

KENYA

WANING
ACCOUNTABILITY FOR
JUSTICE AND HUMAN
RIGHTS

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INTRODUCTION

In May 2010 when Kenya presented its first National Report for the Universal Periodic Review (UPR), it had just embarked on a legal and institutional reform process to address the immediate and long-term causes of the 2007/2008 post-election violence (PEV). A new Constitution with a comprehensive bill of rights is now in place, new institutions with the mandate to promote and protect human rights have been established, a relatively peaceful general election was conducted in March 2013, and key institutions such as the judiciary and the police are implementing reform initiatives, including vetting of police officers.

Despite these positive developments, Amnesty International remains concerned that the situation of human rights in Kenya has not substantively improved and has even deteriorated in some instances. Since the first UPR, the security forces have continued to engage in serious human rights violations, including unlawful killings and enforced disappearances, especially in the context of counter-terrorism operations. Somali refugees and asylum-seekers have predominantly borne the impact of counter-terrorism operations. Most victims of the post-election violence have neither received justice nor reparation six years after they suffered violations. Despite the inclusion of justiciable socio-economic rights in the new Constitution, the enjoyment of these rights by the poor remains elusive. Forced evictions from slums continue to be carried out in contravention of the Constitution and relevant international human rights standards.

FOLLOW UP TO THE PREVIOUS REVIEW

During its first UPR, Kenya accepted most of the recommendations made to it by other states, including relating to torture and other ill-treatment, police reform, and international justice. Although the government has put considerable efforts to implement several recommendations relating to these issues, gaps still remain.

TORTURE AND OTHER ILL-TREATMENT

The recommendations related to torture and ill-treatment included calls for the ratification of the Optional Protocol to the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹ to eradicate the use of torture and ill-treatment by public officials and to punish those responsible,² and to include in national legislation a definition of torture in line with Article 1 of the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³ Amnesty International is not aware of any action towards ratification of its Optional Protocol. The 2010 Constitution provides for the non-derogable right to freedom from torture. Torture is also prohibited in several pieces of legislation.⁴ However, no law currently provides for the definition of torture. The Prevention of Torture Bill, which proposes a definition of torture, has been in the legislative pipeline since 2010.

Torture is still an issue in Kenya.⁵ According to Amnesty International's global survey on attitudes to torture, more than half of the Kenyan public is not confident that they would be safe from torture if taken into custody.⁶ The majority agree that clear rules are needed to eradicate torture.⁷

POLICE REFORM

Kenya accepted recommendations to implement reform of the police,⁸ to provide human rights education for police and prison staff,⁹ to investigate human rights violations committed by police,¹⁰ and to establish an independent police oversight authority.¹¹ Implementation of these recommendations is on-going although challenges exist. The 2010 Constitution requires the police to be professional, to prevent corruption, to promote transparency and accountability, and to apply these principles in practice.¹² New legislation bringing the Kenya Police and the Administration Police under one command structure was enacted in August 2011.¹³ A National Police Service Commission (NPSC), mandated to oversee recruitment and appointment of police officers, was established in October 2012.

In December 2013, the NPSC commenced the vetting of police officers. As of May 2014, 196 police officers have been vetted.¹⁴ The vetting process has faced many challenges, including its temporary suspension due to lack of finances, successful legal suits against the process, and the withdrawal of some of the members of the vetting panel. The process has been criticized for failing to clean up the police service. According to a survey by Usalama Reforms Forum, many Kenyans have lost confidence in the vetting process.¹⁵

Kenya established the Independent Policing Oversight Authority (IPOA) in May 2012. However, since its establishment, it has only published the results of its investigations in one case.¹⁶ Though it takes time to build an institution, frustration is beginning to mount over the slow pace of the implementation of the IPOA's mandate.

INTERNATIONAL JUSTICE

Kenya committed to a range of recommendations to end impunity for the perpetrators of the post-election violence,¹⁷ to cooperate fully with the International Criminal Court,¹⁸ and to provide protection of witnesses.¹⁹ As will be discussed in detail below, Kenya has reneged on all of these commitments.

THE NATIONAL HUMAN RIGHTS FRAMEWORK

Amnesty International welcomes Kenya's adoption of a new Constitution containing a comprehensive bill of rights. Under the new Constitution, conventions ratified by Kenya are automatically part of the country's laws,²⁰ although jurisprudence from the courts on this issue has varied. The interpretation and enforcement of human rights is entrusted to the courts while three constitutional commissions are charged with the promotion and protection of human rights and access to justice by all.²¹

While the Constitution has created an appropriate normative and institutional framework, inconsistent policy and practice prevail. The government continues to disregard court rulings on human rights and its support for the work of national human rights institutions is inadequate.

PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

VIOLATIONS IN THE CONTEXT OF COUNTER-TERRORISM

Since 2010, Amnesty International has continued to receive reports of police abuse. Most of these violations have occurred in the context of Kenya's counter-terrorism operations, led by the Anti-Terrorism Police Unit (ATPU).

In July 2010, following a bomb explosion in Kampala, Uganda, the ATPU arbitrarily detained at least six people who were later the subject of rendition to Uganda.²² The renditions were subsequently declared unconstitutional by the Kenyan High Court.²³

In November 2012, a counter-terrorism operation in Mombasa resulted in ill-treatment and arbitrary detention of several suspects who were later released for lack of evidence to sustain charges against them.²⁴ In February 2014, the police conducted an operation in a mosque in Mombasa during which it is reported that seven people were shot dead while 129 were arrested.²⁵ Those arrested were later released without charge. One man who was last seen in police custody has since disappeared. From around April

2012, several other individuals suspected of engaging in terrorism activities, including Sheikh Aboud Rogo and Abubakar Sharrif “Makaburi”, have been shot dead in what appears to have been extra-judicial killings by the security forces.²⁶

Members of the Somali community in Kenya, particularly refugees, have been disproportionately impacted by counter-terrorism operations in Kenya.²⁷ Since early April 2014, thousands of Somalis have been subjected to arbitrary arrest, harassment, extortion and ill-treatment in the context of the counter-terror operation known as “Usalama Watch”. Over five thousand individuals have been relocated to refugee camps in the north of Kenya and hundreds of others have been deported back to Somalia.

Prior to the April 2014 crackdown on Somali refugees, a tripartite agreement was signed in November 2013 between the governments of Kenya and Somalia and UNHCR, establishing a framework for the voluntary repatriation of Somali refugees over a three year timeframe. Research conducted by Amnesty International indicates that most Somali refugees were deciding to return as a result of negative ‘push’ factors in Kenya rather than positive ‘pull’ factors in Somalia. Such returns do not qualify as voluntary and may violate the principle of *non-refoulement*.

FORCED EVICTIONS

Forced evictions from slums and other informal settlements continue to be carried out in Nairobi,²⁸ in contravention of both Kenya’s Constitution and its international human rights obligations,²⁹ and despite recent commitments to end forced evictions.³⁰

On 10 May 2013, approximately 400 households residing in City Carton, an informal settlement near Nairobi’s Wilson Airport, were forcibly evicted without prior consultation or adequate notice.³¹ The residents were woken up between 4am and 5am by groups of men armed with crowbars, sledgehammers and machetes, who set about demolishing and looting homes in the presence of 170 police officers who had surrounded the area. Although the police did not participate directly in the demolition, they used tear gas and fired live ammunition when the residents tried to resist the eviction. Many people suffered physical injuries during the eviction. Subsequently, the government has failed to take any action to address the situation or to meet the immediate needs of the families who are now living in make-shift shelters beside their demolished homes. As a result, the community continues to suffer violations of other economic and social rights, including their rights to water and sanitation, to education, and to their ability to earn a living.

A government plan to build a bypass known as “Missing Link 15B”, which will cut through Deep Sea, an informal settlement in the Westlands area of Nairobi, has put about 3000 residents at risk of imminent eviction.³² There have been indications of the road construction project, and possible evictions, since 2009, and the authorities responsible for implementing the project – the Kenya Urban Roads Authority (KURA) - have had some engagement with Deep Sea residents, including a public meeting in July 2012 and an enumeration exercise later that year. However, KURA has failed to share vital information with the residents, such as the Resettlement Action Plan, and has not engaged in genuine consultation with the community about alternatives to eviction. Amnesty International is concerned that residents of Deep Sea could be at risk of forced eviction.

JUSTICE AND REPARATIONS FOR THE 2007-2008 POST-ELECTION VIOLENCE

The 2007-2008 post-election violence resulted in the deaths of more than 1,100 people while an estimated 660,000 people were displaced from their homes.³³ Six years later, most of the victims are yet to receive justice or reparation. The government continues to fail to conduct thorough and effective investigations into crimes under international law, including crimes against humanity, committed during the post-election violence and to prosecute those suspected of committing these crimes. It has also ignored calls to establish a comprehensive reparations program to address the harm suffered by the victims. Furthermore, the government is seeking to undermine and stop the International Criminal Court’s (ICC) cases against three Kenyans accused of masterminding the post-election violence: President Uhuru Kenyatta, Deputy President William Ruto and former journalist Joshua Arap Sang.

