Cabinet Secretary for Health accountable for allegedly failing to put in place effective measures to prevent the violence, protect the survivors from sexual violence, investigate and prosecute perpetrators, and provide effective remedies to victims. These failures, in the petitioners' view, amount to violations of fundamental rights and freedoms protected in the Constitution.

The consortium has also strategically organized and presented expert testimonies from eight experts, including a government psychiatrist who had conducted assessments on all the victim petitioners.

The prosecution of the case has experienced serious delays, with the initial failure by the State to respond to the petition for one year having the greatest impact on the time it has taken to conclude the case. Transfers and promotions in the Judiciary contributed to great confusion on the continuation of the hearings after the presiding judge was appointed to the Supreme Court in 2016. For several months the case file was moved across several courtrooms in the High Court, leading to several adjournments. The petitioners tired of the delays were forced to write to the Chief Justice on requesting that he assigns the case file to a specific judge to alleviate the misery for victims resulting from the uncertainties. Chief Justice Maraga responded assigning the case to one of the newly appointed judges in the Constitutional division of the High Court, and the case has progressed with both parties finalizing the presentation of their cases. The proceedings are now at the submission stage.

1. HRW, "I Just Sit and Wait to Die" Reparations for Survivors of Kenya's 2007-2008 Post Election Sexual Violence (2016) available at <https://www.hrw.org/report/2016/02/15/i-just-sit-and-wait-die/reparations-survivors-kenyas-2007-2008-post-election> accessed 10 June 2017

2. Nairobi High Court Constitutional Petition No. 122 of 2013





b) Constitutional Petition by Victims of Forced Displacement

The IDP Constitutional Petition¹ is a representative case filed on behalf of Kenyans who were displaced during the PEV in Kenya. It was filed by the following civil society organizations: FIDA Kenya, Kenya Human Rights Commission and The Kenyan Section of the International Commission of Jurists. Twenty-seven IDPs representatives are petitioners in the case on behalf of the other IDPs in Kenya.

The petitioners claim is founded on the premise that, the government was responsible for the deaths, internal displacements and other harms that resulted from the PEV. The victims therefore seek for the truth about their experiences to be unearthed as well as holistic reparations be provided including medical and psychological treatment, legal and social services and compensation.

This case has experienced similar delays to those cited above in relation to the SGBV case.

c) Constitutional Petition by Victims of Police Shootings

The Police shooting case instituted in 2016, is still undergoing the preliminary trial stages. The victims in this case are seeking to compel the Government of Kenya to address the police shootings that were part of the PEV. The petitioners claim that the government failed to prevent the violence, on the one hand, and to investigate and prosecute the police perpetrators, on the other. Ultimately, the petitioners want the government to publicly acknowledge and apologize to the victims for their failure to protect the rights of Kenyans; to provide appropriate compensation to the victims; to investigate the shootings and prosecute those who are responsible; and to ensure that investigations and prosecutions are credible and independent².

The resolution of these representative suits remains a critical channel for victims' hopes to achieve justice for violations suffered during PEV.

B.2. Failures of the Proceedings Before the ICC

In 2010 the ICC opened investigations into the crimes committed during the PEV. Investigations led to charges being preferred against six individuals, with the charges being confirmed against four of the accused persons, Uhuru Kenyatta and Francis Muthaura charged in one case and William Ruto and Joshua Sang in the other. Before the commencement of the trials two of the accused persons – Uhuru Kenyatta and William Ruto were elected as President and Deputy President of Kenya in 2013.

On 5 December 2014, the ICC Prosecutor withdrew all charges against Uhuru Kenyatta, while the charges against Kenyatta's co-accused Francis Muthaura had been withdrawn on 11 March 2013. On 5 April 2016, the ICC's Trial Chamber V (A) decided by majority to terminate the case against William Ruto and Joshua Sang, the last of the six individuals against whom charges had been initiated in 2010, for their alleged role in the commission of crimes against humanity in Kenya. This effectively brought a premature closure to the last two Kenyan cases as neither was decided on its merits.

