



Kenya: Human Rights Priorities for the New Administration

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Introduction

Uhuru Kenyatta and William Ruto were sworn into office as president and deputy president respectively on April 9, 2013, following the dismissal of court petitions challenging the results of the March 4, 2013 elections.

The new leadership takes over at a time when the country is facing numerous human rights challenges that require urgent action. Long-standing grievances over land and other historical injustices, such as the failure to develop some regions, compounded by the lack of accountability for past crimes, continue to fuel violence across Kenya, including in the lead up to and following the 2013 elections.

As Human Rights Watch documented in a February 2013 report, “High Stakes: Political Violence and the 2013 Elections in Kenya,” police either responded inadequately to violence in some parts of the country ahead of 2013 elections or excessively in others. After the elections, Human Rights Watch found that police in Kisumu, in the western part of the country, used excessive force—leaving 5 people dead and 22 injured with gunshot wounds—in responding to non-violent protests against the Supreme Court decision on March 30, 2013, affirming that Kenyatta and Ruto had won.

Kenyatta and Ruto are due to face trial before the International Criminal Court (ICC) on charges of crimes against humanity related to Kenya’s post-election violence in 2007-2008. Ruto faces ICC charges of organizing attacks to displace and kill perceived supporters of then-President Mwai Kibaki’s Party of National Unity (PNU) following the disputed 2007 presidential results. Kenyatta is accused of enlisting a local militia and criminal gang to kill

and rape in a reprisal attack against perceived supporters of the then-opposition party. Both Kenyatta and Ruto have denied the charges.

This paper sets out four key priorities for Kenya's new administration and offers recommendations for achieving progress in each area.

I. Uphold Key Rights for Civil Society

Kenya is a state party to United Nations and African regional human rights treaties, and its constitution provides for the freedom of assembly, association, expression, and the media. The new government should enforce these rights and freedoms by promptly and impartially investigating recent incidents of intimidation, ensuring civil society has full freedom to operate, and affirming media freedoms.

Impartially Investigate Death Threats and Other Intimidation against Activists

Kenyan authorities appear to have responded selectively to incidents of intimidation of those using the media following the March 4 elections. Police investigated and arrested three activists and bloggers critical of the way the Independent Electoral and Boundaries Commission (IEBC) conducted the just concluded election. Police have accused them of perpetrating hate speech. However, there have been no efforts to investigate threatening messages in social and traditional media against civil society figures and activists perceived as critics of the new administration or those calling for accountability for the 2007-2008 election violence. For example, two journalists and four human rights defenders in Eldoret received death threats in late 2012 and 2013 that appeared linked to the ICC's investigations. Kenyan authorities should impartially investigate all such threats and prosecute those responsible.

Ensure Space for Civil Society

The new government should also ensure continued space for civil society to operate. During the elections candidates made statements critical of civil society, and the manifesto of the now-ruling Jubilee Alliance calls for barring organizations from engaging in "political campaigning" without defining what represents political campaigning. A recent law passed just before the election, the Public Benefits Organization Act 2013, has imposed new registration requirements on nongovernmental organizations.

Protect Media Freedoms

Attacks, intimidation, and threats against investigative journalists or media establishments and editors critical of certain public officials undermine the freedom the media in Kenya has enjoyed in recent years. Authorities should immediately investigate and hold to account those responsible for all forms of attacks on journalists. In January and February 2013 alone, 19 journalists received threats and 1 journalist was found dead under mysterious circumstances.

Bernard Wesonga, a journalist with *The Star*, an independent daily newspaper, was found dead in his home in Mombasa on March 30, 2013. He had complained to several of his colleagues about threats he had received through texts to his phone in relation to a story on the importation of the expired fertilizer that he was investigating.

In addition, Kenya Television Network (KTN) journalists told Human Rights Watch about threats received after KTN aired on April 7, 2013, an investigative report suggesting that former Kenyan vice president and minister for internal security, Prof. George Saitoti, who died in June 2012, might have been one of a growing number of victims of violence by members of a drug cartel. KTN is a privately-owned television station.

Kenyan authorities should also make clear that restrictions will not be placed on media freedoms, including for foreign journalists. Government officials made a number of threatening statements toward foreign media prior to the elections. In February, the government spokesman, Mr. Muthui Kariuki, allegedly warned foreign journalists that “we will burn you before you burn us,” and just after the March 4, 2013 elections officials of the Ministry of Information and Public Communication threatened to deport foreign journalists.