In February 2014, the Director of Public Prosecutions (DPP) announced that a review by a multi-agency task force of more than 4,000 post-election investigation files had failed to identify any prosecutable cases due to lack of evidence, while others had already been investigated and prosecuted as 'ordinary' crimes.³⁴ However, Amnesty International's research has revealed that many victims and witnesses have been discouraged or prevented by the police from submitting complaints.³⁵ Discussions are continuing towards establishing an International Crimes Division of the High Court, which may prosecute some cases relating to the post-election violence. However, the DPP has stated that the opportunity to create an International Crimes Division to try such cases "was long lost when Parliament rejected the Special Tribunal Bill" in 2009.³⁶ The International Crimes Act currently limits national courts to prosecuting crimes against humanity committed after 1 January 2009, requiring that such crimes committed during the post-election violence be prosecuted as ordinary crimes under domestic law.³⁷

The Truth, Justice and Reconciliation Commission (TJRC), established in 2009 to investigate gross violations of human rights committed in Kenya between December 1963 and February 2008, issued its report in May 2013.³⁸ The report contains lists of individuals the Commission has recommended for prosecution, including relating to the 2007/2008 post-election violence, as well as a framework for a reparations program. However, the recommendations of the Commission have not been acted upon.

In December 2013, the National Assembly amended the Truth, Justice and Reconciliation Act requiring that parliament must consider the report and that it would only be implemented thereafter "in accordance with recommendations of the National Assembly."³⁹ It also amended the law so that the Minister can establish an implementing mechanism based on the recommendations of the National Assembly.⁴⁰ More than six months after the amendments to the Act and a year since the publication of the report, parliament has yet to take steps to consider it, raising concern regarding its willingness to do so. Amnesty International is also concerned that, if it does so, parliament may use the new powers it has granted itself and the Minister to undermine the implementation of key recommendations relating to justice and reparations.

During its first UPR, Kenya stated that "commitment to cooperating with the International Criminal Court was not a favour, but an obligation under the International Crimes Act".⁴¹ However, since the election of President Uhuru Kenyatta and Deputy President William Ruto, the government has initiated or supported political initiatives to undermine the work of the ICC and to stop the ICC trials. In May 2013, a Kenyan official called on the UN Security Council to "terminate" the cases.⁴² The government has also supported calls by the African Union to the Security Council to defer the prosecutions, as well as African Union decisions to promote non-cooperation with the ICC.⁴³ It has also proposed amendments to the Rome Statute seeking to preclude the ICC from prosecuting sitting heads of state.⁴⁴ Furthermore, in September 2013, the National Assembly passed a resolution asking the government to withdraw from the Rome Statute and to repeal the International Crimes Act.

The trial of the Kenyan President is currently adjourned until 7 October 2014 because of witnesses withdrawing and delays by the government in providing records requested by the ICC Office of the Prosecutor.⁴⁵ Risks relating to witnesses, including intimidation and interference with obtaining their testimony, have emerged as a significant challenge to the ICC proceedings in Kenya.

RECOMMENDATIONS FOR ACTION BY THE STATE UNDER REVIEW

Amnesty International calls on the government of Kenya to:

Violations in the context of counter-terrorism

- Immediately investigate all reports of abuses by the state security forces carried out during “Operation Usalama Watch”, and to bring to justice any member of security forces suspected of committing a criminal offense;
- Immediately halt all forcible relocations of refugees to camps and forcible returns to Somalia;
- Guarantee that all people detained are ensured due process rights, including access to a lawyer of their own choice, and being brought promptly before a judge, in line with Kenyan and international law.

Forced evictions

- Adopt a moratorium on forced evictions until adequate legal and procedural safeguards are in place to ensure that all evictions comply with international human rights standards;
- Expedite the enactment of the Evictions and Resettlement Bill into law and ensure that the bill complies with international human rights standards on housing and evictions;
- Develop comprehensive guidelines for officials in charge of carrying out evictions based on the UN Basic Principles and Guidelines on Development-based Evictions and Displacement and other international human rights standards;
- Initiate an independent and impartial investigation into police involvement in and conduct during the City Carton forced evictions on 10 May 2013;
- Immediately provide all necessary support and assistance to all those who have been subject to forced evictions, including adequate temporary housing, water and sanitation while ensuring effective remedy and reparations;
- Engage in a meaningful dialogue with Deep Sea residents and to provide full and accurate information on the timeline for the road construction project, the number of persons affected, and the proposed plans to minimize displacement and mitigate the impact on disadvantaged groups.