1. Nairobi High Court Constitutional Petition No. 273 of 2011

2. Fact Sheet: Police Shootings in Kenya, Open Society Justice Initiative accessed at <https://www.opensocietyfoundations.org/fact-sheets/fact-sheet-police-shootings-kenya> accessed 9 June 2017





During the life of the ICC cases, sharp focus fell on both the Court and the conduct of the Accused. The ICC Prosecution struggled to secure and retain crucial evidence, while the accused persons who exercised ultimate power in Kenya were accused of scuttling government cooperation and undermining witness support for the successful prosecution of the cases, determined to obtain the premature termination of the cases¹. The judges in the cases observed that there was massive witness interference.

There was a disturbing level of interference with witnesses as well as inappropriate attempts at the political level to meddle with the trial and to affect its outcome

observed Judge Robert Fremr².

In the last report on Kenya by the Observatory for the protection of human rights defenders (May 2017), it is also reported that during the period of the ICC investigations and prosecutions, a large number of civil society leaders and human rights defenders engaged in an open cooperation with the Office of the Prosecutor. As a result, the Kenyatta administration conducted a smear campaign blaming NGOs and human rights defenders for instigating crimes-against-humanity charges against him and others, and many hate blogs mushroomed, which had the goal to publicly identify the various ICC witnesses to expose them, putting their lives in great danger.

Many human rights defenders and other witnesses, whose names were mentioned in the media, were similarly intimidated, threatened, attacked and in some cases killed or forced to flee into exile. Even after charges against Kenyatta were withdrawn and vacated concerning Ruto, threats and intimidations continued to be directed at CSOs cooperating with the ICC³.

The government also failed to cooperate in providing the Prosecution with information requested for⁴. Judge Osuji in his decision stated that “the proceedings are declared a mistrial due to a troubling incidence of witness interference and intolerable political meddling that was reasonably likely to intimidate witnesses⁵”.

While the cases against the accused were terminated without prejudice, leaving the Prosecutor with the option of re-opening the cases in the future if new or more evidence was secured to support the prosecution, it is unlikely that the Court will re-open the investigations in the near future. The court has significantly closed its operations in Kenya and it is unlikely that the necessary cooperation by the government for collection of new evidence will be forthcoming.

Outside of the courtroom, the cases were also weakened by vicious political attacks on the Court in Parliament and public rallies in Kenya and by a massive diplomatic offensive by the Government of Kenya and the African Union targeting the UN Security Council and the Assembly of State Parties. At its 15th session the Assembly of State Parties (ASP) for the first time expressed its “concern[s] by the recent reports of threats and intimidation directed at some civil society organizations cooperating with the Court⁶”.

The Kenya cases serve as the first cases at the ICC to be terminated without the benefit of a full trial.

1. “ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence.” BBC News. BBC, 05 December 2014.

2. Decision on Defence Applications for Judgements of Acquittal, Trial Chamber V(a), No. ICC-01/09-01/11, 5 April 2016, para. 147

3. Kenya, 2017 elections : broken promises put human rights defenders at risk, Observatory for the Protection of Human Rights Defenders, May 2017, available at <https://www.fidh.org/en/issues/human-rights-defenders/kenya-2017-elections-broken-promises-put-human-rights-defenders-at> accessed 9 June 2017

4. Kenya’s William Ruto’s Case Dismissed by ICC.” BBC News. BBC, 05 Apr. 2016. Web. 08 June 2017.

5. Decision on Defence Applications for Judgements of Acquittal, Trial Chamber V(a), No. ICC-01/09-01/11, 5 April 2016, para. 464

6. Resolution ICC-ASP/15/Res.5 “Strengthening the International Criminal Court and the Assembly of States Parties”, Adopted at the 11th plenary meeting, on 24 November 2016, p.2.





This situation left the victims' demand for truth and justice unanswered, especially given that there had been dismal domestic efforts to investigate and prosecute mid-level and lower-level perpetrators of the crimes committed during the PEV.

Politicization of the Reparations process

Kenyan citizens have put pressure on the government to provide reparations. The main visible groups that continue to push for remedies for the violations experienced during the PEV have been victims of displacement and sexual or gender-based violence. Progress towards reparations has been slow in developing for both of these groups.