II. Ensure Accountability for Serious Crimes

Kenya faces enormous challenges in providing accountability for serious crimes. Despite efforts by both governmental and nongovernmental agencies to document violations, there have been worrying gaps, particularly in the following areas.

Killings and Forced Disappearances in Mt. Elgon

Authorities should set up an independent commission of inquiry into crimes committed in Mt. Elgon with the view to holding those responsible to account, including through criminal investigations and prosecutions. As documented in an October 2011 Human Rights Watch report, “‘Hold Your Heart’: Waiting for Justice in Kenya’s Mt. Elgon Region,” some 325 people were forcibly disappeared, 1,000 killed, and thousands tortured, raped, and forcibly displaced by the Sabaot Land Defense Forces (SLDF), a militia group, and the Kenyan military in 2008.

On November 3, 2011, Human Rights Watch and Western Kenya Human Rights, a Kenyan nongovernmental organization, accompanied some of the victims to Chesikaki police station in Western Kenya, where they filed complaints with police, asking for investigations into the disappearances and killings. There has been no further action by the Kenyan authorities to date. In the absence of credible national investigations, the ICC prosecutor should examine whether crimes falling within the ICC’s jurisdiction were committed in Mt. Elgon and consider opening additional investigations in Kenya.

Perpetrators of Post-Election Violence

Kenyan government should urgently investigate and prosecute cases related to the 2007-2008 post-election violence, which resulted in the killing of at least 1,100 people and displacement of 650,000 others. The report of the Commission of Inquiry into Post-Election Violence (CIPEV), known as the Waki Commission, identified a list of those it considered most responsible for the violence in what was described by the Kenyan media as “a secret envelope.”

The ICC prosecutor initially brought cases against six individuals; three—including Kenyatta and Ruto—now face trial. Kenyan media have suggested that the secret envelope could have contained as many as 26 names of high ranking individuals, including some members of parliament. Names in this envelope handed to Kofi Annan have never been made public.

Human Rights Watch is aware of only 7 convictions involving 16 individuals in cases related to serious crimes committed during the election-related violence; a conviction against two individuals in one case has now been vacated. In 2012 the Director of Public

Prosecutions (DPP) announced that his office would review at least 5,000 cases with the view to prosecuting them ahead of the 2013 elections, but a committee appointed to review the cases said in August 2012 that it was finding it difficult to obtain evidence and the cases have not proceeded. The committee's work has not been made public.

As Human Rights Watch documented in a report on accountability for post-election violence, “‘Turning Pebbles’: Evading Accountability for Post-Election Violence in Kenya,” weaknesses in Kenya's criminal justice system contributed to a paltry rate of convictions for serious election-related crimes. These included police officers' unwillingness to investigate and prosecute their colleagues; the poor quality of investigations in general; incompetence on the part of some police prosecutors; political influence and corruption to subvert the judicial process; and the absence at the time of an operative witness protection system.

The government should ensure full cooperation with the ICC in its investigations and pending cases (see below). The government should also establish special mechanisms to investigate, prosecute, and adjudicate other cases involving the most serious election-related crimes, using the International Crimes Act and other Kenyan laws, while ensuring that, where possible, cases of lesser crimes or against lower-level perpetrators are effectively handled by the ordinary courts. A unit within a special investigative team should be specifically empowered to investigate police crimes during the post-election violence in 2007-2008 given the scope of police impunity in Kenya.

Human Rights Watch has previously called on the ICC prosecutor to continue investigations into police shootings and other abuses committed during the election violence and to bring additional charges if the evidence indicates that these abuses amount to crimes within the ICC's jurisdiction.

In November 2012 the chief justice announced plans to establish an International Crimes Division in the Kenyan high court. The Kenyan government should ensure broad public consultation on the establishment of the International Crimes Division.

Extrajudicial Killings

The new Kenyan government should investigate extrajudicial killings by police and prosecute those responsible, and remove them from the police force. It should vet police officers for involvement in extrajudicial killings and other abuses.

Kenya has had an extraordinarily high number of cases of extrajudicial killings by police in the last decade. In November 2007 the state-funded Kenya National Commission on Human Rights (KNCHR) released its report “Cry of Blood: Report on Extra Judicial Killings and Disappearances” in which it found that a hit squad within the Kenya police was responsible for the killing of up to 500 young people and disappearance of many others in 2007.

