

# Addressing Human Rights Concerns from Kenya's Counter-terrorism Laws and Policies

## Country Profile Report



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# HISTORY AND POLITICAL BACKGROUND

## a. Colonial rule, independence and the post-independence years

1. In the aftermath of the partition of Africa by colonial powers, Kenya was carved out from the former British East Africa.<sup>1</sup> After briefly declaring Kenya to be a colony, the British established a protectorate in 1920. The process of forging Kenya into a colony was disruptive, as it dismantled hitherto autonomous tribal communities. The communities were subjected to military conquests, appropriation of their lands, loss of livestock, and a regime of taxation and forced labour.<sup>2</sup> By 1962, 7.5 million acres - or half the agricultural land - in Kenya had been annexed and expropriated by European settlers.<sup>3</sup>

2. In response to this exploitation, independence movements emerged, most notably the Kenya African Union (KAU) and the militant Kenya Land and Freedom Army (widely known as the 'Mau Mau'). Attacks were mounted by the Mau Mau against European settlers and perceived African collaborators.<sup>4</sup> In response, the colonial administration intermittently declared a state of emergency from 1952 to 1960. This decision led to the arrests of prominent independence movement leaders such as Jomo Kenyatta, Bildad Kagia, Ramogi Achieng Oneko, Paul Ngei, Fred Kubai and Kungu Karumba.<sup>5</sup> A Truth, Justice and Reconciliation Commission (TJRC) report submitted to the government in 2013 estimates that between 150,000-320,000 Africans were detained in Kenya during this period, with many of them enduring torture and other ill-treatment at the hands of collaborators and European settlers retained by the colonial administration.<sup>6</sup>

3. The British government eventually moved toward granting Kenya's independence by convening the Lancaster Conferences between 1960 and 1962. The main parties at the conferences were KAU's successor, the Kenya African National Union (KANU), and the Kenya African Democratic Union (KADU). KANU was dominated by the Kikuyu and Luo communities and led by Jomo Kenyatta (a Kikuyu) as president. Oginga Odinga was vice-president while Tom Mboya served as secretary general; both were of Luo descent. KADU, by contrast, was formed with the encouragement of European settlers. It drew its membership primarily from minority communities fearful of domination by the Kikuyu and Luo ethnic groups. It was led by Ronald Ngala from the coastal region as president, Daniel Arap Moi from the Kalenjin ethnic group as chair and John Keen from the Maasai tribe as secretary.

4. Elections were conducted in 1963 to usher in self-rule. KANU emerged victorious, and Kenya gained its independence on December 12, 1963, with Jomo Kenyatta as prime minister. On December 12, 1964, Kenya became a constitutional republic with Jomo Kenyatta as president and Oginga Odinga as vice-president.

5. Due to ideological differences and a quest to consolidate power, the leadership duo of Kenyatta and Odinga subsequently split. Odinga stepped down as vice-president in 1966



and left the government to form the Kenya People's Union (KPU), which was eventually banned. This ban triggered the detention of some of its members. Meanwhile, KADU was subsequently absorbed into KANU, which effectively made Kenya a one-party state.

6. The Kenyatta administration was characterised by the assassination of high-profile politicians who were considered threats to Kenyatta's hold on power. Those assassinated included Pio Gama Pinto in 1965 (who was born into a Kenyan-Asian family and was considered one of Kenya's leading journalists, politician and freedom fighter); Tom Mboya in 1969 (a leading trade unionist, Pan-Africanist and former minister of justice) and Josiah Mwangi Kariuki (a politician who was popularly referred to as JM, was a self-proclaimed socialist and held several positions in Kenyatta's administration) in 1975. Kenyatta died in office in 1978 and was succeeded by Daniel Arap Moi, his vice-president.

## **b. The Daniel Arap Moi Years: 1978-2002**

7. The Moi administration furthered the colonial legacies of unresolved land grievances and poor governance. It consolidated power through ethnically biased appointments to public offices and politicisation of the provincial administration. It was also during Moi's tenure that terrorism became a key national security concern with the 1998 attack on the United States embassy in the capital, Nairobi.

8. The Moi administration survived a failed coup attempt by a section of the Kenya Air Force in 1982 and consequently turned Kenya into a *de jure* one-party state via a constitutional amendment. Nevertheless, a strong pro-democracy movement persisted and derived impetus from the failure of the administration to deal with an economic decline, as annual per capita income from 1990 to 2002 fell from \$271 to \$239 and poverty - as measured by a person's or family's income and the minimum amount of income needed to cover basic needs - rose from 48 to 56 percent.<sup>7</sup>

9. President Moi chose Uhuru Kenyatta, son of the late Jomo Kenyatta, to succeed him as KANU leader and presidential candidate. A large section of the opposition formed the National Rainbow Coalition (NARC) and rallied behind Mwai Kibaki, a former vice-president, to be its presidential candidate. The NARC leadership also included Raila Odinga, son of the former vice-president Oginga Odinga and former secretary general of KANU, who had orchestrated a mass walkout of KANU leaders to join NARC after Uhuru Kenyatta's appointment as leader. NARC emerged victorious in the 2002 elections, with Mwai Kibaki elected as president with 62% of the total votes cast and NARC winning 125 of the available 210 seats in Parliament.<sup>8</sup>

## **c. A return to multi-party constitutional democracy**

10. The Task Force on the Establishment of a Truth, Justice and Reconciliation Commission was set up in April 2003. It gained the overwhelming support of the public with a mandate



to investigate human rights violations that occurred between 1963 and 2002. The government instituted other public inquiries into corruption such as the Goldenberg Inquiry and the Commission of Inquiry into Illegal/Irregular Allocation of Public Land, known as the Ndung'u Commission. It committed to concluding the inquiry within 100 days, a process that had stalled under President Moi.

11. President Kibaki ascended to power on a platform of improving civil service efficiency, reviving the economy by creating 500,000 new jobs, reducing corruption, reforming the judiciary, implementing constitutional reforms and to addressing past injustices. These efforts started off promisingly: the reform of the judiciary saw 82 judges in the Court of Appeal and High Court as well as magistrates suspended for a laundry list of allegations ranging from corruption to incompetence and miscarriages of justice.
12. However, the NARC agenda ground to a halt due to corruption within the administration<sup>9</sup> as well as the failure of President Kibaki to honour a pre-election Memorandum of Understanding with Raila Odinga that entailed the distribution of executive power, and in particular, the establishment of a position of prime minister.<sup>10</sup> The political fallout prevented further progress on the establishment of the TJRC and culminated in an acrimonious constitutional referendum that fractured the coalition and pitted President Kibaki, who favoured the proposed constitution, against a Raila Odinga-led faction that opposed it. The Odinga faction emerged victorious as a majority of voters rejected the proposed constitution.
13. President Kibaki ejected the Odinga-led faction from government, leading to new political realignments ahead of the 2007 elections. President Kibaki went on to seek re-election under a newly formed Party of National Unity (PNU) that would form a coalition with KANU and the then opposition leader Uhuru Kenyatta. Raila Odinga became the lead opposition candidate under the newly formed Orange Democratic Movement (ODM).
14. Election-related violence prior to the 2007 elections resulted in the displacement of a reported 470,000 persons.<sup>11</sup> This election ended in dispute and high levels of violence after President Kibaki was declared the winner on December 30, 2007, by a margin of 231,728 votes. He was sworn in for a second term that same evening. The outcome of the violence included the estimated deaths of 1,300 persons, the internal displacement of 663,921 persons and the destruction of 78,254 houses.<sup>12</sup>

#### **d. A descent into political chaos and violence**

15. The 2007 post-election violence came to an end through a mediated settlement under the auspices of the Kenya National Dialogue and Reconciliation (KNDR). The KNDR was an informal forum for dialogue and peace negotiations convened for the two main political parties in Kenya -- the Party of National Unity (PNU) and Orange Democratic Movement (ODM) -- to resolve the political impasse after the 2007 election. The process was steered by former UN Secretary General





Kofi Annan and endorsed by the African Union and was based on four agenda items: (1) an immediate end to the violence and the restoration of fundamental rights and liberties; (2) immediate measures to address the humanitarian crisis and promote reconciliation, healing and restoration; (3) overcoming the current political crisis; and (4) long-term issues and solutions.<sup>13</sup> The KNDR resulted in a national accord that established the Grand Coalition Government, with Mwai Kibaki retaining the position of president and Raila Odinga assuming the newly created position of prime minister while also appointing several ministers from his ODM party to the cabinet.

## **e. Truth, justice and reconciling a fractured nation**

16. Under Agenda Item 2, the KNDR saw the establishment of a Commission of Inquiry into the Post-Election Violence (CIPEV). This was a non-judicial body with a mandate to investigate the facts and circumstances leading to the post-election violence, examine acts of commission or omission by the state security agencies in the course of the violence and recommend legal, political or administrative measures that could bring those criminally responsible to account. Following the failure to establish a special tribunal to try suspected perpetrators of the post-election violence, the matter was taken up by the International Criminal Court (ICC). Six individuals have been charged at the ICC for crimes related to the post-election violence: Henry Kiprono Kosgey, who was at the time the chair of ODM; William Samoei Ruto, who was a senior member of ODM and cabinet minister in the Grand Coalition government; Joshua Arap Sang, who was the head of operations and host of a breakfast show at a popular radio station broadcasting in the Kalenjin vernacular; Uhuru Kenyatta, who was the head of KANU and a Deputy Prime Minister in the Grand Coalition government; Francis Muthaura, who was the head of the public service and Secretary to the Cabinet; and Mohammed Hussein Ali, who was the Commissioner of Police. However, charges would only be confirmed against 4 of these 6 suspects: William Samoei Ruto and Joshua Arap Sang in one case one, and Uhuru Muigai Kenyatta and Francis Muthaura in another.<sup>14</sup> The remaining 4 ICC accused/defendants continue to deny the charges before the ICC.