Reparations for Sexual and Gender Based Violence (SGBV)

Due to litigation and mounting pressure brought by NGOs against the Kenyan government on failure to act on the crimes committed during the PEV, President Kenyatta was compelled to respond. When delivering his State of the Nation address in March 2015, the President formally acknowledged and apologized for the long-standing injustices suffered by Kenyans. In order to remedy these injustices, the President announced the establishment of a 10-billion-shilling restorative justice fund for the victims of past violations, over the next three years¹. This was the first time in 8 years since the violence that victims of the PEV had received a tangible commitment from the State on reparations for the violations committed against them. The operationalization of the fund has however been an unduly protracted process since the President's pledge two years ago. The government has failed to take substantive action to implement the fund. In 2016 President Kenyatta's State of the Nation address did not mention the fund or material efforts to create it². The Truth, Justice, and Reconciliation Commission (TJRC) in its report of 2013, had already called for such a fund to be established. The TJRC also included in its report a robust reparations framework that would guide implementation of reparations for victims of violations. The Jubilee administration and Parliament has failed to adopt the TJRC report³ despite numerous petitions by victims urging that the report be adopted so as to allow for the implementation of the recommendations, which include a detailed framework on how reparations will be administered.

One of the major obstacles to operationalizing the fund was the lack of clarity as to which office was responsible for the establishment of the fund since no clear legal or policy framework existed at the time of the declaration. Civil society together with the Kenya National Commission for Human Rights have for the past two years pushed for the adoption of a clear legal and policy framework to guide the operationalization of the restorative justice fund. While progress has been slow, in 2016 the Attorney General renewed efforts for the establishment of the fund and adopted a governance structure for the disbursement of funds.

Draft regulations to govern the implementation of the fund were also developed in partnership with civil society, under the leadership of the Kenya National Commission on Human Rights. At the time of writing this report the regulations were with the Attorney General and are expected to be tabled before the Cabinet and subsequently Parliament for adoption. It is anticipated that this process will culminate in the provision of reparations for some of the victims of past violations.

1. ICTJ, "In Kenya, Organizing Women Victims to Help Inform Future Reparations Policies" International Center for Transitional Justice, 15 June 2015, available at <https://www.ictj.org/news/kenya-women-inform-reparations-policies> accessed 08 June 2017

2. Wheeler, "Dispatches: The Kenyan President's Failed Promises to Rape Victims" Human Rights Watch, 01 April 2016

3. The TJRC report was handed to President Uhuru Kenyatta in May 2013 and formally published in the government's Kenya Gazette on 7 June 2013. It was tabled in parliament in July 2013. Under Kenya's Truth, Justice and Reconciliation Act, implementation of the recommendations contained in the report was to commence immediately after consideration of the report by parliament. Parliament has failed to discuss and adopt the report.





Although there have been promises made to the survivors of SGBV in 2007/2008, the government has failed to deliver on these promises to the survivors. 10 years later and the victims are left without any way to pay for the ongoing expenses due to medicine or doctor's treatments. The ability to work and find food for those who contracted diseases such as HIV is reduced. The provision of ARVs by the government while welcome has also not been effectively utilized by some of the disenfranchised survivor's as they avoid taking ARVs if they do not have food.

"The ARVs weaken us if we have not eaten. When I do not have food I avoid taking ARVs, until I am able to afford food¹."

This predicament that HIV positive victims find themselves in, re-emphasizes the need for the government to look into a more sustainable and comprehensive approach to reparations for survivors.

Victims and survivors of SGBV have used national, regional and international platforms to urge the government to provide sustainable and comprehensive reparations to them.

When I attended the 15th Annual Assembly of State Parties (ASP), in November 2016, I highlighted the plight of sexual violence victims of the PEV, who seem forgotten. The Kenya government representatives present at the meeting led by Mr. Korir Singoei, the legal advisor in the office of the Deputy President, promised that they would urgently deal with the concerns I was raising when they returned to Kenya. They gave me their telephone numbers and promised to meet me. Since December 2016, I have tried without success to meet with these government officials, my calls and text messages are never responded to. I feel that the officials just wanted to show delegates that they were committed to addressing the plight of SGBV victims, when in reality they are not.

I feel frustrated as I traveled around the country meeting sexual violence survivors who drafted letters addressed to President Uhuru Kenyatta, seeking acknowledgement, recognition and reparation. I delivered seven of these letters to the President through the office of the State House Chief of Staff Mr. Joseph Kinyua. Every month when I call to follow up on the requests in the letters, I am told they cannot be traced. This government is blind to the needs of sexual violence victims it has never been acknowledged or offered any assistance².

