

CIVIL-MILITARY RELATIONS IN AN ERA OF VIOLENT EXTREMISM

Policy Options for
The Kenya Defense Forces

CHRIPS

Judy Gitau

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About CHRIPS

The Centre for Human Rights and Policy Studies (CHRIPS) is an independent think tank, research and policy development institution that invests in the generation and dissemination of knowledge that facilitates the development of innovative and effective policy solutions to the pertinent security challenges in Africa.

CHRIPS convenes a multidisciplinary team of experts towards this end.

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Glossary

Civil-Military relations: describes the relationship between civil society as a whole and the military organization or organizations established to protect it. More narrowly, it describes the relationship between the civil authority of a given society and its military authority.

Counter Terrorism: Includes the practice, military tactics, techniques, and strategy that government, military, law enforcement, business, and intelligence agencies use to combat or prevent terrorism.

Countering Violent Extremism: s a basket of measures that encompass community engagement, development, education, strategic communications, and public-private partnerships intended to reduce the appeal of and support for extremist groups, and enhance resilience against them.

Violent Extremism: Violent extremism, broadly speaking, refers to the process of taking radical views and putting them into violent action

Acknowledgments

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1. Introduction

The Constitution of Kenya 2010 provides for democratic governance of the security sector through establishing accountability and oversight measures in its fourteenth chapter on national security and relevant subsidiary legislation. In theory, the concept of civilian oversight over the National Police Service (NPS), Kenya Defense Forces (KDF) and National Intelligence Service (NIS) are anchored in the National Assembly, the office of the Cabinet Secretary responsible for national defence, (the Executive) and in some specific instances oversight authorities and commissions. With specific regard to the KDF, the Constitution, and the Kenya Defence Forces Act are particularly clear, regulating the conduct of the military internally, through the court martial process and externally through the penal process. Civil-military relations are tightly governed through the National Assembly.

However, this robust security legislative framework has been tested in the recent past. Owing to the changing nature of security challenges in Kenya, and in particular terrorism attributed to Al-Shabaab, the military has been deployed on several occasions either to respond to terrorism incidents or to pre-empt terror threats within the country.

Deployment of military personnel in the domestic context always presents challenges to democracies. Since militaries are by orientation, training and nature more attuned to dealing with external enemies, their interaction with civilians in a domestic context is fraught with uncertainties and challenges. Kenya is no exception and there has been reports of human rights violations at specific points of military deployment domestically as well as controversy over whether such deployments were consistent with the law.

As civil-military interactions in this context increase, it has become important not only to interrogate the efficacy of the oversight institutions and legal

framework but also their relevance in the current context of insecurity. Indeed, the emerging practice within the African continent to use military personnel in the face of violent extremism, now requires further interrogation and understanding if policy guidance and strengthening is to be provided.

With specific focus on civilian oversight, especially as regards compliance with human rights provisions, the Centre for Human Rights and Policy Studies undertook a study in four perceived violent extremism hotspots in Kenya (Garissa Wajir, Mombasa and Nairobi). The objectives were to examine the oversight structure over the Kenya Defence Forces; explore the effectiveness of this infrastructure in the context of military engagements in countering violent extremism and set out the various policy options for improving military oversight and accountability. The study was undertaken from July 2015 to July 2016 and drew from interviews with key stakeholders, key informants and civilians residing in areas identified as violent extremism hotspots. It also included a critical review of various relevant literature.

The study sought to answer the following questions:

- What kind of civilian oversight frameworks over KDF exist (at policy, strategic and operational levels) and how effective are they?
- How has violent extremism and countering violent extremism affected KDF operations and, therefore, oversight over the military?
- What, if any, are the civil-military challenges emerging in this context?

This study was not about the operational effectiveness of KDF in the areas studied. Questions of adequacy of deployment and military capabilities were, therefore, outside the scope of the study. The study was also limited by the paucity of relevant data and published research on KDF in general and on the question of oversight and accountability in particular.