In August 2008, KNCHR reported that extrajudicial killings by police continued. Two NGOs, Oscar Foundation, an NGO that provided legal aid to victims of human rights violations, and Independent Medico Legal Unit (IMLU), have also documented a high number of cases of extrajudicial killings in the last five years.

In 2009 the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, also found that “death squads” operating at the behest of senior police officers, including the police commissioner, were responsible for extrajudicial killings in Kenya. Prof. Alston also recommended independent investigations into extrajudicial killings by police and death squads in Nairobi and Central Kenya.

To date, there have been no meaningful attempts by the Kenyan authorities to create mechanisms for independent investigations that would lead to the prosecution of those responsible for extrajudicial killings.

Abuses against Ethnic Somalis

The new government should ensure accountability for abuses by the Kenyan security forces, including police, against ethnic Somalis, both Kenyans and refugees, particularly in northern Kenya.

The October 2011 Kenyan military intervention in Somalia has prompted retaliatory grenade and gun attacks by suspected supporters of al-Shabaab, the militant Somali

Islamist group. Many of the attacks have targeted Kenyan government installations or individual police and military officers. The Kenyan security forces have often responded with excessive force, beating, raping, arbitrarily detaining, and killing civilians in northern Kenya. Human Rights Watch has in 2012 documented these reprisals in a report titled “Criminal Reprisals: Kenyan Police and Military Abuses against Ethnic Somalis.”

The Kenyan military’s initial response to the findings of this report was encouraging. A military board was established to investigate the abuses and the military promised to hold those responsible to account. Members of this board visited and talked to Human Rights Watch as part of preliminary investigations in mid-2012. But there has been little progress since June 2012 when a military official informed Human Rights Watch that the chairman of the board, who was a senior military official, had been transferred out of Nairobi, thus putting its work on hold. Human Rights Watch calls on the new administration to revisit the matter of police reprisals against ethnic Somalis and ensure that those responsible are held to account.

Human Rights Watch also documented serious abuses, primarily by the paramilitary wing of the police, the Kenyan General Service Unit (GSU), against Somali and Ethiopian refugees and asylum seekers, as well as ethnic Somali Kenyans, in the Eastleigh neighborhood of Nairobi in late 2012 and early 2013, including beating, rape, and widespread extortion. The wave of abuses started on November 19, a day after the first of six terrorist attacks hit the area and continued until late January. They coincided with a government announcement ordering urban refugees to relocate to refugee camps outside Nairobi. The Kenyan government should ensure police put an end to these crimes immediately, and hold abusive police accountable.

III. Pursue Reforms to Address Long-Standing Grievances

Since the 2007 elections the Kenyan government has embarked on a set of essential institutional and legal reforms, largely in response to the recommendations of at least two commissions of inquiry formed after the 2007-2008 post-election violence. Progress implementing them has been slow and insufficient, however. The new government should accelerate reforms in the security sector, particularly police reforms, the land sector, and public administration, especially as the 2010 constitution creates a framework and timelines for institutional and legislative reforms, and contains a strong bill of rights.

There has been progress in judicial reforms, but police reforms have been slow and partial, and at times have failed to respond to the key human rights concerns. Police officers have not been investigated and prosecuted for alleged abuses in the 2007-2008 post-election violence. Some have been promoted or simply given additional responsibility despite pending allegations. Although the National Police Service Commission Act of 2011 provides for the vetting of all police officers to identify those who have been implicated in past human rights abuses, the vetting exercise has not even commenced.

The fifth Schedule of the Constitution also recommends relevant legislation for dealing with land grievances. Injustices around land, such as land grabbing and dispossession, have fuelled ethnic and elections-related violence since 1992 and are still the root causes of tension in various parts of the country. Like police reforms, land reforms have been slow and acrimonious. The National Land Commission, a body mandated under the 2010 constitution to deal with historical land injustices, has yet to embark on its core mandate following more than a year of delay in setting it up. The key ruling of the African Commission on Human and Peoples' Rights in *The Endorois Community v Kenya*—which ordered the government to restore the Endorois people to their historic land and compensate them—has not been implemented.

The new administration should prioritize land reforms and ensure that the relevant agencies are provided with adequate financial and other support, including that the key concept of community land under the 2010 constitution is recognized in practice. According to article 63 (IV) of the constitution, community land cannot be disposed of except as provided for under an act of parliament, which law is yet to be enacted. The administration should implement the Endorois ruling without further delay. It should also ensure that institutions mandated to undertake vetting of police get the necessary backing to start the work and that those found responsible for past human rights violations are prosecuted.