Reparations for Internally Displaced Persons

Following the violence after the 2007 elections, 663,921 Kenyans were displaced from their homes³. In response, the Kenyan Government has been working to provide aid to the citizens who suffered displacement. The Government stands accused of neglecting victims who suffered other types of violations other than displacement.

In 2012, Parliament passed the Prevention, Protection, and Assistance to IDPs and Affected Communities Act which has been guiding the government during the process of providing reparations to IDPs. There remains a lot of confusion though, on how IDPs are being compensated and how many have been compensated so far.

1. Interview with a sexual violence survivor living with HIV held on 28 May 2017.

2. Interview with Jackline Mutere, a survivor of sexual violence from the PEV, and founder of Grace Agenda, an organization that supports sexual violence victims of the PEV, particularly those who bore children after being raped, held on 5 June 2017

3. Government of Kenya, Ministry of State for Special Programmes. (2012), Progress on Resettlement of Internally Displaced Persons as at 6th January, 2012.





On 26 April 2016, the Devolution Cabinet Secretary Mwangi Kiunjuri stated that the government has spent 17 billion shillings on IDPs. These funds were used to provide aid to approximately 193,000 IDPs¹. Deputy President Ruto has announced that the government has spent KES 17.5 billion on 28,924 IDP households since 2008². The government has been working closely with National Coordination Consultative Committee on IDPs (NCCC), in order to verify that the individuals receiving the funds are in fact IDPs. In December of 2016 the chairman of NCCC announced that the government had compensated all 19,000 individuals who had lived in the 80 different camps and now the government was shifting its focus on the 90,000 “integrated IDPs” – that is the people who following the PEV fled to urban and peri-urban areas, where they found shelter with host communities or rented accommodation – for which it had 6 billion shillings set aside³. The initial projections on how many of the displaced persons were integrated IDPs, stood at 300,000 of the over 650,000 that were displaced. Considering the government has over the years only focused on compensating IDPs who that had taken refuge in tents, it remains unclear why the government has set aside funds for only 90,000 of the 300,000 integrated IDPs.

As the government moves towards disbursing the final 6 billion shillings to the integrated IDPs, there is a large amount of turmoil regarding who qualified as an integrated IDP. On 19 April 2017, the Kenyan High Court allowed the application of the Internally Displaced Persons Support Initiative (IDPSI) and issued a temporary injunction preventing the government through the Ministry of Devolution from releasing the funds. In an affidavit on behalf of the IDPSI, Stephen Mbogwa stated that the government had not brought to light the mechanism put in place to ensure the proper beneficiaries would be compensated⁴. IDPSI sought from the government the full list of beneficiaries, in order to be assured that those on the list were IDPs and they actually received the funds as promised by the government.

Though the injunction was meant to force the government into being transparent it has not had that effect. The injunction was raised against the Principal Secretary Ministry of Devolution and Planning, Principal Secretary Ministry of Interior and Co-ordination of National Government and the Attorney General, but it has not stopped the President from dispersing these funds to different communities while on the campaign trail. On 6 June 2017 President Kenyatta presented the 7,000 IDPs in Kisii county with a cheque for KES 358 million⁵. The following day he presented the 9,000 IDPs in Nyamira County with a cheque for KES 470 million⁶. It is unclear where these funds are being drawn from, if not from the 6 billion shillings set aside for the integrated IDPs. Not only would these actions seem to violate the injunction of the high court, but it would also seem to be the President is using the government assistance programme as an inducement for votes in the upcoming 2017 elections⁷.