Accountability for 2007-2008 post-election violence

- Conduct thorough and effective investigations into all allegations of crimes under international law committed during the post-election violence and, where sufficient admissible evidence exists, to prosecute those suspected of the crimes before national courts;
- Amend the International Crimes Act so that national courts can prosecute crimes against humanity committed during the post-election violence as such crimes;
- Ensure that parliament promptly considers the report of the Truth, Justice and Reconciliation Commission and that efforts to implement its recommendations to ensure justice and reparations for victims are not undermined by political interference;
- Establish a comprehensive reparation program to ensure full and effective reparation for victims of the post-election violence, including taking into account the recommendations of the Truth, Justice and Reconciliation Commission on reparation;
- Cooperate fully with the International Criminal Court, including on the protection of victims and witnesses and by supplying records and other evidence requested by the Court;

- End political attacks against the International Criminal Court, including by opposing African Union calls for non-cooperation with the Court and amendments that seek to undermine it;
- Remain a state party to the Rome Statute and to oppose efforts to repeal the International Crimes Act.

ENDNOTES

- ¹ Report of the Working Group on the Universal Periodic Review of Kenya, A/HRC/15/8, paragraph 101.3 (Denmark).
- ² Ibid, paragraph 101.46 (Denmark).
- ³ Ibid, paragraph 102.12 (Czech Republic).
- ⁴ National Police Service Act, section 95; Chief's Authority Act (Cap 28); Children's Act (2001).
- ⁵ World Organization Against Torture, *Kenya: Torture reforms must tackle implementation gap and end impunity*, 5 October 2013, available at <http://www.omct.org/monitoring-protection-mechanisms/statements/kenya/2013/10/d22401/> (accessed on 14 July 2014).
- ⁶ Amnesty International, *Stop governments torturing: Global perspectives on torture*, April 2014.
- ⁷ Ibid.
- ⁸ A/HRC/15/8, paragraphs 101.6 (Zimbabwe), 101.20-22 (USA, Netherlands, France)
- ⁹ Ibid, paragraph 101.33-34 (Finland, Czech Republic)
- ¹⁰ Ibid, paragraph 101.43-44 (France, UK), 101.72-73 (Spain, Austria)
- ¹¹ Ibid, paragraph 101.15 (UK)
- ¹² Constitution of Kenya, 2010, Art. 244
- ¹³ National Police Service Act.
- ¹⁴ "Statement by Chairman Johnston Kavuludi during the release of SACPs and ACPs vetting results", available at www.npsc.go.ke/index.php/trendy-scroll-news/121-statement-by-the-chairman-johnston-kavuludi-during-the-release-of-sacps-acps-vetting-results (accessed on 9 June 2014).
- ¹⁵ "Police vetting has failed to restore trust", available at www.nation.co.ke/news/Police-vetting-has-failed-to-restore-trust/-/1056/2328650/-/wtjsqz/-/index.html (accesses 26 August 2014).
- ¹⁶ "Charges against OCS Pangani police station", available at www.ipoa.go.ke/ipoa-media/press-releases/205-oversight-authority-releases-report-on-policing-standards-and-gaps-8.html (accessed on 9 June 2014).
- ¹⁷ A/HRC/15/8, paragraph 101.75 (Netherlands)
- ¹⁸ Ibid, paragraph 101.77-83 (Austria, Finland, Republic of Korea, Ireland, Australia, Norway, Portugal).
- ¹⁹ Ibid, paragraphs 101.65-69 (USA, Netherlands, Japan, UK, Austria). 101.88 (Sweden).
- ²⁰ Constitution of Kenya (2010), Article 2(5) & (6).
- ²¹ The three commissions are: Kenya National Commission on Human Rights; National Gender and Equality Commission; and the Commission on Administrative Justice.
- ²² See Open Society Justice Initiative & MUHURI, "We're tired of taking you to the court: Human rights abuses by Kenya's anti-terrorism police unit" (2013).
- ²³ Zuhura Suleiman v. Commissioner of Police and three others, High Court at Nairobi, Misc. App. 441 of 2010; Mohamed Aktar Kana v Attorney General, High Court at Nairobi, Const. App. 544 of 2010.
- ²⁴ See Open Society Justice Initiative & MUHURI "We're tired of taking you to the court: Human rights abuses by Kenya's anti-terrorism police unit" (2013).
- ²⁵ Ibid.
- ²⁶ Asim Qureshi, "Feeding grievances: The killing of Makaburi", available at www.aljazeera.com/indepth/opinion/2014/04/feeding-grievances-killing-mak-2014411 (accessed on 9 June 2014).
- ²⁷ Amnesty International, "Somalis are scapegoats in Kenya's counter-terror crackdown", 27 May 2014.
- ²⁸ See Amnesty International, "We are like rubbish in this country": Forced evictions in Nairobi, Kenya, 7 October 2013.
- ²⁹ International Covenant on Economic, Social and Cultural Rights, article 11; International Covenant on Civil and Political Rights, article 17.
- ³⁰ At least on two occasions in 2013, the Cabinet Secretary for Lands, Housing and Urban Development publicly stated her commitment to end forced evictions: on 10 October 2013 and 9 December 2013.
- ³¹ Amnesty International, "We are like rubbish in this country": Forced evictions in Nairobi, Kenya, 7 October 2013.
- ³² Ibid.
- ³³ See Republic of Kenya, *Report of the Commission of Inquiry into the Post-Election Violence* (2008). See also *Kenya National Commission on Human Rights, On the brink of the precipice: A human rights account of Kenya's post-2007 election violence* (August 2008).
- ³⁴ Capital Reporter, "Stakeholders reach consensus on proposed ICD Court", Capital FM news, 9 February 2014, available at: <http://www.capitalfm.co.ke/news/2014/02/stakeholders-reach-consensus-on-proposed-icd-court/> (accessed on 20 August 2014).
- ³⁵ Amnesty International, *Crying for justice: Victims' perspectives on justice for the post-election violence in Kenya* (15 July 2014).
- ³⁶ Sam Kiplagat, "Most PEV cases cannot be prosecuted – Tobiko", The Star, 6 February 2014, available at:

