

Tom Lantos Human Rights Commission Briefing
Briefing Series on the Shrinking Space for Civil Society

Kenya: Tensions between Human Rights and Security,
and the Shrinking Space for Civil Society

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SECURITY AND HUMAN RIGHTS IN KENYA

Current Situation

The security situation in Kenya is characterized by high incidences of crime, including murder, robbery with violence, rape, and cattle rustling. Crime is especially prevalent in the urban areas. The state of insecurity has been heightened with the increase of terror related attacks in Nairobi, Mandera and Garissa, as well as the coastal areas of Mombasa and Lamu. These are both urban and peri-urban counties. There has also been an increase in the radicalization of youth, especially among the Muslim communities.

In counter-terror operations, Muslim male youth are being negatively profiled, arrested and indiscriminately harassed. Incidences of collective punishment, including closures of places of worship and the extra-judicial killing of Muslims, including clerics, have been feeding the radicalization rhetoric. Death, serious injuries, and destruction of property of both civilians and security agents have become common; shoot to kill orders by the Inspector General of Police have further exacerbated the problem.

Security Structure in Kenya

National Security in Kenya is guided by Article 238 of the 2010 Constitution, which governs the protection against internal and external threats to Kenya's territorial integrity and sovereignty. The National organs as set by the Constitution include the Kenya Defence Forces (KDF), National Intelligence Service (NIS) and National Police Service (NPS) and are part of the executive branch. According to the Constitution, these organs are supposed to promote Kenya's security in accordance with the rule of law, the principles of democracy, and human rights. In this endeavor, respecting Kenya's ethnic, cultural and religious diversity is paramount. There are several specialized counterterrorism units, including the Anti-Terrorism Police Unit (ATPU), the Rapid Response Unit (RRU), and the new National Counter-Terrorism Center (NCTC).

Drivers of Insecurity

The state of insecurity has been characterized by high levels of corruption and impunity among the political and business class who control and direct the security agents in their given locality. The heavy-handed and discriminatory tactics of the security forces, especially the ATPU, further contribute to radicalization and have hampered counter-terrorism efforts, rather than helped.

Additionally, Kenya's poor infrastructure of roads, lighting and communication enables criminal gangs to thrive, especially in remote and urban centers.

Both the public and security agents have low expectations or confidence in the Kenya's courts, which often leads to extrajudicial killings and mob attacks. Court processes are characterized by frequent delays due to missing files, inadequate forensic investigations and poor management of exhibits, which often lead to case dismissals. The lack of a working legal aid program means that accused persons are often unrepresented by counsel during trial.

The security agents especially the NPS and NIS have poor coordination mechanism among themselves, leading to serious lapses. This was evidenced in the 2007/8 post-election violence and more recently during the Westgate Mall attack. There are reports of botched operations by different units due to lack of communication, delaying the rescue of civilians and possibly resulting in friendly fire deaths.

Security Legislation Framework

Kenya has several security laws, including, Prevention Against Terror Act, Counter Trafficking Act, Surrender of Proceeds of Crime and Money Laundering, Extradition Acts, among others. More recently, Parliament passed the Security Laws (Amendment) Act, 2014 on 19 December 2014. The new Act aims to enhance national security through enhanced penalties and granting power to the NIS on surveillance, supervision, and arrests. The law also creates new institutions like the National Counter Terrorism Center (NCTC). Several provisions in the Act were contested as being unconstitutional by the Kenya National Commission on Human Rights (KNCHR), opposition political parties, among others. A judgment by the constitutional division of the High Court was delivered on 23rd February 2015 suspending several provisions but maintained others. Some of the provisions and laws of grave concern include:

1. The powers of the National Intelligence Service to stop, arrest, detain, search, remove and monitor communication with weakened judicial oversight;
2. The power of the National Intelligence Service to do "anything necessary to preserve national security and to carry out covert operations broadly defined as measures aimed at neutralizing threats against national security";
3. Police power to extend pre-charge detention for up to 90 days for all offences and 360 days for terrorism related offences, well beyond the 24 hour limit under Kenyan Law and very loose structure of judicial oversight;
4. Forced encampment of refugees and asylum seekers;
5. Introduction of broadly defined offences such "facilitation of terrorist acts" which punishes a person who advocates, glorifies, incites or facilitates acts of terrorism whose punishment is imprisonment for up to 20 years. Furthermore, the introduction of radicalization which punishes a person who adopts and promotes an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious and social change whose punishment is imprisonment for up to 30 years;
6. Increased power and discretion upon the state to register and deregister public benefit organizations (NGOs);

7. Increased power on political appointees (cabinet secretaries) to determine curfews hence limiting the right to freedom of movement and association; and
8. The increased power of the presidency to appoint the Inspector General with no reference to the National Police Service Commission.

Recommendations

The need for enhanced security is not in dispute. However, this must be advanced within a human rights framework that respects democratic principles and rule of law and does not infringe on civil liberties. Addressing the systemic defaults within the security apparatus such as endemic corruption, police welfare, security assistance and training would contribute immensely to counter-terrorism efforts of the state.

This assistance should however be measured, monitored and targeted towards providing long term stability rather than reactive short term approaches that have led to more violations and radicalization.

1. The US government should urge its Kenyan counterpart to comprehensively review its legislative framework in consultation with all stakeholders to address the need for enhanced security in a manner that also upholds human rights and the rule of law.
2. The USG should urge the Government of Kenya to urgently complete the comprehensive reform of the security system in accordance with the 2010 Constitution and the recommendations of previous independent Commissions.
3. USG should urge the Kenyan government to investigate all cases of extra-judicial executions and disappearances with a view to prosecuting the culprits and providing reparations to the families of the victims.

USG should make any additional bi-lateral assistance to Kenya's efforts to fight terrorism conditional upon a comprehensive audit and continuous monitoring to ensure compliance with international human rights standards.