1. Kajilwa, “Government Has Spent Sh17b on IDPs, Says CS Mwangi Kiunjuri.” *The Standard*, 24 April 2016, available at <https://www.standardmedia.co.ke/article/2000199481/government-has-spent-sh17b-on-idps-says-cs-mwangi-kiunjuri> accessed 08 June 2017
2. Dpps, “Government to Resettle All Remaining IDPs by Monday.” *The Standard*. *The Standard*, 04 February 2016, available at <https://www.standardmedia.co.ke/article/2000190529/government-to-resettle-all-remaining-idps-by-monday> accessed 08 June 2017
3. Openda and Adisa, “Govt to Use Sh6bn to Resettle Integrated IDPs.” *Daily Nation*, 20 December 2016. available at <http://www.nation.co.ke/counties/nakuru/resettle-integrated-IDPs/1183314-3492226-34drxf/index.html> accessed 08 June 2017
4. Chepkwony, “Court Stops Disbursement of Sh6 Billion to IDPs.” *The Standard*, 19 April 2017, available at <https://www.standardmedia.co.ke/article/2001236966/court-stops-disbursement-of-sh6-billion-to-idps> See also Openda, “Court Stops Compensation of Sh 6bn to IDPs.” *Nairobi News.*, 18 April 2017, available at <http://nairobi.news.nation.co.ke/news/court-stops-compensation-idps/> accessed 08 June 2017
5. Nyarangi and Abuga, “President Uhuru Woos Gusii Voters with Sh358 Million IDPs Compensation.” *The Standard*, 07 June 2017, available at <https://www.standardmedia.co.ke/article/2001242491/president-uhuru-woos-gusii-voters-with-sh358-million-idps-compensation> accessed 08 June 2017
6. Okuoro, and Asamba, “Uhuru Issues Sh470 Million to 9,000 IDPs in Nyamira.” *The Standard*, 07 June 2017, available at <https://www.standardmedia.co.ke/article/2001242597/uhuru-issues-sh470-million-to-9-000-idps-in-nyamira> accessed 08 June 2017
7. Both Nyamira and Kisii Counties are located within Nyanza province which is largely viewed as a strong support base for the political opposition. In the 2013 elections however, President Kenyatta received 29% and 27.6% of the valid votes cast in Nyamira and Kisii counties respectively. The President seems to recognize that he can grow his support base by endearing himself to the citizens of that region. See the National Summary and voting information by county accessed at <http://psephos.adam-carr.net/countries/k/kenya/kenya2013.txt> accessed 8 June 2017





While IDPs have had greater success at receiving reparations from the Kenyan Government, it seems that the disbursement of funds has lacked proper oversight and is plagued by political interference.

Reparations and Assistance by the ICC Trust Fund for Victims

The Trust Fund for Victims (TFV) is mandated to provide assistance and reparations to victims of serious violations in ICC situation countries. Regarding its assistance mandate only, the intervention of the Trust Fund is not tied to the successful completion of the cases instituted by the Court. Since the opening of the Cases in Kenya the TFV has continually promised to conduct an assessment in Kenya, before initiating the much needed assistance to the victims. Unfortunately, the promises did not materialize during the life of the ICC cases, and despite follow-up by civil society in June 2016, no action has been forthcoming from the TFV.

In July 2016, following the termination of the proceedings against William Ruto and Joshua Sang, the ICC trial chamber declined to consider a request by victims who had been admitted to participate in the case to determine if the Kenya government should provide the victims with reparations or in the alternative order the Trust Fund for Victims to provide them with assistance and reparations. The reasoning of the majority of the chamber was that because the case had been closed without a conviction then the chamber could not rule on reparations. The dissenting judge opined that the chamber should have considered whether reparations principles could have applied in this case considering the circumstances of the close of the case and the fair administration of justice¹.

1. Maliti, "Judges Decline to Consider Reparation Request of Victims in Ruto and Sang Case" 15 July 2016, available at <https://www.ijmonitor.org/2016/07/judges-decline-to-consider-reparation-request-of-victims-in-ruto-and-sang-case/> accessed 02 June 2017





CONCLUSION

As the Kenyatta presidency comes to an end and Kenya enters into another electoral campaign season it is clear that the Jubilee Administration has presided over significant progress and setbacks in the Security and Justice Sectors. Much more should have been accomplished if the Jubilee administration was to live up to its promises to guarantee safety to the people of Kenya, ensure good governance and respect for the law and provide leadership that is accountable to the people¹. There is concern regarding the state of security sector reforms.

Their use of digital surveillance has been broad, insufficiently regulated and used to violate people's rights. There is an increasing concern regarding the use of extra judicial killings and there is uncertainty whether the NPS will cooperate with IPOA in the long run. Within the security sector there are also concerns regarding the KDF, their continued abuses of human rights, and their potential role during any unrest in the upcoming elections. Finally, the Jubilee Coalition has left much to be desired during their treatment of victims of violations. Regardless of the election outcome in August 2017, the next administration needs to secure greater protections for human rights for the people of Kenya.