17. The Truth, Justice and Reconciliation Commission (TJRC) was established in 2009 with a broad mandate of inquiring into human rights violations, economic crimes, historical land injustices and other historical injustices from December 12, 1963 - the day Kenya secured independence from Britain - to February 28, 2008. It submitted its final report in May 2013, concluding (amongst other findings) that 'the Kenyan police and military forces have been at the center of the country's history of violations of human rights' and recommending amongst others, that the government pay damages and compensation to victims; and that 'there is need for rapid, effective and transparent implementation of the proposed police reforms, including the introduction of new operating procedures on the use of force, based on international standards.



18. The Grand Coalition government would also preside over a constitutional review process that resulted in a referendum and the promulgation of the current constitution on August 27, 2010. This development was accompanied by institutional reforms envisaged under Agenda Item 4 of the KNDR, which focused on the judiciary, the police and land.

19. The ICC cases triggered a series of political realignments ahead of the next general elections in March 2013. Uhuru Kenyatta and William Ruto, while facing prosecution at the ICC, came together and formed the Jubilee Alliance to contest the election on a joint ticket for president and deputy president. Prime Minister Odinga, along with the serving Deputy President Kalonzo Musyoka, came together to form a joint ticket under the Coalition for Reforms and Democracy (CORD).

20. The election held in March 2013 saw Uhuru Kenyatta and William Ruto elected president and deputy president respectively, after garnering 50.51% of the votes.<sup>15</sup> Odinga disputed the results and took his case before the Supreme Court. However, the Supreme Court upheld the election results.

21. Under President Kenyatta, previous covert efforts to frustrate the ICC cases escalated into overt non-cooperation with the Court, with the cases now framed as a threat to Kenya's sovereignty and a matter of peace and security.<sup>16</sup> The ICC case against President Kenyatta was withdrawn on March 13, 2015, while William Ruto and Joshua Sang had their charges vacated after a decision by the Trial

Chamber on April 5, 2016.<sup>17</sup> These developments occurred under a cloud of concerns about witness tampering, intimidation, non-cooperation and failures to execute arrest warrants,<sup>18</sup> and resulted in a finding of non-compliance by the ICC against Kenya<sup>19</sup> which led to Kenya's referral to the Assembly of States Parties (ASP) in 2016. The ASP is the legislative and management oversight body of the ICC, and it deliberates and makes decisions on issues referred to it by the Court and States Parties to the Rome Statute (the treaty establishing the ICC).

## **f. A return to some semblance of normalcy?**

22. Under the Kenyatta administration, civil society groups experienced significant backlash for their perceived involvement in facilitating the ICC cases. This alleged support for the ICC charges has been a major reason for the continued harassment of human rights NGOs, as well as the government's failure to implement the Public Benefits Organization Act (PBO Act), which would have offered some level of human rights protections for organisations. Although President Kenyatta received the TJRC report in 2013, its recommendations - particularly those on reparations - have not yet been implemented. In his March 2015 state of the nation address, President Kenyatta urged Parliament to consider the TJRC report without further delay and established a fund of 10 billion Kenyan shillings (\$9.5 million) over three years, to encourage measures he described as restorative justice; however, this pledge was never fulfilled.



23. Kenya continued to experience several attacks described as terrorism, including the Westgate Mall attack in Nairobi in which more than 60 were killed and the 2015 attack on Garissa University, in which 147 persons (mostly students) were killed. It was also during this period that the Kenyatta administration presided over the passage of the Security Laws (Amendment) Act to expand the discretionary powers of the executive - primarily the president - to combat terrorism.

24. The next elections were held in August 2017 and saw a repeat of the 2013 contest, with Uhuru Kenyatta and William Ruto heading the Jubilee Alliance and Raila Odinga and Kalonzo Musyoka as the candidates for the new National Super Alliance (NASA). Uhuru Kenyatta was declared the winner of these elections, but the Supreme Court nullified the outcome after a successful petition by Odinga, with calls for fresh presidential elections to be held.<sup>20</sup> Repeat presidential elections were held on October 26, 2017, in a tense atmosphere of protests, police brutality and killings.

25. Odinga boycotted the October elections, stating that insufficient changes had been made to address the anomalies identified in the previous election. Kenyatta won the re-run and was sworn in for a second term. The start of President Kenyatta's second term was marked by an escalation of violence when, on January 30, 2018, the opposition staged a mass rally that saw Raila Odinga sworn in as the 'people's president'. On March 9, 2018, the political crisis de-escalated when President Kenyatta and Raila Odinga came together to unveil the Building Bridges Initiative (BBI) as a collaborative programme aimed at fostering national unity. It remains to be seen whether this collaboration will be sustained and complete what was started under the KNDR's agenda items.

26. Currently, the uneasy working relationship between Kenyatta and Odinga has triggered political realignments ahead of the scheduled August 9, 2022, elections, in which deputy president William Ruto and Raila Odinga have emerged as early front-runners.<sup>21</sup> This situation - of the two main political parties presenting two male candidates - brings to the fore the question of women's inadequate representation within the political space and inadequate recognition of their broader contributions to Kenyan society.

## **g. Gender mainstreaming: nation-building, politics and society**

27. The role of women in Kenya continues to evolve, even as there is a dearth of published information about the contributions of women in modern Kenyan society and political development.<sup>22</sup> Academic publications often depict Kenyan women in pre-colonial times and prior to independence as playing family-based and support-focused socio-economic roles, although such findings may have been influenced by biased perspectives within historically male-dominated disciplines.<sup>23</sup> The visibility of women in national public life began to increase during the liberation struggles of the 1940s and 1950s and continued well into independence and the post-independence period. However, this trend did not translate in any significant way to women's holding of formal political leadership positions (whether elected or appointed), until very recently.





28. As a 2017 co-authored report by the US National Democratic Institute (NDI) and the Federation of Women Lawyers (FIDA Kenya) noted:

'A number of important political gains were made by women during the 2017 general elections. For the first time in Kenya's history, women were elected to serve as governors and senators, and 29 percent more women ran for office than in the previous election - a fact that led to the largest number of women ever seated at all levels of the Kenyan government. Women now hold 172 of the 1,883 elected seats in Kenya, up from 145 after the 2013 elections.'<sup>24</sup>

29. Despite these gains, women in Kenya still face serious obstacles around discrimination, including in the workplace<sup>25</sup> as well as when accessing education and political opportunities. As the NDI/(FIDA Kenya) report further noted, 'Although Kenya's Constitution mandates that all appointed and elected bodies contain at least one-third women, women's actual representation often falls short of that threshold. Women account for just 23 percent of the National Assembly and Senate -- a figure that includes seats reserved exclusively for women representatives.' Ahead of the upcoming general elections in August 2022, the expectation is that these gains will be bolstered, with more women elected or appointed to serve in public offices to help shape public policy and build a diverse and inclusive nation.

30. In conclusion, although Kenyan women until lately were relegated to the background in the scheme of governance, politics and participation in society - at least in terms of their formal roles and visibility - the data thus far points toward an increasing balance, if not a shift in the very near future.<sup>26</sup> New legislation and the reworking of obsolete laws remain necessary to continue these advances, along with a deliberate attempt to fashion policies that target the specific needs of women. The Constitution also has a key role to play in ensuring that women's rights are protected.<sup>27</sup> An example of this is the September 2020 advisory by the chief justice to the president to dissolve parliament for failing to implement the 2010 constitutional requirement that 'not more than two-thirds of elective public bodies shall be of the same gender.'

## CONSTITUTION, COURT AND LEGAL SYSTEM

### Legal and constitutional background

31. Kenya's legal system mirrors the British system: a mix of customary law/ common law and legislation passed by Parliament. However, unlike the UK, Kenya has a written constitution, and this constitution is the supreme law of the land.<sup>28</sup>

32. The judiciary as an organ of government is established under chapter 10, article 159 of the Constitution.<sup>29</sup> The courts operate at two levels: the superior and subordinate courts. The system is decentralised, with the Supreme Court and the Court