Our interpretation of oversight borrowed from the principal-agent concept, which proposes that “oversight is aimed to prevent, correct and address agency loss — that government agents may not behave as intended by their bosses i.e. civilians.”¹ This interpretation, therefore, focuses the study on what the existing oversight structures are doing over the KDF and what impact they are having especially in the context of violent extremism. The study also makes normative recommendations.

¹ The Varying Roles Played by Legislatures in Civil-Military Relations: Global Comparisons Stephen M. Saideman Carleton University, Ottawa, Canada; David P. Auerswald National War College, Washington, DC; Philippe Lagassé, University of Ottawa, Ottawa, Canada. Prepared for presentation at the ISA-FLACOS meeting in Buenos Aires, Argentina, July 23rd -25th, 2014.

2. Background

Over the past decade, Kenya has experienced an increase in terrorist attacks within its territory. From low-key grenade incidents to large-scale attacks, the country suffered more than 70 attacks between 2011 and 2012 alone.²

Indeed, it was following a spate of high-profile cross-border attacks in 2011 by Somalia-based terrorist group Al-Shabaab, that the Kenyan government deployed KDF to Somalia, ostensibly to stabilise the neighbouring country and prevent further attacks.³ However, in spite of this intervention, Kenya continued to suffer increased terrorist attacks, resulting in loss of lives and destruction of livelihoods. The worst attacks include the one at Westgate Mall in Nairobi in September 2013, where at least 67 people were killed; the twin massacres in Mandera in December 2013 where 28 civil servants and 38 quarry workers were killed and the April 2015 Garissa University massacre of 147 people, mostly students.⁴

² ACLED, 2016; Government of Kenya and United Nations Development Programme “Strengthen Community’s Capacity Against Radicalization and Violent Extremism In Kenya” Project Document [https://info.undp.org/docs/pdc/Documents/KEN/\(Kenya%20rev%20270115\)%20Kenya%20Counter%20Terrorism%20project%20Document%20FINAL.pdf](https://info.undp.org/docs/pdc/Documents/KEN/(Kenya%20rev%20270115)%20Kenya%20Counter%20Terrorism%20project%20Document%20FINAL.pdf)

³ While the ostensible catalyst for the intervention was a spate of high-profile cross-border kidnappings and murders by freelance Somali criminals, a longer-term set of ambitions and objectives underlay the operation (such as exponential increase of the Dadaab camp, National security threat through deteriorating situation in northern pastoralist regions, which, according to some analysts, was contemplated by elements of the Kenyan military as early as 2009. Kenya’s Intervention in Somalia, David W. Throup <https://www.csis.org/analysis/kenya%E2%80%99s-intervention-somalia>, Last visited June 2016

⁴ *Supra* note 2

While the government took several measures to respond to these assaults on national security, including legislative reform (Security Amendment laws),⁵ improved use of technology⁶ and even increased numbers of police officers,⁷ the most visible response particularly in the perceived violent extremism hotspots has been the deployment of the military. Kenya Defence Forces Commando Units have been deployed in specific areas mapped by the National Intelligence Service and military intelligence services as terror cell operating zones.⁸

It can be reasonably argued that this internal deployment has been due to the increasingly militarised nature of Al-Shabaab attacks as well as perceived lack of trust in the capability of the police to prevent the attacks.⁹ Through flooding identified violent extremism hotspots and key government installations with military and intelligence officers, the government has strategically declared war on Al-Shabaab.

This approach has resulted in unprecedented increased interaction between the military and civilians, which has in turn generated several challenges, including human rights violations, particularly at the Coast and northern parts of the country where youth are said to have been radicalised.¹⁰ Ordinarily,

⁵ Security Laws Amendment Act 2014, http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws_Amendment_Act_2014.pdf

⁶ President speech during Madaraka Day celebration <http://www.eadestination.com/news-articles/331-kenya-to-employ-more-police-officers-in-war-on-terror>; Business Daily Africa. Last visited 10th September 2016

⁷ *ibid*

⁸ KDF special units capture 8 Al-shabab Terrorists Targeting Manderah <http://intelligencebriefs.com/kdf-special-units-capture-8-al-shabaabterrorists-targeting-travellers-in-mandera/> Last visited 14th September 2016