This report comes at a time when the country is preparing to go to a general election that presents two possibilities for the future leadership of the country. The first possibility is that the Jubilee administration will be re-elected to serve a second five-year term. With this outcome, if the leadership of Jubilee approaches their second mandate as one of building a legacy, then it is likely that it could depart from its approach in the first term where it has avoided to take significant action to stem impunity and instead enhance spaces for collaboration with different actors to increase accountability of the governance institutions and to safeguard the integrity of its leadership. Conversely, the Jubilee administration if elected for a second term, could return more emboldened to claw back and disregard fundamental constitutional principles and fundamental rights. This could lead to a minimalist approach to constitutional and legislative reforms and a spike in the state of human rights violations and disregard for the rule of law observed in its first term and documented in this report.

The second possibility is that of a win by the NASA coalition. This would herald a new administration and based on their recently launched manifesto, certain issues of interest that touch on justice and security sector reforms, such as redressing past historical injustices, are articulated as part of their priority areas. The NASA manifesto also speaks to increasing accountability and adopting good governance practices to curb the current indifference towards due process and the rule of law. This possibility presents a strong platform from which a NASA government can be engaged in its initial months of leadership for the implementation of some of the recommendations this report articulates.

In all these scenarios, there is opportunity to illuminate key priorities in the security and justice sectors that can facilitate constructive engagement with the incoming administration as well as lay the foundation for holding it accountable over the next five years. It is therefore on the basis of these scenarios and possible outcomes in the August 2017 elections that FIDH and KHRC make the following recommendations.

1. Jubilee 2013 Manifesto





RECOMMENDATIONS

From the developments highlighted that have been particularly influential in defining and influencing the changing character of the security and justice sector, both because of changes in governance as well as wider societal change, FIDH and KHRC make the following recommendations to the stakeholders identified below on how some of the challenges and lapses affecting the integrity of security sector governance and the fair administration of justice can be addressed.

RECOMMENDATIONS ON THE SECURITY SECTOR

FIDH and KHRC urge the **Government to:**

- Undertake an audit on the state of security sector reforms with a pledge of political support to prioritize and fast-track the pending security sector reforms;
- Ensure that there is accountability of the security agents involved in violation of human rights and failure to respect the rule of law. Where possible, individual responsibility, whether civil or criminal, must be pursued;
- Constitute a Judicial Commission of Inquiry on Extrajudicial Killings and Executions in Kenya;
- Address the drivers of insecurity in the Country. The KNCHR Audit notes the key drivers of insecurity in Kenya as being- the massive youth unemployment, poor working conditions and terms of service for the police officers, corruption;
- Undertake to protect the Kenyan people from violence by taking appropriate preventative action and responsive action in case violence occurs pre, during and post the August 2017 elections;
- Explicitly and unequivocally repudiate shoot-to-kill orders and undue use of force in policing of protests with a guarantee of prosecuting officers found culpable;
- Actively uphold the rights of its citizens and respect the fundamental freedoms enshrined in the Constitution.

FIDH and KHRC urge **Security Enforcement Agencies to:**

- Embrace a human rights culture and be encouraged to respect, protect and promote human rights for all by adopting human rights based practices in their various operations;
- Design human rights based crowd management strategies during protests and demonstrations and in particular align the provisions on public order management in the NPS standing orders with the African Commission on Human and Peoples Rights's Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa. The security agents should be mandatorily trained on international standards of public order management. The NPS should publicize its guidelines on public order management and policing assemblies, in consultation with stakeholders, should develop and adopt guidelines for policing and management of protests and public gatherings;
- Avoid use of force at all costs and should not be the standard modus operandi for crowd control and management. Further any use of force, if necessary and indispensable, should be informed by proper intelligence and security analysis and mapping and should be graduated based on the different contexts. Force should only be used to subdue and not to inflict injury, harm or loss of life. Further the use and deployment of all weapons, lethal and non-lethal, should be accounted for after every security operation to enhance individual and corporate accountability;
- Ensure the necessary approvals for Security operations by the National Police Service as well as joint operation with the Kenya Defence Forces in the context of elections are approved by the National Assembly.