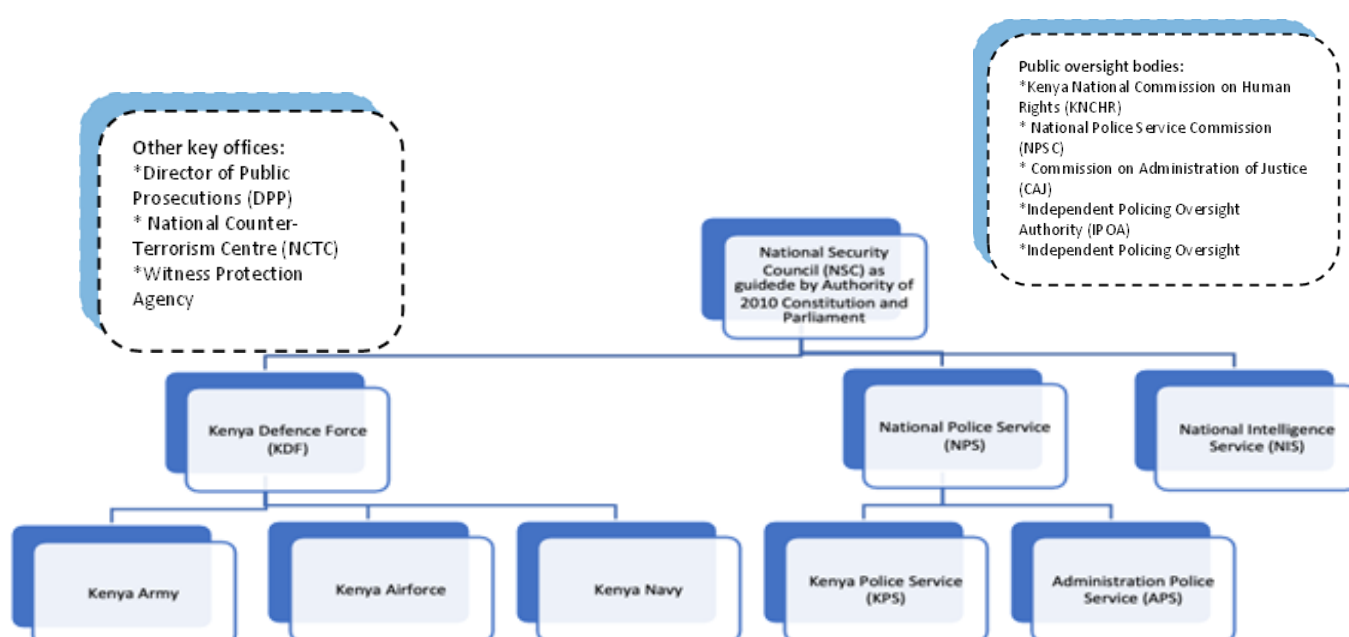
of Appeal supervised by separate presidents, while the High Court is headed by a principal judge. The Supreme Court is established under article 163 of the Constitution and is the highest and final court of law.<sup>30</sup> The court is composed of seven judges: the Chief Justice, who is president and head of the court; the deputy chief justice, who is vice president of the court; and five other judges.

33. The Court of Appeal is established under article 164 of the Constitution, while the High Court is established article 165.<sup>31</sup> The High Court is staffed by as many judges as prescribed by an act of parliament. The subordinate courts consist of the Magistrate courts, Kadhis courts (which address certain questions of Islamic family and inheritance law), Court Martial and any other court or local tribunal created by an act of parliament. These subordinate courts draw their authority from article 169 of the Constitution.<sup>32</sup>

## NATIONAL SECURITY STRUCTURE

34. Kenya's Constitution structures the country's national security in accordance with the following principles<sup>33</sup>: a recognition of the supremacy of the Constitution and authority of Parliament; adherence to and respect for the rule of law, democracy, human rights and fundamental freedoms; national security organs that respect the diverse cultures of the communities within Kenya; and recruitment within national security organs that equitably reflects the diversity of the Kenyan people.

Diagrammatic overview of Kenya's national security architecture



35. These national security principles are the result of a struggle for reforms that sought to rid the security sector of its legacy as a tool of coercion and political repression - first at the behest of the colonial administration, and then at the hands of successive post-independence administrations.<sup>34</sup> Article 239 of the 2010 Constitution establishes three primary national security organs: the Kenya Defence Force (KDF), National Police Service (NPS) and National Intelligence Service (NIS). The operations of these national security organs are predicated on their independence from undue influence, transparency in undertaking their operations, and accountability to the people of Kenya in the exercise of the powers vested under the Constitution and other enabling legislation.

36. Since the promulgation of the Constitution in August 2010, Kenyans have continued to experience violations that are indicative of a significant gap between national security principles and practice. While the Constitution facilitated a raft of institutional and legislative reforms within the security sector, especially the police, analysts are nearly unanimous in agreeing that reforms are unlikely to substantially reorient current unaccountable police practices.<sup>35</sup> This situation has been attributed to an absence of political will, endemic corruption, insufficient capacity building and infrastructure, sustained impunity and a penchant for legalistic prescriptions over social change.<sup>36</sup>

37. Indeed, as will be discussed in subsequent sections of this report, grievous violations such as extrajudicial executions, enforced disappearances and excessive uses of force continue to be documented despite a close to 20-year reform trajectory for the police and the establishment of public oversight institutions. Consequently, monitoring and surveys by various stakeholders have consistently revealed a diminished public confidence in the state of security in the country and in the police as a national security organ.<sup>37</sup> Yet, it is within this context that Kenya's counter-terrorism measures have been forged and continue to evolve.

## The fragility of counter-terrorism laws and the escalation of human rights abuses

38. Kenya's experience with terrorism as a security threat is one that predates independence<sup>38</sup> and continues to be of concern today. Juliet Atallah and Yvonne Masinde have stated that Kenya experienced approximately 350 terror attacks between March 1975 and January 2019 with the consequent loss of over 1,411 lives.<sup>39</sup> During this time frame, Kenya's counter-terrorism measures were shaped by the 'global war on terror', drawing on the following pivotal events: the 1998 attack on the United States embassy in Nairobi, the September 2001 attacks in the United States commonly referred to as 9/11, the 2002 twin attacks targeting an Israeli commercial aircraft and a hotel on the Kenyan coast, and Kenya's military invasion of Somalia in 2011 in pursuit of the *Al Shabab* terror network, code-named Operation *Linda Nchi*.<sup>40</sup>



39. These incidents served as the impetus to focus on institutional lapses within Kenya's national security framework, at the same time attracting international support for the improvement of Kenya's terrorism responses and broadening the scope of Kenya's main concerns from domestic terrorism to transnational terrorism.

40. As a result, Kenya's counter-terrorism strategy in the post-2001 era has come to embody the following:<sup>41</sup>

- a) Institutional development through providing the military and other law enforcement agencies with training and equipment, which led to the revamping of the National Intelligence Service (NIS) and the establishment of the National Counter Terrorism Centre (NCTC) as well as the Anti-Terrorism Police Unit (ATPU)
- b) Enactment of relevant legislation, including the Proceeds of Crime and Anti-Money Laundering Act, the Witness Protection Act, the Prevention of Terrorism Act and the Security Laws (Amendment) Act, and more recently the Prevention of Torture Act and the National Coroners Service Act
- c) Security operations aimed at law enforcement and border security
- d) Prosecutions steered by the constitutional office of Director of Public Prosecutions
- e) 'Rehabilitation' programmes and 'de-radicalisation' processes to encourage people to abandon affiliations with what the state regards as terrorism
- f) Intelligence cooperation, which entails information sharing agreements with counter-terrorism allies such as the United States, Israel and the United Kingdom.

41. International support is an essential feature of Kenya's counter-terrorism strategy. In addition to intelligence sharing, this support has prominently consisted of technical assistance, such as the supplying of military hardware and combat equipment,<sup>42</sup> and financial support,<sup>43</sup> as well as joint military training and exercises<sup>44</sup> and the establishment of institutional links regarding investigation and prosecution.<sup>45</sup>

42. Despite substantial investment in these measures, the threat of large-scale violence in Kenya has persisted and has escalated in intensity since the Operation *Linda Nchi* invasion of Somalia in October 2011, which has since evolved with the additional deployment of forces by the African Union Mission to Somalia (AMISOM).

43. Indeed, between October 2011 and September 2014, Kenya experienced 133 violent attacks widely described as terrorism, which caused 264 fatalities and injured a further 923 persons.<sup>46</sup> In addition to the Westgate Mall and Garissa University attacks, these included a 2014 attack on villages in the Mpeketoni area of Lamu County and an attack in Nairobi at the Dusit hotel complex, where 21 persons were killed.



44. This situation points to several challenges within Kenya's counter-terrorism laws, practices and measures.<sup>47</sup> However, the focus of this report is on the key human rights concerns that have arisen in the context of the country's counter-terrorism measures, and these prominently include impunity and alleged gross or serious human rights violations at the hands of security officers - the very legacy that police reforms sought to end.

45. The next section of this report will identify trends that illustrate how Kenya's counter-terrorism measures are both the by-product of, and a contributing factor to, the retrogressive environment that stifles security sector reforms - engendering human rights violations and undermining Kenya's national security principles as a result.

## RECENT AND RECURRING TRENDS IN THE NATIONAL SECURITY SPACE AIMED AT SHRINKING DEMOCRATIC SPACE

### a) *De jure* independence vs. *de facto* political interference in Kenya's National Police Service

46. Following the post-election violence of 2007-2008, one of the defining pillars of Kenya's police reforms was to eliminate political interference within the service and enhance its operational efficiency and independence. It is on this basis that the Constitution, at Article 239, precludes national security organs and their members from acting in a partisan manner or furthering political party interests or causes. Furthermore, Article 245 of the Constitution establishes the office of the Inspector General to exercise independent command over the National Police Service (NPS). This independence is elaborated in Article 245 (4): the executive is permitted to only provide policy direction, and must not intervene in matters of investigation, law enforcement against individuals or the administrative matters including employment, assignment, promotion, suspension or dismissals within the service. However, the unfolding practice has failed to live up to these stated constitutional requirements of independence. The following are illustrative examples of fettered independence:

47. Appointment of the inspector general and senior officers within the NPS: The executive branch quickly reasserted itself in the appointment process of the inspector general by orchestrating an amendment to the National Police Service Act in 2014. Prior to this amendment, the procedure for appointing the inspector general required the National Police Service Commission (NPSC) to conduct public interviews and shortlist at least three persons for consideration by the president, who would then nominate a single candidate for consideration by Parliament. The amendment eliminated the role of the NPSC and public interviews, thereby making the nomination process a preserve of the president, only requiring parliamentary approval.<sup>48</sup> The president defended this action by relying on his constitutional powers as executive president and as the chief law officer in preserving the peace and national security of the country.