⁹ Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya, July 19, 2016, Human Rights Watch: <https://www.hrw.org/report/2016/07/19/deaths-and-disappearances/abuses-counterterrorism-operations-nairobi-and>; Kenya's Counterterrorism Approach is Floundering: <http://nationalinterest.org/feature/kenyas-counterterrorism-approach-floundering-17247?page=2>

¹⁰ Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya, July 19, 2016, Human Rights Watch: <https://www.hrw.org/report/2016/07/19/deaths-and-disappearances/abuses-counterterrorism-operations->

and in many places in the world, the use of the military to fight terrorism domestically is fraught with political, practical, legal and ethical challenges.¹¹ Kenya's case is no exception.

A study in Garissa, Wajir, Mombasa and Nairobi resulted in the following findings.

nairobi-and; The Error of fighting terror with terror: Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism September 2015 last visited 10th September 2016: <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf>

¹¹ <file:///Users/judygitau/Downloads/nps58-051211-03.pdf>

3. Findings

3.1 Legal ambiguity on status of military security operations

3.1.1 Peace operation or emergency response?

The Constitution provides in Article 238 that the deployment of the Kenya Defence Forces domestically must be done with the express authorisation of the National Assembly and only in instances of a national emergency or disaster or to restore peace in a part of Kenya affected by unrest and instability.¹² Sections 8, 31 and 32 of the Kenya Defence Forces Act further underscore this provision by requiring the Defence Cabinet Secretary to inform the National Assembly about the KDF deployment.¹³ The National Defence Cabinet Secretary is then required to issue a gazette notice of the commencement of such deployment as well as issue another notice when it comes to an end.¹⁴

Whereas it is clear that there is military presence in the areas identified for this study (Garissa, Wajir, Mombasa and Nairobi), particularly in key government installations and sections identified as potential violent extremism hotspots, it is not apparent under what legal mandate the KDF personnel are operating within these areas since no request for such operation is on record before the National Assembly.¹⁵

During the study, researchers observed KDF officers on the ground undertaking law enforcement activities including mounting road blocks along

¹² Constitution of Kenya Article 238; Kenya Defence Forces Act Section 8, 31 and 32

¹³ *ibid*

¹⁴ Kenya Defence Forces Act Section 34 (2) and 34 (3)

¹⁵ Review of the Parliamentary Hansard

highways,¹⁶ providing security for key State installations such as the Likoni ferry in Mombasa,¹⁷ undertaking ‘stop and search’ operations within certain sections of Mombasa, Wajir and Garissa (bridge before Garissa town) and even arresting and detaining terror suspects.¹⁸ The Kenya Military Intelligence has itself reported in its public briefings the arrest of eight suspected Al Shabaab terrorists in Mandera (at Omar Jillo), who were reportedly planning to attack buses plying the Mandera-Wajir route.¹⁹ There is, however, no parliamentary report of their request to operate in these regions or a report of operations to the National Assembly.²⁰

Whereas the Cabinet Secretary in charge of Internal Security, through notice number 93 of September 2, 2015, declared 13 villages as being “dangerous” zones through a gazette notice,²¹ operations by KDF in these areas would still require the National Assembly’s approval and must contemplate an end date. The gazetted areas, which stretch from Garissa to Tana River and Lamu, included the Holugho border point, Galmagala, Sangilu, Ijara, Bodhei, Milimani, Baurre, Basuba, Mangai, Malalani, Kiunga, Ishakani and the Dar-es-Salaam border point. The minister indicated that the government would undertake operations in the listed villages, including clearing the areas of Al-Shabaab operatives and rehabilitating schools, health centres as well as roads. Key informant interviews revealed that the highlighted areas were under effective military control, including, seemingly, for routine law enforcement activities.²²

¹⁶ Interview with Key informants in Mombasa, Garissa, Wajir; Reconnaissance visit by researchers

¹⁷ Interview of Key informants including County administration officials

¹⁸ Interview with Key informants, Interview with organizations that represents persons detained

¹⁹ KDF special Units capture 8 Al-Shabab Terrorists Targeting Mandera: <http://intelligence-briefs.com/kdf-special-units-capture-8-al-shabaabterrorists-targeting-travellers-in-mandera/>