FIDH and KHRC urge **the National Police Service and the National Police Service Commission to:**

- Ensure that the welfare of the security officers and more so that of the police officers are addressed in a holistic manner. Reports have documented the negative effects of a demoralized and neglected force on the respect of the rule of law. Furthermore, the rights of police officers particularly as relates to dignity, fair labour practices including fair wages and remuneration and adequate housing need to be ensured. The government should ensure improved conditions of service for the police officers including better housing, better remuneration and better terms of service;
- Operationalize the Community Policing Act and clear command structures- have one chain of command to enhance accountability which is difficult where you have multiple chains of command;
- Include in the vetting of police officers and security agents an aspect of respect for human rights and conduct the process in a more transparent and objective manner that encourages public participation;
- Ensure that the vetting process is clear, the evidentiary threshold and procedures to be followed are explained to the officers and a waiver signed before the vetting process in order to avoid the abuse of judicial process to avoid or defeat the outcome of the vetting. Additionally, other state and non-state actors especially within the Police Reforms Working Group should engage the members of the public through public forums to collect information that could assist the NPSC in the vetting process and also offer technical support to the Commission;
- Adopt clear policies on consultation and decision making procedures and processes, particularly for NPSC;
- Ensure the policing of protests is guided by the need to provide security to the protesters exercising their constitutional rights, as opposed to using force to quell protests;
- Take stern action against security officers who use excessive force against peaceful protesters.

FIDH and KHRC urge **the IEBC and NPS to:**

- Hold security briefings with all the political aspirants and sensitize them on what security measures are available to them and how to access them;
- Use the security briefings to gather intelligence and understand the security challenges that the candidates are facing in their respective localities.





RECOMMENDATIONS ON THE JUSTICE SECTOR

FIDH and KHRC urge **the Government to:**

- Provide leadership in ensuring that the principles of the rule of law and independence of the judiciary are respected in managing the tensions between the three arms of government;
- Ensure the Judiciary is provided with adequate resources for the efficient and effective support of its functions;
- Genuinely support the adoption of the TJRC report, so as to allow for a comprehensive and deliberate implementation of its recommendations and in the interim to avoid discriminatory and piecemeal implementation of the recommendations which disenfranchises some of the victims;
- Accord all categories of victim's equal recognition and provide measures of redressing even those whose violations are not easily visible, such as Sexual Violence victims. This should lead to a comprehensive and transparent process for identification and profiling of victims for future reparation programmes;
- Continuously review 2007/8 post-election violence case files in their possession and to initiate genuine efforts to bring accountability for mid-level and lower level perpetrators as well as offering effective remedies and compensation to the victims;
- Institute a comprehensive an audit of the IDP resettlement programme thus far and its findings made publicly available.

FIDH and KHRC urge **the Parliament to:**

- Exercise its responsibility in the budgeting process transparently and with integrity, by ensuring that the budget cuts for allocations made to the Judiciary are not motivated by personal vendetta against decisions of the judiciary;
- Exercise its responsibility to hold the judiciary to account on behalf of the citizens that it represents with caution. The motive of such exercise of power should be limited to discussions that do not touch on individual decisions by judges;
- Prioritize and not undermine the process of adopting laws that are crucial in the implementation of the 2010 Constitution;
- Adopt the TJRC report and an implementation framework without further delay.

FIDH and KHRC urge **the Judiciary to:**

- Ensure it continues to account to its main stakeholder – the public on actions taken that facilitate access to justice;
- Reassess the efficacy of the reforms undertaken under the implementation of the JTF, drawing from lessons learnt from the failures and fault lines;

FIDH and KHRC urge **the ICC Trust Fund for Victims to:**

- Conduct its long overdue assessment of victims needs in Kenya so that it can decide on whether to initiate assistance to the victims of the PEV.

FIDH and KHRC urge **the ICC Assembly of State Parties to:**

- Based on its 2016 omnibus resolution expressing concerns by reports of threats and intimidation directed at some civil society organizations, to remain seized of this situation and develop an internal mechanism to respond to these threats and intimidation, in particular when committed during its sessions.





GENERAL AND CROSSCUTTING RECOMMENDATIONS

- Inter-agency collaboration across the board needs to be enhanced and encouraged within the security and justice sectors. Institutions must not work at cross-purposes but aim to complement each other in order to effectively deliver reforms in the Country.
- There should be an independent forensic audit of the police vetting process to be conducted independently (by legal and financial firms) to establish the number of vetted cases, the reasons for reinstatement, the process, the reasons for removal.