48. In Kenya's prevailing political climate, where the presidency enjoys a super-majority in Parliament, the opportunity for a democratised and transparent process of recruitment to this crucial office has significantly deteriorated. According to some experts, such an appointment process has been insufficient to insulate the inspector general from the perception of being beholden to the president and weakens the NPSC, to the detriment of the independence of the NPS as envisaged in the Constitution. However, the appointment process for the deputy inspector general still retains the oversight role for the NPSC to recommend candidates to the president,<sup>49</sup> The ramifications of these amendments were tested in January 2018 when President Uhuru Kenyatta made appointments to the positions of deputy inspector general of Police and the head of the Directorate of Criminal Investigations. The president named his nominees, and in a record three days, they were purportedly shortlisted by the NPSC, interviewed and sworn into office.<sup>50</sup> Many observers believe that the presidency was at the helm of the recruitment process and that the NPSC was far from independent in practice. The president continues to maintain that the constitution of Kenya invests in him the discretionary executive power to make these sorts of appointment.

49. The 2014 recruitment of police trainees: Against the backdrop of the Garissa University attack, which had called into question the government's ability to ensure national security, in April 2015 President Uhuru Kenyatta instructed the NPS to immediately commence the training of 10,000 police recruits whose recruitment had been halted by the High Court due to allegations of corruption, irregularities and contravention of the Constitution.<sup>51</sup> Many construed the president's directive not only as an assault on judicial authority, but also as revealing that the independence of the police had been compromised. The president's contention was that the security situation needed to be urgently beefed up given the ease with which the attack was carried out, which the president said was due to the reduced police manpower. The inspector general sought to enforce the president's directive even as the NPSC and the Independent Policing Oversight Authority (IPOA) sought to abide by the court process.<sup>52</sup> This presidential directive was only rescinded after a considerable public outcry, and the matter was finally resolved at the Court of Appeal, where the recruitments in question were nullified.<sup>53</sup>

50. The police vetting process: The vetting of NPS officers was envisaged by the Constitution and police statute as an essential step to transforming the service by expunging officers responsible for human rights violations and other crimes, while retaining only those officers who lived up to the constitutional thresholds of integrity. The NPSC bears the mandate for this process, which commenced in 2013, but the process has veered off course and failed to maintain public confidence. As of September 2017, the NPSC reported that it had only successfully vetted over 4,000 police officers from an approximate 77,500 officers and was yet to embark on the vetting of over 10,000 Inspectorate Directorate of Criminal Investigations police officers.<sup>54</sup> While several challenges inherent in the vetting framework have been identified<sup>55</sup>, a key reason identified by most human rights organisation for its failure has been interference by the executive. In 2016, the then-Interior Cabinet





secretary spoke against the police vetting process and questioned the competency of the NPSC to undertake the task.<sup>56</sup> A year earlier, the same cabinet secretary had described the NPSC and IPOA as impediments to efficient policing and questioned the rationale for civilian oversight of the police.<sup>57</sup> This lack of political support has adversely affected these institutions in the execution of their mandates, and according to human rights defenders and civil society groups, police vetting has inevitably been undermined as a result.

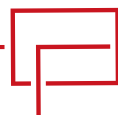
51. Elements of partisanship and undue influence in police operations during the 2017 elections: Kenya's last three elections have been highly contentious and ended in dispute and protests, with the post-2007 environment witnessing unprecedented levels of violence. While the 2017 dispute over the presidential election results was ultimately resolved at the courts, the electoral period was marked by episodes of protest and unrest from supporters of the opposition, which in turn saw excessive and illegal reactions from the police, which some political observers believe were indicative of partisanship and undue influence from officials within the executive.<sup>58</sup>

52. A manifestation of this alleged influence was the actions of the Interior Cabinet secretary in October 2017, during the run-up to a repeat presidential election after the Supreme Court had nullified the initial August 2017 election. Following a series of protests by opposition supporters who questioned the preparations for the repeat elections, the cabinet secretary invoked Section 5 of the Public Order Act and suspended all public protests in the cities of Nairobi, Mombasa and Kisumu.<sup>59</sup> However, while castigating opposition supporters as being violent and instructing the police to restore public order, the same cabinet secretary soon staged a political rally in support of the president's re-election. During this rally, he allegedly encouraged a proscribed militia group to attack opposition supporters, with an assurance of non-interference from the police since he was Interior Cabinet secretary.<sup>60</sup> In response, the Interior Cabinet secretary justified this action by saying the gathering of his supporters were lawful since they requested for and were granted permission by the police to stage the rally.

53. Furthermore, independent monitoring reports during that period suggested a heavy security presence in regions perceived as opposition strongholds and witnessed alleged unlawful killings by police in the midst of protests.<sup>61</sup>

## **b) Promoting policies and practices that shrink civic space**

54. The right of civil society and the media to effectively play their roles as public watchdogs is a critical element of ensuring good governance and respect for human rights. Kenya has sought to rid itself of the legacy from the one-party state era, when numerous activists and journalists were charged with sedition or detained without trial and their institutions shut down for criticising the government. The return to multiparty democracy and politics in 1991 witnessed the resurgence of local civil society organisations and



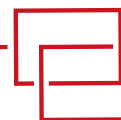
the emergence of a large number of human rights non-governmental organisations (NGOs) across the country. There was also a proliferation of private media outlets as radio and television airwaves were liberalised.

55. Despite this progress and the current progressive constitutional dispensation, authorities have targeted civil society and media actors in the name of enforcing national security laws and measures.<sup>62</sup> Civil society and human rights defenders have expressed concerns that in reality, the objectives of these measures are to stifle dissent, avoid public scrutiny and escape accountability for errant policies and actions.<sup>63</sup> Rather than facilitating an enabling environment in which civil society and the media can thrive, authorities have acted in ways that have led to the shrinking of civic spaces. Examples of government actions that have given rise to concerns about the protection of civic spaces include:

56. Non-implementation of the Public Benefits Organisations Act and the shutdown of NGOs: A key pillar of enhancing civic space under the post-2010 constitutional dispensation is the Public Benefits Organisations Act of 2013 (PBO Act). The objective of the PBO Act is to consolidate the regulatory regime of institutions falling within the ambit of 'public benefit organisations', so as to enhance good governance, transparency, accountability, independence and the rule of law.

57. The PBO Act also repeals the Non-Governmental Organisations Coordination Act, 1990 (NGOs Act), which was adopted during the one-party state era and is inconsistent with the current Constitution's Bill of Rights as well as Kenya's international human rights obligations. More specifically, the NGOs Act has a narrow definition that does not include some of the different kinds of organisations that operate for public benefit, confers far-reaching and discretionary powers on the NGOs Coordination Board and the responsible cabinet secretary in a manner that is prone to abuse, creates monetary burdens on NGOs, and lacks clarity on regulation beyond registration of NGOs.<sup>64</sup> Despite these deficiencies, the government has yet to implement the PBO Act.

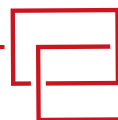
58. While the PBO Act was enacted and received Presidential assent in 2013, the cabinet secretaries responsible (initially Devolution and Planning and now Interior) have not gazetted the law's commencement date, hence frustrating its implementation. This situation persists despite a 2016 High Court decision compelling the Devolution cabinet secretary to gazette a commencement date for the law<sup>65</sup> and a further judgement by the same court in 2017 citing the Interior Cabinet secretary (now responsible for the PBO Act after a restructuring of the government) as being in contempt of court for failing to enforce the previous order.<sup>66</sup> A section of civil society organisations has since referred the matter to the African Commission on Human and Peoples' Rights as *Communication 679/17: Kenyans for Peace with Truth and Justice v. The Republic of Kenya*.



59. According to leading civil society organisations in Kenya,<sup>67</sup> the consequence of non-implementation of the PBO Act has been the sustained use of the NGOs Act as a tool of suppression and intimidation against human rights NGOs perceived to be a threat to the partisan interests, which are disguised in by government rhetoric as national security concerns. As an illustration, the NGO Coordination Board in 2015 attempted to de-register 957 NGOs, ordered that their bank accounts be frozen and called for criminal investigations. The NGO Coordination Board contended that the renewed attempt to regulate NGOs is necessary as a result of reports linking the transfer of slush funds through these organisations, as well as to ensure that these organisations are accountable. However, the Kenya Human Rights Commission (KHRC), as one of the affected organisations, successfully obtained a court judgement nullifying this deregistration on the grounds that it contravened constitutional safeguards on fair administrative action.<sup>68</sup>

60. Despite this court decision, the NGO Coordination Board again targeted the KHRC for deregistration in August 2017, making a range of allegations related to the organisation's finances and employment practices. KHRC again sought legal recourse at the High Court, and again the court nullified the NGO Coordination Board's deregistration order.<sup>69</sup> At this time, the KHRC was leading a consortium of NGOs to monitor the 2017 general elections, and this deregistration attempt by the NGO Coordination Board took place at a time when the consortium was issuing its findings that challenged the credibility of the election. Therefore, the KHRC and a host of other civil society groups portrayed the deregistration as an act of intimidation and part of a campaign to discredit the KHRC and its partners in the consortium called *Kura Yangu Sauti Yangu* (My Vote My Voice).<sup>70</sup> The NGO Coordination Board has responded saying that their actions were in line with their statutory responsibilities under the NGO Act.