<http://www.the-star.co.ke/news/article-153986/most-pev-cases-cannot-be-prosecuted-tobiko> (accessed on 20 August 2014).

³⁷ International Crimes Act.

³⁸ See Republic of Kenya, *Report of the Truth, Justice and Reconciliation Commission* (May 2013). For a summary of the report see <http://www.acordinternational.org/silo/files/kenya-tjrc-summary-report-aug-2013.pdf> (accessed on 14 July 2014).

³⁹ See Truth, Justice and Reconciliation (Amendment) Act (No. 44 of 2013) available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/TruthJusticeandReconciliation_Amendment_Act2013.pdf (accessed on 13 July 2013).

⁴⁰ The Truth, Justice and Reconciliation Act had previously required that the mechanism should be established in accordance with the recommendations of the Commission.

⁴¹ A/HRC/15/8, paragraph 100.

⁴² Reuters, "Kenya asks U.N. Security Council to end Hague Case against President", 9 May 2013, available at <http://www.reuters.com/article/2013/05/10/us-kenya-icc-un-idUSBRE94900T20130510> (accessed on 26 August 2014).

⁴³ Decision on Africa's Relationship with the International Criminal Court, EXT/Assembly/AU/Dec.1 (Oct 2013), para. 10(xi), the African Union decided that Uhuru Kenyatta will not appear before the ICC "until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC."

⁴⁴ Available at: <https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf> (accessed on 20 August 2014).

⁴⁵ The adjournment was granted in order to allow the Kenyan government to respond to a request made by the Prosecutor in April 2012 for the financial records of the accused – which in November 2013 she alleged in a non-compliance filing that the Kenyan Government had failed to comply with – and to allow time for further investigations, see: Prosecutor v. Uhuru Muigai Kenyatta, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09/02/11-908, 31 March 2014.

ANNEX

AMNESTY INTERNATIONAL DOCUMENTS FOR FURTHER REFERENCE¹

Somalis are scapegoats in Kenya's counter-terror crackdown, 27 May 2014 (AFR 52/003/2014)

No place like home: Returns and relocations of Somalia's displaced, 19 February 2014 (AFR 52/001/2014)

'We are like rubbish in this country': Forced evictions in Nairobi, Kenya, 7 October 2013 (AFR 32/005/2013)

Police reform in Kenya: A drop in the ocean, 30 January 2013 (AFR 32/001/2013)

From life without peace to peace without life: The treatment of Somali refugees and asylum seekers in Kenya, 8 December 2010 (AFR 32/015/2010)

Insecurity and indignity: Women's experiences in the slums of Nairobi, 7 July 2010 (AFR 32/002/2010)

¹ All of these documents are available on Amnesty International's website: <http://www.amnesty.org/en/region/kenya>