FIDH and KHRC urge **Constitutional Commissions and Independent Offices to:**

- Sustain and continue vigilance and advocacy for the implementation of the various laws and regulations that have an effect on improved service delivery, professionalism and improved accountability;
- Enhance inter-agency collaboration and harness synergies towards improved delivery on the specific mandates.

FIDH and KHRC urge **NGO's to:**

- Due care and consideration should be given to proper planning, conduct and management of public protests and gatherings. Organizers of public protests and gatherings must properly brief the participants of the due process, expectations and code of conduct, which must include personal security and responsibility;
- Invest in partnering with the relevant bodies to offer capacity building to security agencies with a focus on aspects of accountability, oversight, professionalism, service delivery and human rights and respect for the rule of law. In the same breath, CSOs should offer constructive criticism on these aspects;
- Consolidate efforts where there are similar mandates and avoid over-stretching and causing fatigue to the victims. NGOs should also adopt a multi-disciplinary approach to the pursuit for justice as demonstrated in the SGBV case;
- Offer technical support and capacity enhancement to grassroots human rights defenders and organizations such as Mathare Social Justice Center on documentation of human rights violations and pursuit of justice and accountability for these violations.

FIDH and KHRC urge **the Development Partners/ Donors to:**

- Implore the Government to uphold constitutionalism and respect for human rights with respect to its various national and international obligations on matters of security and justice;
- Consider pegging funding to government agencies on the basis of demonstrating the respect, promotion and fulfilment of human right;
- Support preventive/ response measures and support NGOs working on sexual and gender based violence. Further, development partners should allow for flexibility in their funding and allow a budget for security within the human rights sector to allow for rapid response;
- Support organizations working towards justice and accountability, and good governance. Donors should not be dissuaded by political rhetoric from those occupying the highest levels of public office and would therefore prefer limited scrutiny and transparency.





Kenyan policemen beat a protester during clashes in Nairobi, Kenya; May 16, 2016



The Kenya Human Rights Commission (KHRC) was founded in 1992 and registered in Kenya in 1994 as a national level Non-Governmental Organisation (NGO). Throughout its existence, the core agenda of the Commission has been campaigning for the entrenchment of a human rights and democratic culture in Kenya through monitoring, documenting and publicising rights violations.

The KHRC also works at community level with 27 human rights networks (HURINETS) across Kenya. We link community, national and international human rights concerns. KHRC's strategic plan aims to 'Secure civic-driven, accountable and human rights centred governance. Its founders and staff are among the foremost leaders and activists in struggles for human rights and democratic reforms in Kenya.

KENYA HUMAN RIGHTS COMMISSION

Gitanga Road opp. Valley Arcade Shopping Center,
P.O Box 41079-00100, Nairobi, Kenya
Tel: +254-20 2044545 / Tel: +254-20 2106709
Tel: +254-20 3874998
Fax: +254-20 3874997
Email: admin@khrc.or.ke
Website: <http://www.khrc.or.ke>



This publication has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of FIDH and can in no way be taken to reflect the views of the European Union.



Keep your eyes open

fidh

Director of publication:

Dimitris Christopoulos

Editor:

Antoine Bernard

Coordination :

Andrew Songa,
Tchérina Jérôlon

Authors:

Esther Waweru,
Stella Ndirangu

Design :

FIDH

Establishing the facts - Investigative and trial observation missions

Supporting civil society - Training and exchanges

Mobilising the international community - Advocacy before intergovernmental bodies

Informing et reporting - Mobilising public opinion

For FIDH, transforming societies relies on the work of local actors

The Worldwide movement for human rights acts at national, regional and international levels in support of its member and partner organisations to address human rights abuses and consolidate democratic processes. Its work is directed at States and those in power, such as armed opposition groups and multinational corporations.

Its primary beneficiaries are national human rights organisations who are members of the Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

fidh

CONTACT US

FIDH

International Federation for Human Rights

17, passage de la Main d'Or

75011 Paris

Tel: (33-1) 43 55 25 18

www.fidh.org

Twitter: @fidh_en / fidh_fr / fidh_es

Facebook: [https://www.facebook.com/](https://www.facebook.com/FIDH.HumanRights/)

FIDH.HumanRights/





FIDH is
an international
human rights NGO
federating **184** organisations
from **112** countries



fidh



ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 184 member organisations in 112 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

www.fidh.org