61. In addition to the NGOs Act, the government has also used terrorism-related legislation in attempts to restrict NGOs, including those that have spoken out against alleged excesses in counter-terrorism measures. For example, in April 2015, Haki Africa and Muslims for Human Rights (MUHURI) were declared to be specified entities under the Prevention of Terrorism Act, which in turn led to their deregistration by the NGO Coordination Board as well as the freezing of their bank accounts by the Central Bank in conjunction with the Kenya Revenue Authority (KRA). The organisations had issued reports on the alleged culpability of security officers in extrajudicial executions of Muslim clerics suspected of aiding terrorist networks. Therefore, both Haki Africa and MUHURI have alleged that this action by the state was designed for intimidation and retaliation rather than based on good faith and evidence.<sup>71</sup> The High Court, in a case filed by the two organisations, subsequently held that various state agencies had failed to uphold the constitutional right to fair administrative action by sanctioning the organisations in the manner that they did.<sup>72</sup> The government had argued that the measures were proportionate to its goals of combating terrorism and terrorist activities.

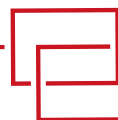


62. Closure of media outlets and arrests of journalists and bloggers: Similar to the experiences of NGOs, the media faces scrutiny and restrictions on what the State describes as security grounds, as well as a range of harms. In the period between May 2017 and April 2018, the international free-expression NGO Article 19 documented 94 incidences of rights violations against journalists and media workers, 11 of which were arrests and detentions.<sup>73</sup> A pivotal point for the media in this period occurred on 30 January 2018, when the Communications Authority of Kenya (CAK) shut down three private stations that were accused of subversion for airing a live broadcast of an event by opposition leader Raila Odinga, who was purportedly sworn-in as the 'people's president' at the height of the political crisis that followed the 2017 elections.<sup>74</sup> The shutdown had been preceded by threats to the media houses from government officials instructing them not to cover the event.<sup>75</sup> The media houses obtained an order from the High Court instructing the CAK to immediately restore their live transmission, but the government took seven days to restore the transmission of two media houses and ten days to do so for the third.<sup>76</sup>

63. Additionally, the upsurge of social media has accentuated the impact of "citizen journalists" and bloggers in shaping public opinion, and this has also attracted repressive acts from state authorities. Bloggers have been the subject of arrest and intimidation under a variety of laws. Those who opine on corruption in government and other topical issues of political interest have been arrested and charged with either the crime of undermining the authority of a public officer under Section 132 of the Penal Code, or the offence of improper use of licensed telecommunication system under Section 29 of the Kenya Information and Communication Act.<sup>77</sup> However, both provisions have since been declared unconstitutional by the High Court.<sup>78</sup> In May 2018, the Bloggers Association of Kenya (BAKE) successfully secured 'conservatory orders' against the recently enacted Computer Misuse and Cybercrimes Act, which risked criminalising numerous aspects of social media use and telecommunications based on ambiguous offences, creating concerns about potential abuse by the State.<sup>79</sup>

64. Despite this progress in court, the risk of arrest persists for media practitioners in relation to legislation on terrorism. For example, Section 30A of the Prevention of Terrorism Act (POTA) criminalise the publication of offending material that is understood to be a publication or statement 'likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism'.

65. Furthermore, Section 19 of this law criminalises the disclosure of information that may prejudice terror-related investigations, and Section 27 criminalises the dissemination of information with the intent of directly or indirectly inciting acts of terrorism. These provisions raise questions as to how media coverage of terrorist acts should be undertaken and has recently been brought into sharp focus by the arrest of prominent blogger Robert Alai. Alai was arrested on 18 June 2019 after publishing pictures of dead security officers after a suspected terror attack in Wajir County.<sup>80</sup> The state contemplated charging him for offences under POTA,<sup>81</sup> although instead it charged him with treachery.<sup>82</sup> Robert Alai has denied all the charges, including the charge of treachery that he was eventually charged with.



# NATIONAL SECURITY MEASURES USED AGAINST GROUPS IN SITUATIONS OF VULNERABILITY

66. Numerous research and independent monitoring reports have consistently suggested that the practice of Kenya's national security measures fall well below the constitutional requirements of adhering to the rule of law, human rights and fundamental freedoms. In relation to counter-terrorism measures, the Kenya National Commission on Human Rights (KNCHR) has previously stated that 'the government of Kenya has adopted high-handed and extra-legal security measures in containing the threats posed by terrorism which have resulted in multiple human rights violations of citizens and terror suspects.'<sup>83</sup> Analysis of Kenya's counter-terrorism measures has also revealed aspects of discrimination, since such measures disproportionately and unjustifiably profile groups that are in vulnerable situations or historically have faced discrimination, such as refugees, the Muslim community, the Somali community and youth.

67. This section of the report will now discuss some illustrative instances of Kenya's counter-terrorism measures being adversely used against groups that were already disadvantaged.

## a) Arbitrary swoop-operations, disappearances and detentions

68. It is a common feature of Kenya's law enforcement for security officers to mount 'swoop-operations': the rapid deployment of security officers within a concentrated area to pursue criminal suspects and undertake mass arrests, presumably on the basis of advance investigations.<sup>84</sup> However, swoops conducted in the fight against terrorism point to undue profiling and the commission of serious human rights violations, as suggested by the following examples:

69. Operation Usalama Watch: This operation was undertaken in April 2014 on the heels of two terror attacks in March 2014 that targeted locations in Nairobi and Mombasa and resulted in 11 fatalities. As a precursor to the operation, the Interior Cabinet Secretary issued a directive that closed all refugee registration centres in urban areas and required all refugees residing outside the designated refugee camps of Kakuma and Dadaab to report to those camps immediately. It also saw the deployment of 500 police officers in Nairobi to enhance security and surveillance.<sup>85</sup> This directive revealed a profiling of the terror suspects, specifically targeting Somali foreign nationals, and this was fostered by political statements



and some aspects of media coverage regarding the terror attacks which disproportionately directed attention and blame to Somali nationals.<sup>86</sup> The profiling had dire consequences for the urban refugee population (predominantly Somali) residing in Kenya's major towns such as Nairobi, Isiolo, Nakuru, Mombasa and Malindi, as the backlash led to ethnic tension and discord between the Somali nationals/refugees and their host communities.

70. *Usalama Watch* at its height saw the deployment of 6,000 security officers to arrest foreign nationals deemed to be in the country unlawfully, as well as persons suspected of terrorism.<sup>87</sup> The main focus of the operation was Nairobi's Eastleigh estate, which is home to a large number of Somali urban refugees, but it eventually spread to include the towns of Mombasa, Nakuru, Thika, Eldoret, Lamu, Malindi, Garissa, Mandera and Kitale.<sup>88</sup> The consequence was the arrest of at least 4,000 persons, predominantly ethnic Somalis. Independent observations of the operation by KNCHR, IPOA and other stakeholders revealed a deluge of alleged human rights violations that included arbitrary arrests, extortion, theft and looting of businesses and homesteads, sexual harassment, arbitrary detentions, illegal deportations, torture, and inhuman and degrading treatment.<sup>89</sup> Furthermore, the KNCHR report emphasised that the operation had a devastating impact on groups such as women, children, people with disabilities and the elderly.<sup>90</sup>

71. Security Operation in the aftermath of the 2014 Terror Attacks Lamu and Tana River Counties: In June and July 2014, a series of attacks were perpetrated in various villages within Lamu County and Tana River County, resulting in 87 deaths as well as damage to 30 buildings and 50 vehicles.<sup>91</sup> After failing to act on prior intelligence regarding the attacks, the government eventually responded by mounting a search-and-round-up operation in pursuit of terror suspects. As in the *Usalama Watch* incident, a report by Human Rights Watch (HRW) corroborated by the Kenya Human Rights Commission (KHRC) established that the security forces targeted Muslim and ethnic Somali men and boys; 47 victims spoke of alleged arbitrary detentions, beatings and theft of property at the hands of the security officers.<sup>92</sup>

## **b) Deportation, extradition, *refoulement* and extraordinary rendition of alleged terrorists**

72. Kenya's security operations, as undertaken under its counter-terrorism strategy, are often accompanied by reports of alleged terrorists being subjected to deportation, extradition and rendition. Some of these cases have involved refugees being forcibly returned to their home countries, potentially violating the prohibition on *non-refoulement*





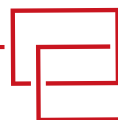
(forcible return despite a real risk that the person will be tortured) as stipulated in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Reuters, amongst other organisations, reported that between December 2006 and February 2007, at least 85 persons were 'rendered' to Somalia in the absence of due legal process.<sup>93</sup> A Kenyan citizen, Mohamed Abdulmalik, was detained and later emerged as a detainee at the Guantánamo Bay detention camp operated by the United States.<sup>94</sup> Following an attack in Kampala, Uganda in July 2010, Kenya extradited Kenyan citizens to face prosecution in Uganda through a process that the Kenyan High Court declared to be unlawful and unjustifiable.<sup>95</sup> More recently, between July and September 2021, claims have emerged of the extraordinary rendition of Nnamdi Kanu, a Nigerian-British citizen and the leader of the Indigenous People of Biafra (IPOB), from Nairobi, where he was allegedly forcibly abducted and transferred to Abuja, Nigeria for trial.<sup>96</sup>

73. During *Usalama Watch*, KNCHR documented 359 cases of deportation or return that disproportionately affected Somalis who had legally obtained refugee status.<sup>97</sup> The Kenyan government also closed refugee registration centres prior to the commencement of the operation.<sup>98</sup> As an indicator of the pervasiveness of these practices, the infractions under *Usalama Watch* took place within just a year of the High Court decision in *Salim Awadh Salim & 10 others v. Commissioner of Police & 3 others*, in which the State was found culpable, among other things, of presiding over the forcible removal of the petitioners to foreign States in a manner that was unlawful and unconstitutional.