IV. Cooperate with the International Criminal Court

The new government should ensure full cooperation with the ICC. Three Kenyans—including Kenyatta and Ruto—face trial before the ICC on charges of crimes against humanity related to the post-election violence of 2007-2008. The ICC prosecutor stepped

in following the failure of the national authorities to set up a local mechanism to try those responsible for the violence. Kenya is a state party to the Rome Statute, which it signed in 2005. The country has on numerous occasions promised to cooperate with the ICC, in line with its obligations under the Rome Statute and as implemented in national law through the International Crimes Act.

Kenya has challenged the ICC in and out of court. In 2011 Kenya filed an admissibility challenge to the ICC's jurisdiction. The judges rejected the challenge—a decision confirmed on appeal—finding no evidence that the government was actually investigating any of the six people then-named in the two cases.

Kenya has lobbied the UN Security Council to have the cases deferred, and supported the expansion of the mandate of the East African Court of Justice to include crimes against humanity, a move motivated at least in part to create an alternative forum for the ICC's cases.

The Kenyan government signed a memorandum of understanding with the court in 2010 and has facilitated some court activities in Kenya. But the ICC prosecutor has indicated that Kenya has stalled or failed to assist its evidence collection, including access to government records. Limited assistance by the government in the ICC investigations was one factor cited by the prosecutor in withdrawing charges against Kenyatta's former co-accused Francis Muthaura. The government is now seeking to challenge the prosecutor's claims of its limited assistance in court before the ICC judges. The ICC prosecutor has not asked the ICC judges for a formal finding of non-cooperation.

The three accused persons in the Kenyan cases have so far attended court hearings voluntarily and have promised to continue doing so. Public statements by Kenyan government officials even since the new administration took office, however, have cast doubt on its commitment to the ICC. At his inauguration on April 9, Kenyatta modified his earlier pledge to uphold international obligations by stating that these obligations would only be honored where based on "mutual respect and reciprocity," without further explanation. On April 11, Kenya's deputy ambassador to the United Nations, Ms. Koki Muli, appeared to press for the cases to be handled nationally.

The new government should signal unequivocal support for the ICC and take steps to strengthen Kenya's cooperation with the court. These steps should include ensuring free movement within the country for ICC staff, defense counsel, and victims' legal representatives and expeditious and meaningful responses to requests for assistance from the ICC or its prosecutor. In light of what the ICC prosecutor has termed "unprecedented" witness interference in the Kenya cases, the government should also state publicly that every witness has a right to testify and that it will investigate reports of witness interference. Kenya's authorities should prosecute threats, harassment, and bribery amounting to violations of national law, evidence permitting. The ICC treaty requires Kenya to extend its criminal laws to offenses against the ICC's administration of justice when committed in Kenya or one of its nationals. This includes corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, and retaliating against a witness for giving testimony.

Conclusion and Recommendations

Kenya's new leadership has both opportunity and obligation to address serious human rights challenges that, left unaddressed, continue to fuel violence and human rights abuses. The government should prioritize progress in four key areas:

Uphold Key Rights for Civil Society

- Impartially investigate intimidation and hate speech;
- Preserve space for civil society activity; and
- Protect media freedoms.

Ensure Accountability for Serious Crimes

- Establish an independent commission of inquiry into crimes committed in Mt. Elgon in 2008;
- Establish special mechanisms to investigate, prosecute and adjudicate the most serious election-related crimes;
- Conduct independent investigations into extrajudicial killings by police and death squads in Nairobi and Central Kenya; and

- Stop crimes by police including rape, beatings, and extortion against refugees, asylum seekers, and ethnic Somalis; investigate and hold accountable abusive police officials.

Pursue Essential Reforms

- Accelerate land reforms by ensuring relevant agencies have adequate financial and other support; enact the pending community land law as required under 2010 constitution; and implement the Endorois ruling; and
- Ensure financial and other support for institutions mandated to undertake vetting of police and other relevant agencies for police reforms; prosecute any police found responsible for past human rights violations.

Cooperate with the International Criminal Court (ICC)

- Strengthen cooperation with the ICC including by ensuring free movement of ICC staff, defense counsel, and victims' legal representatives;
- Respond expeditiously and meaningfully to requests for assistance from the ICC or the ICC prosecutor; and
- Publicly affirm the right of every witness to testify and commit to investigating and prosecuting witness interference including threats, harassment, and bribery where they amount to violations of national law.