²⁰ Review of National Assembly Hansard

²¹ <http://www.standardmedia.co.ke/article/2000176080/boni-forest-security-operation-targets-13-villages-in-lamu-and-garissa>: http://kenyalaw.org/kenya_gazette/gazette/volume/MTIxNA-/Vol.CXVII-No.93

²² Key informant interviews Garissa October 15 2015; Nairobi June 2016

It may be argued that the collaboration between KDF personnel and police in this regard is provided for in Section 31 (c) of the KDF Act in the interest of national security. Indeed, section 31 provides that the Defence Forces shall, in the interest of national security, co-operate and work with other security organs in the discharge of its constitutional mandate. However, such operations must still be either in the event of national disaster or emergency or peace-keeping and must also comply with constitutional standards relating to human rights and fundamental freedoms.²³

It was not apparent if this particular deployment was in response to a national disaster or emergency or restoration of peace. In addition, there is no National Assembly approval underpinning this gazettelement, which was issued by the Cabinet Secretary in-charge of Internal Security.

Such operations without clear legal basis and lacking in the fulfilment of provisions for reporting to the National Assembly further muddy the waters with regard to oversight, as there is no clarity on their nature, timeline or even scope. Therefore, any violations that may occur in the course of such operations are shrouded in secrecy.

The lack of legal basis is further illustrated in the joint parliamentary report by the Parliamentary committees on Administration and National Security and on Defence and Foreign Relations, on their investigations into a reported KDF retaliatory attack following the killing of three KDF service men in a terrorist attack in Garissa²⁴ as well as police and civilian deaths in Eastleigh, Nairobi and Baragoi in Samburu. The committees' mandate in investigating these incidents was among other things, to establish why the Executive ignored Parliament by deploying KDF personnel to Garissa and Baragoi respectively against the Constitution.²⁵ Following the joint parliamentary committee inves-

²³ Section 34 of The KDF Act

²⁴ Report Of The Joint Committee Investigating The Matter Of The Adverse Security Situation, Loss Of Property, Loss Of Lives Of Security Personnel And Civilians In Garissa And Eastleigh Towns, and The Baragoi Environs

²⁵ <http://www.businessdailyafrica.com/Parliament-orders-probe-into-Turkana-Garissa-deaths/539546-1626328-n990y0/index.html>; Last visited September 10th 2016 Report Of

tigation, the Cabinet Secretary (CS) in charge of National Defence admitted that the deployment of the military domestically without parliamentary approval was a contravention of the law.²⁶ The Cabinet Secretary in charge of National Defence informed the joint parliamentary committee that “it was a Cabinet decision” to deploy the army to Baragoi to pursue bandits who had killed police officers.²⁷ He further alluded to the fact that the National Security Council erred by deploying KDF in Baragoi without first seeking the approval of the National Assembly, which was in contravention of Article 241(3)(c) of the Constitution.²⁸ In its report, the joint committee expressed concern that KDF took orders from the National Security Council irrespective of their constitutionality or otherwise.²⁹ The Cabinet Secretary revealed that KDF had not been deployed in Garissa and they were simply reacting to the killing of their colleagues.³⁰ The committee recommended compensation for victims of the KDF violence and directed that soldiers should not be deployed domestically contrary to the Constitution.³¹ Despite this finding by the National Assembly, it is not clear whether or not the court martial system was triggered to hold to account the soldiers responsible for the Garissa attack on civilians. This is because no official report to this end has been made by

The Joint Committee Investigating The Matter Of The Adverse Security Situation, Loss Of Property, Loss Of Lives Of Security Personnel And Civilians In Garissa And Eastleigh Towns, and The Baragoi Environs http://www.nfdonline.net/BARAGOI,%20GARISSA,%20EASTLEIGH%20REPORT%202012.pdf?articleID=2000074595&story_title=Kenya-Councillors-in-Kilifi,-Wajir-defect-to-URP, Last visited 9th September 2016

²⁶ *ibid*

²⁷ Report Of The Joint Committee Investigating The Matter Of The Adverse Security Situation, Loss Of Property, Loss Of Lives Of Security Personnel And Civilians In Garissa And Eastleigh Towns, and The Baragoi Environs, *supra* note 28