### c) Enforced disappearances and extrajudicial executions

74. The Kenyan government has long denied the existence of a policy of enforced disappearances and extrajudicial executions by security officers. Yet, independent investigations continue to suggest a pattern of disappearances and killings that raise concerns about the tacit approval of such a policy by the highest levels of government. A database compiled by the Police Reforms Working Group Kenya (PRWG-K) indicates that between 1995 and 2018 (the most recent year for which figures are available), Kenya accrued 153 cases of enforced disappearances and 285 cases of extrajudicial executions. A further 1,732 cases have yet to be verified.<sup>99</sup>

75. A 2017 report by the International Federation for Human Rights (FIDH) and KHRC referred to a 'Normalization and Digitization of Extrajudicial Killings and Executions', in light of continued alleged killings by a squad within the NPS that recounts its exploits on social media and utilises the platform to issue public warnings to prospective targets.<sup>100</sup> The report also underscores that the victims largely fall within the demographic of young people from low-income areas, a conclusion that was reinforced by reporting about security operations in the aftermath of the 2017 elections.<sup>101</sup>



76. The overall pervasive culture of extrajudicial executions and enforced disappearances is also a concern regarding Kenya's counter-terrorism measures, with alleged victims largely coming from the Muslim and Somali communities. An investigation by KNCHR in 2015 found 25 cases of alleged extrajudicial killings and 81 alleged enforced disappearances against the backdrop of counter-terrorism operations that were deemed to disproportionately target ethnic Somalis and Muslims from the country's coastal region.<sup>102</sup> In a 2016 report, the NGO Haki Afrika echoed the concerns about profiling by claiming that the killings, disappearances and wider counter-terrorism measures were tantamount to collective persecution of Coastal Muslims and have eroded trust between community members and State authorities.<sup>103</sup>

77. The ATPU is widely alleged to be the primary perpetrator of reported extrajudicial executions and disappearances in the context of counter-terrorism measures.<sup>104</sup> However, this does not exclude other security agencies from culpability, as some research has pointed to the potential involvement of units such as the Kenya Defence Forces (KDF), Kenya Wildlife Service (KWS) and the National Intelligence Service (NIS), particularly in the context of joint operations.<sup>105</sup>

## **d) Unfettered state surveillance and how it facilitates other human rights abuses**

78. Surveillance is a key component of Kenya's counter-terrorism strategy. The Kenyan government has invested heavily in enhancing the surveillance capabilities of the security agencies and has pursued a legislative framework that facilitates expansive and discretionary surveillance powers. Surveillance and intelligence sharing also feature prominently in Kenya's agreements of international cooperation on counterterrorism.

79. In terms of legislative developments, the Security Laws (Amendment) Act of 2014 (SLAA) secured significant amendments to POTA with regard to surveillance. As a result, Section 36A of POTA provides broad powers to national security organs to intercept communications for the purposes of detecting, deterring and disrupting terrorism, with the only limitation being 'procedures to be prescribed by the Cabinet Secretary.' This provision vitiates other existing provisions, such as Section 36 of POTA and Section 42 of the National Intelligence Service Act, which impose the judicial safeguard of requiring officers to obtain an order from a Chief Magistrate or the High Court prior to intercepting communication.

80. In terms of surveillance capabilities, a report by the NGO Privacy International concluded that the police service and NIS can infiltrate the country's telecommunications networks in the following ways: With the consent and cooperation of the telecommunication operators, security officers are present within the telecommunication operators' facilities and have direct access to the networks as undercover officers. The NIS also possess 'base transceiver stations' that enable them to be passively connected to the telecommunication networks.<sup>106</sup>



81. In addition, the CAK in 2017 sought to install a 'device management system' that would have facilitated the mass surveillance of mobile telephones, data, internet and mobile money transfers; this measure was only halted after the High Court's intervention via two decisions that declared the measure to be unconstitutional.<sup>107</sup> Kenya's surveillance capabilities are further enhanced by its cooperation and intelligence sharing with countries such as the United States and Israel; however, the nature and extent of that assistance remains unknown and is not thoroughly regulated within the country's security legal frameworks.<sup>108</sup>

82. It is against this backdrop that surveillance has been utilised and abused in the context of counter-terrorism measures, in a process that has been described as 'Spying first, then "making it proper"'. It has also been reported that security officers willfully circumvent the legal provisions on authorization for surveillance only to sanitize the process after the fact to enable its use as evidence in prosecutions.<sup>109</sup> A more grievous potential consequence of surveillance has been its alleged link to the extrajudicial execution of terror suspects, which indicates that intelligence obtained by NIS may be funneled through to squads within the police service who then execute suspects based on the information obtained. One case of concern was that of Abubakar Shariff Ahmed, alias 'Makaburi', who was a Muslim cleric based in Mombasa and suspected of aiding terrorism in Kenya and Somalia.<sup>110</sup> After a series of failed prosecution attempts, he was allegedly executed by unknown individuals, with concerns raised about a potential link between the killing and Kenyan security services.<sup>111</sup>

## IMPUNITY, ACCOUNTABILITY AND ACCESS TO JUSTICE

83. Impunity arises in an environment where the State fails to act (whether in terms of criminal, civil, administrative or disciplinary proceedings) against perpetrators who commit violations and where victims are hindered from obtaining redress. Following the over twenty-year clamour for constitutional reform in Kenya, which finally culminated in the promulgation of the 2010 Constitution, which was driven by citizens' aspirations to seek 'emancipation from impunity that has been fanned by the collapse of institutional, legal and constitutional safeguards.'<sup>112</sup> The 2010 Constitution emanated from the Kenya National Dialogue and Reconciliation (KNDR) process that provided a mediated settlement to end the post-election violence and a framework for constitutional and institutional reforms to address the underlying issues that caused the conflict. It established that the entire reform agenda would be underpinned by transparency, accountability and the fight against impunity and corruption.<sup>113</sup>

84. With regard to national security and as already noted in sections of this report, the need to address impunity has since been reflected in the articulation of constitutional principles and institutional reforms that emphasize adherence to the rule of law and human rights, operational independence of the NPS, civilian oversight of the NPS through NPSC and IPOA, an independent Director of Public Prosecutions and an independent Judiciary. Additionally, the KNDR process gave rise to the Truth, Justice and Reconciliation Commission (TJRC) that was mandated to investigate historical injustices from



independence to February 28, 2008, as well as make recommendations for redressing past wrongs. The TJRC report, which was submitted to the president in 2013, confirmed that national security organs had long been plagued by impunity; it recommended the prosecution of officers in some instances as well as reparations for the victims of violations such as extrajudicial killings, enforced disappearances and torture and other ill-treatment.<sup>114</sup>

85. Despite these normative and institutional developments, addressing impunity in Kenya remains an ongoing concern. As already highlighted, the executive has undermined accountability of national security organs by speaking against the vetting process of police officers, attempts to endorse a fraudulent police recruitment exercise and continuing engagement in acts that subvert civic space despite various court orders against the same. Despite the documentation of violations committed by security officers in the aftermath of the 2017 elections, President Kenyatta ignored these reports and commended the police for exhibiting professionalism and firmness.<sup>115</sup>

86. As seen in earlier sections of this report, the judiciary has acted against impunity and enhanced accountability through its judgments against unconstitutional practices such as legislative over-reach and errant directives issued by the executive. However, besides the failure to abide by some court decisions, the executive has gone a step further by directly threatening the judiciary. In the aftermath of the Supreme Court decision nullifying the first edition of the 2017 presidential election, President Kenyatta was on record as threatening to 'deal with' and 'revisit' the judiciary once he secured a victory in the repeat election.<sup>116</sup> Since then, the judiciary has had to contend with budget cuts<sup>117</sup> and political machinations aimed at gaining control of the Judicial Service Commission (JSC).<sup>118</sup>

87. The existence of KNCHR and IPOA has enhanced the illumination of violations by security officers and steered the focus towards investigations and accountability. However, these oversight institutions face significant challenges. The executive largely discounts their reports with blanket denials and has on occasion spoken against the usefulness of their mandates. The IPOA Board that served from 2012-2018 identified the following challenges in its exit report: a lack of sufficient understanding by the NPS and members of the public of its mandate; high staff turnover because of not having competitive remuneration packages; and non-cooperation by the NPS, which subsequently affects cooperation with other agencies such as the DPP, pathologists, government analysts and hospitals.<sup>119</sup>

88. As a result, IPOA investigations have been adversely affected. Notably, IPOA in this period achieved only three convictions and, as of May 2019, had 64 cases before the courts with a further 1,355 cases under active investigation.<sup>120</sup> Considering the statistics on alleged extrajudicial executions and enforced disappearances, more needs to be done to hasten investigations and prosecutions. A notable development that has introduced some measure of optimism among human rights advocates is the rhetorical recommitment by the current heads



of the Directorate of Criminal Investigations and the Director of Public Prosecution's (DPP) office to effectively address extrajudicial killings and work closely with the human rights organizations that document these violations.<sup>121</sup> Whether this declaration will amount to increased prosecutions and accountability remains to be seen.

89. From a legacy perspective, the recommendations of the TJRC report are yet to be fully implemented and have thus prevented reparations for victims of past gross human rights violations. In his 2019 State of the Nation Address, the president revisited one of his previous pledges and stated that the government would finally implement a fund of 10 billion Kenyan shillings to 'heal the wounds of historical grievance which have long poisoned by our politics and strained communal relations.'<sup>122</sup> On the heels of this pledge came the reinvigoration of a legislative initiative, the Kenya Reparations Bill, 2019 whose stated objective is 'to provide for the recognition and reparation of victims of human rights violations in Kenya arising from, but not limited to, the period covered by the Truth Justice and Reconciliation Report.'<sup>123</sup>

## CONCLUSION

90. Kenya's counter-terrorism measures have developed almost in parallel with the reform agenda aimed at inculcating a rights-based approach in the implementation of the country's national security laws and practices. However, the State has adopted an approach that has largely framed national security and human rights as being mutually exclusive, with the consequence that authorities use counter-terrorism measures that violate human rights and create further resentment of national security organs among communities that are targeted by these measures. Not only does this undermine violence prevention, but it also has a destabilising effect on the country's broader efforts to deepen constitutional democracy.

91. Under the pretext of counter-terrorism disregard for judicial authority and other independent public oversight bodies by the executive and other powerful entities has been common. Counter-terrorism measures have also been used to lend credence to the shrinking of civic spaces by government targeting of NGOs and the media. Moreover, counter-terrorism initiatives have deepened ethnic and religious cleavages through excessive profiling; this has created a notion of 'them versus us', which has in turn undermined collective approaches to seeking vertical accountability from the State. Unfettered excesses in the pursuit of counter-terrorism measures have perpetuated a legacy of repressive national security organs, as witnessed routinely in allegations of violations such as extrajudicial killings, executions, enforced disappearances, torture, and cruel and other degrading and inhuman treatment.

92. Therefore, to address the human rights concerns caused by Kenya's counter-terrorism measures, it is necessary to confront the persistent impunity and seek to salvage



the reform agenda that was ushered in by the KNDR in 2008. The pillars for such an endeavour would include initiatives that: (1) document and publicize ongoing violations associated with counterterrorism; (2) show solidarity with as well as safeguard and enhance the capacities of independent oversight institutions; (3) safeguard civic space and legitimize the role of non-state actors in matters of national security; and (4) take a holistic approach to justice, transparency and accountability, with due regard for the local, national and international interactions of Kenya's counterterrorism strategy.

## **RSI's engagement**

93. RSI's logic in engaging with and supporting work on human rights in the counter-terrorism context in Kenya is grounded in the priorities and needs of NGOs and other parts of civil society, with a view to raising both national and regional level awareness of the serious threats to human rights in the country. The absence of critical voices amplifying these concerns helps to explain why counter-terrorism measures, laws and practice have often been left unfettered, while recommendations for strengthening important protections against abuse remain unimplemented. This report indicates that this situation is attributable to the government's failure and, at times, refusal to implement Kenya's national security laws transparently and respect Kenya's Constitution. The results have included harms to communities that were already facing discrimination and marginalization, women, internally displaced persons, and a cross section of human rights defenders and journalists, including citizen journalists and bloggers. These harms may go beyond Kenyans to include citizens of States bordering Kenya or falling within the political influence of the Kenyan government.

94. We note that Kenya is at the hub of East Africa's regional peace, conflict and security debates and operations, given the proximity of Kenya to other theatres of conflict, particularly in the Horn of Africa, that produces millions of internally and externally displaced persons. The most conflict-affected States in the region include Ethiopia, Uganda, Sudan, Tanzania, and Somalia. The Kenyan government should be held accountable and compelled to respect its international legal obligations regarding any engagement with these conflicts, such as support for counter-terrorism measures.

95. How will RSI help its partners create greater accountability for the state, and which accountability mechanisms most require strengthening or overhauling? First, improving accountability requires effective demands on the Kenya government to be transparent about its governance practices, policies and laws, especially in the ways it goes about establishing national security institutions, appointing leaders and personnel to those institutions. It also requires the putting in place of monitoring mechanisms to check the excesses of other State agencies, including the police, that may be committing serious rights violations.





96. Other areas for action include, among others, strengthening the oversight functions of parliament; building the capacity of the judiciary to ensure its independence; and repealing or at the minimum reforming laws that unduly constrain the freedoms of expression and assembly, as well as the right to a fair hearing. Regional and international pressure on the government to uphold its numerous international human rights obligations through treaties that the government has signed or ratified will likely be critical in achieving results.

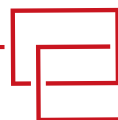
## PROJECT PLAN

97. We will partner with groups whose agendas align with those of RSI in compelling the government to be transparent and accountable; to promote a free society with a human rights-based approach to confronting violence and addressing 'extremism', whilst advocating for the opening of civic space conducive to the deepening of participatory democracy. The project plan is to:

- a) Expose impunity and State excesses disguised under problematic - published or unpublished - national security laws, policies and measures.
- b) With the support of local actors -- civil society, journalists and human rights defender - - reveal and end these practices by challenging the institutions constitutionally designed to provide oversight functions to do their work and hold the government and its agents to account.
- c) Determine the extent of the involvement of international actors - particular the US and the UK - in supporting or abetting the government in pursuing national security laws around countering 'extremism' that excessively constrain liberty and target vulnerable people.
- d) RSI will champion a 'whole of region' approach to the question of addressing Kenya's national security, terrorism and counter-terrorism laws, policies and measures. All too often, the regional dimension has been the missing link to a holistic solution.
- e) With further reference to 'd' above, RSI believes the 'matrix of conflict' involves a range of States and actors across East Africa and the Horn of Africa, with Kenya at the centre of this intricate web. As a result, many other issues are created or implicated -such as refugee flows, the question of internally and externally displaced persons, statelessness, deprivation of citizenship and repatriation, and the phenomenon of the return of alleged 'foreign terrorist fighters' (FTF) to the region.
- f) RSI plans to do further research on each of these themes and partner with organisations in Kenya to obtain evidence of how national security laws impact people and communities who face marginalisation and discrimination.
- f) RSI will work with a range of community, local and national actors who are prepared to be part of the Rise Coalition to address some of these issues collaboratively.

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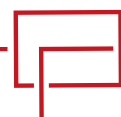
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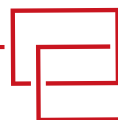
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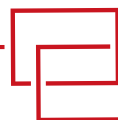
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<sup>122</sup> 'Speech By His Excellency Hon. Uhuru Kenyatta, C.G.H., President Of The Republic Of Kenya And Commander In Chief Of The Defence Forces During The 2019 State Of The Nation Address at Parliament Buildings, Nairobi, 4th April 2019 | The Presidency', accessed 10 July 2019, <http://www.president.go.ke/2019/04/04/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-during-the-2019-state-of-the-nation-address-at-parliament-building/>.

<sup>123</sup> 'MP Seeks Justice for Victims of Rights Abuses', Daily Nation, accessed 10 July 2019, <https://www.nation.co.ke/news/Gladys-Shollei-seeks-justice-rights-abuses-victims/1056-5178010-13bvnte/index.html>.

<sup>124</sup> <https://www.ohchr.org/en/hr-bodies/upr/ke-index>

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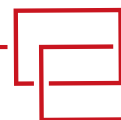
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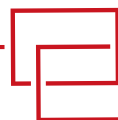
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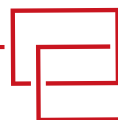
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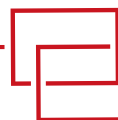
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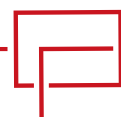


## ANNEX: DESCRIPTIVE REPORT ON KENYA PROFILE

### A. KENYA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND COMMITMENTS

#### INSTRUMENTS FROM THE AFRICAN HUMAN RIGHTS SYSTEM<sup>121</sup>:

TREATY NAME	SIGNATURE DATE	RATIFICATION DATE, ACCESSION (a), SUCCESSION (d) DATE
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment		21 Feb 1997 (a)
Optional Protocol of the Convention against Torture		
International Covenant on Civil and Political Rights		01 May 1972 (a)
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
Convention for the Protection of All Persons from Enforced Disappearance	06 Feb 2007	
Convention on the Elimination of All Forms of Discrimination against Women		09 Mar 1984 (a)
International Convention on the Elimination of All Forms of Racial Discrimination		13 Sep 2001 (a)
International Covenant on Economic, Social and Cultural Rights		01 May 1972 (a)
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		
Convention on the Rights of the Child	26 Jan 1990	30 Jul 1990
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	08 Sep 2000	28 Jan 2002
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	08 Sep 2000	
Convention on the Rights of Persons with Disabilities	30 Mar 2007	19 May 2008
Rome Statute of the International Criminal Court	11 Aug 1999	15 Mar 2005



## INSTRUMENTS FROM THE AFRICAN HUMAN RIGHTS SYSTEM<sup>121</sup>:

TREATY NAME	DATE OF SIGNATURE	DATE OF RATIFICATION/ACCESSION	DATE DEPOSITED
African Charter on Human and Peoples' Rights	-	23 Jan 1992	10 Feb 1992
African Charter on the Rights and Welfare of the Child	-	25 July 2000	10 Aug 2000
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	17 Dec 2003	6 Oct 2010	13 Oct 2010
OAU Convention Governing the Specific Aspects of Refugee problems in Africa	10 Sep 1969	23 Jun 1992	4 Feb 1993
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa	-	-	-
African Union Convention on Preventing and Combating Corruption	17 Dec 2003	3 Feb 2007	7 Mar 2007
OAU Convention on the Prevention and Combating of Terrorism	10 Dec 2001	28 Nov 2001	10 Dec 2001
Protocol to the OAU Convention on the Prevention and Combating of Terrorism	28 Jun 2008		
African Youth Charter	28 Jun 2008	23 Jan 2014	29 Jan 2014
African Charter on Democracy, Elections and Governance	28 Jun 2008	-	-
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons	-	-	-
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa	-	-	-
Protocol to the African Charter on Human and Peoples' rights on the Establishment of an African Court on Human and Peoples' Rights	7 Jul 2003	4 Feb 2004	18 Feb 2005
Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights	27 Jan 2015	-	-



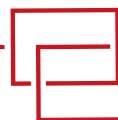
## Status of Reporting Obligations

While guilty of delayed submissions, Kenya is currently compliant in its reporting obligations to the various UN treaty-based human rights mechanisms. In one of the recent reports, the State report to the Human Rights Committee, Kenya referred to an ongoing terror threat and stated as follows:

.....To combat these attacks Government has increased security personnel in these areas [*where?*] to enable quick response as well as deterrence in the regions affected by violent extremism and terrorist attacks. Curfews have also been announced in some areas. However, curfews are normally short lived and used only to contain the insecurities. All human rights are protected and due process followed in brings perpetrators of terrorist attacks to justice.

The government further states in the report that its counterterrorism laws are aimed at balancing the imperatives of security and those of civil liberties in the age of terrorism. Kenya is also scheduled to undergo its third cycle of Universal Periodic Review (UPR) in January 2020.<sup>124</sup> At the last review in 2015, Kenya accepted recommendations related to counterterrorism that spoke to safeguarding the rights of marginalised and vulnerable groups in the midst of counter-terrorism measures, compliance with international law obligations, respect for the Constitution and rule of law, proper investigation of extrajudicial killings and enactment of anti-torture legislation.

At the African level, Kenya reported to the African Commission on Human and Peoples' Rights (ACHPR) in 2015 by submitting a combined report for the period 2008-2014<sup>125</sup>. In its concluding observations, the ACHPR cited the continued acts of terror experienced in Kenya as well as Security Laws (Amendments) Act of 2014 to be factors that inhibited the enjoyment of human rights in the country. Kenya also recently underwent its second cycle of review under the Africa Peer Review Mechanism (APRM) in January 2017. Kenya was advised to "undertake preventative and comprehensive strategies to address the crisis caused by terrorism related insecurity."



## B. KEY COUNTER-TERRORISM LAWS AND POLICES

The following are the key law and policies that shape and influence Kenya's counter-terrorism framework:

LAW/POLICY	DESCRIPTION
Prevention of Terrorism Act No. 30 of 2012	This is the primary legislation that provides for the detection and prevention of terrorist activities. It defines a terrorist act, prescribed related offences, outlines investigation procedures and requirements and establishes the National Counter-Terrorism Centre as a coordinating mechanism.
National Police Service Act No. 11A of 2011	Provides for the operations of the National Police Service. This includes its composition, administrative structure, the powers, obligations and rights accorded to police officer, rules pertaining to arrest and detention, conditions governing the use of force and offences against discipline but to name a few .
National Intelligence Service Act No. 28 of 2012	Provides for the functions, organization and administration of the National Intelligence Service Act. Notably, it prohibits torture or cruel treatment. It also establishes oversight bodies that include the National Intelligence Service Council, Parliamentary oversight and the Intelligence Service Complaints Board.
Kenya Defence Forces Act no. 25 of 2012	Provides for the functions, organization and administration of the Kenya Defence Forces. It also outlines the procedures for addressing disciplinary matters.
The Computer Misuse and Cybercrimes Act, 2018	Provides for offences relating to computer systems; to enable timely and effective detection, prohibition, prevention, response, investigation and prosecution of computer and cybercrimes; and to facilitate international cooperation in dealing with computer and cybercrime matters.





The Security Laws (Amendment) Act, 2014	An omnibus legislation that was enacted to amend laws relating to security. It has provided expanded powers to the national security organ in the domains of surveillance, search and seizure and detention. However it should be noted that courtesy of <u>Coalition for Reform and Democracy (CORD) &amp; 2 others v Republic of Kenya &amp; 10; others [2015] eKLR</u> the following provisions were declared unconstitutional: Sections 12, 64, 34, 16, 20, 26, 48 and 95.
The Proceeds of Crime and Anti-Money Laundering Act no. 9 of 2009 as amended by the Proceeds of Crime and Anti-Money Laundering (Amendment) Act no. 3 of 2017	Provides for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime and for connected purposes.
The Witness Protection Act, 2006	Provides for the protection of witnesses in criminal cases and other proceedings. It also establishes the Witness Protection Agency.
The Prevention of Torture Act no. 12 of 2017	To give effect to Article 25(a) and 29(d) of the Constitution and to the principles of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment; reparations to victims of torture and cruel, inhuman or degrading treatment or punishment; and for connected purposes.
The National Coroners Service Act no. 18 of 2017	Establishes the National Coroners Service and empowers it to investigate reportable deaths in order to determine the identities of the deceased persons, the times and dates of their deaths and the manner and cause of their deaths.



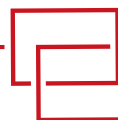
Victims Protection Act no. 17 of 2014	To give effect to Article 50 (9) of the Constitution; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services; to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes.
National Strategy to Counter Violent Extremism	Aims to minimize and/or eliminate violent extremism by mobilizing individuals and groups at the national and community levels to reject violent extremist ideologies while also limiting avenues for recruitment and radicalization.
Sessional Paper No. 3 of 2014: National Policy and Action Plan on Human Rights	Provides the basis and framework for coherence and coordination in the protection and promotion of human rights in the country. It is intended to: Implement Kenya's vision on human rights; set human rights goals and priorities within achievable time frames; clarify the responsibilities for the implementation of human rights, as anchored in the Bill of Rights in the Constitution, in view of the multiplicity of actors; and to monitor and evaluate the performance of different implementers in the fulfilment of human rights.



## C. INSTITUTIONAL SAFEGUARDS

The following are the institutions that provide various aspects of oversight in relation to Kenya's counterterrorism strategy:

INSTITUTION	DESCRIPTION
<b>National Police Service Commission</b>	Presides over recruitment, appointment, promotions and transfers and vetting within the National Police Service; also observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the service.
<b>Independent Policing Oversight Authority</b>	Investigate deaths and serious injuries caused by police action; to investigate police misconduct; to monitor, review and audit investigations and actions by Internal Affairs Unit of the police; to conduct inspections of police premises; to monitor and investigate policing operations deployment; to review the functioning of the internal disciplinary process; and reporting.
<b>National Police Service Internal Affairs Unit</b>	Receive and investigate complaints against police; promoting uniform standards of discipline and good order in the Service; keeping a record of facts of any complaints or investigations made to it; recommend appropriate action in respect of anyone found engaging in any unlawful conduct; and hear complaints from members of the Service or members of the public.
<b>Kenya National Commission on Human Rights</b>	Investigate and provide redress for human rights violations, to research and monitor the compliance of human rights norms and standards, to conduct human rights education, to facilitate training, campaigns and advocacy on human rights as well as collaborate with other stakeholders in Kenya.
<b>Commission on Administration of Justice</b>	Investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.



<b>Director of Public Prosecutions</b>	The National Prosecuting Authority in Kenya which has been mandated by the Constitution to prosecute all criminal cases in the country. It has a counterterrorism division that: handles prosecutions matters with respect to terrorism activities; study and evaluate case files presented for decisions whether to commence prosecution; advise the government on matters of prosecution of terrorism activities; and liaise with the police in prosecution of terrorism suspects.
<b>National Cohesion and Integration Commission</b>	Key aspect of its mandate is to investigate complaints of discrimination and make recommendations to the Attorney General, Human Rights Commission or other authority on remedial measures to be taken where such complaints are valid.
<b>Witness Protection Agency</b>	Provides the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.
<b>National Intelligence Service Council</b>	Advises on: the national intelligence policies and strategies; the administration of the Service; and the expenditure of the Service.
<b>Intelligence Service Complaints Board</b>	Receive and inquire into complaints against the Service made by any person aggrieved by anything done by the Director-General or any member of the Service in the exercise of the powers or the performance of the functions of the Service; inquire into any other matter referred to it by the President or the Cabinet Secretary; and to make recommendations to the President or the Cabinet Secretary.
<b>Defence Council</b>	Exercise oversight role on the training or undertaking of instructions of members of the Defence Forces in any country outside Kenya.
<b>National Coroners Service</b>	Empowered to investigate reportable deaths in order to determine the identities of the deceased persons, the times and dates of their deaths and the manner and cause of their deaths.



<p><b>Parliamentary oversight through Departmental Committees</b></p>	<p>Departmental committees are mandated to: investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments; study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation; study and review all legislation referred to it; study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives; investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House; to vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments) ; and make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.</p> <p><b>Relevant Committees within the National Assembly:</b> Defence and Foreign Relations; Justice and legal Affairs; and National Cohesion and Equal Opportunity.</p> <p><b>Relevant Committees within the Senate:</b> Justice, Legal Affairs and Human Rights; National Cohesion, Equal Opportunity and Regional Integration; and National Security and Foreign Relations</p>
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