²⁸ *ibid*

²⁹ http://www.nfdonline.net/BARAGOI,%20GARISSA,%20EASTLEIGH%20REPORT%202012.pdf?articleID=2000074595&story_title=Kenya-Councillors-in-Kilifi,-Wajir-defect-to-URP, Last visited 9th September 2016

³⁰ *ibid*

³¹ http://www.nfdonline.net/BARAGOI,%20GARISSA,%20EASTLEIGH%20REPORT%202012.pdf?articleID=2000074595&story_title=Kenya-Councillors-in-Kilifi,-Wajir-defect-to-URP, Last visited 9th September 2016

the military.³² Residents of Garissa have therefore, resorted to pursuing civil redress through lengthy court processes.³³

While on one hand military operations and indeed activities that preserve national security require some measure of secrecy in order to be effective, this secrecy is not absolute as it might jeopardise the rule of law, democracy and human rights. Anchoring operations in the law, therefore, provides the requisite oversight mechanism to ensure accountability in the actions of KDF personnel without jeopardising their mission.

3.1.2 Criminal Justice Process with Regard to Violations by KDF

It is apparent that the KDF presence in the selected areas of study is neither covered under international humanitarian law nor is it underpinned by Article 241(3) of the Constitution on deployment of KDF domestically. This is because, for the latter, no authorization from the National Assembly has been sought, and for the former, in order for international humanitarian law and its corresponding safeguards to be triggered, there must be an armed conflict of an international or non-international nature.³⁴ Although the tensions exacerbated by the terrorist attacks in Kenya place it in a near state of armed conflict, Kenya is not at war.

The national mood in the researched areas is such that the country is in the unique position of not being within the domestic legal regime because national security has been threatened and yet not being quite at war- legally speaking.

³² Interview of Constitutionally mandated oversight bodies

³³ Justice at last for victims of KDF brutality in Garissa <http://www.nation.co.ke/counties/Justice-at-last-for-victims-of-KDF-brutality-in-Garissa/1107872-3374158-o6rmq0/> Last visited September 8 2016

³⁴ How is the Term “Armed Conflict” Defined in International Humanitarian Law? International Committee of the Red Cross (ICRC) Opinion Paper, March 2008, <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>, Last visited August 2015

Indeed there is a lack of clarity among the security actors and civilians on which laws obtain when national security is at stake, placing civilians at great risk. Whenever violations occur, – and indeed many have been reported, – equivocation takes place as to which laws apply to protect civilians or even the KDF soldiers for that matter. There is almost an excusal of criminal conduct by security actors if the conduct falls within the broad context of preserving national security.

In Mombasa for example, it was reported that fishermen fishing at night were shot by KDF soldiers who mistakenly suspected them of being terrorists. Two fishermen were killed while several others were injured.³⁵ The survivors, who through a non-governmental organisation, reported the matter to the Mombasa Central Police Station, were informed that the incident was a military matter which did not fall within the purview of law enforcement.³⁶

Further, interviews with civilians, who indicated they had suffered violations under the military in Garissa, noted that police officers felt intimidated by the KDF personnel and further held that the military were not subject to the criminal law process.³⁷

Researchers encountered reports of not less than 11 cases of arrests and disappearances of civilians, alleged to have been detained or disappeared during joint military and police operations. With police officers bluntly refusing to pursue military or military related matters, family members of the disappeared and detained persons could only resort to filing 'habeas corpus' applications before courts or constitutional petitions to obtain any form of accountability.³⁸

³⁵ Interview of NGO official representing the fishermen in Malindi

³⁶ Key informant interview Mombasa

³⁷ Focus Group Discussion with youth in Garissa.

³⁸ Criminal Miscellaneous application case no 581 of 2011; Habeas corpus application Miscellaneous criminal 228 of 2015; Criminal Application no 276 of 2015; Habeas Corpus Miscellaneous Application 142 of 2015

Whether or not a KDF domestic deployment has been legally mandated, there is no legal vacuum since the operations within such deployment are still subject to domestic legal proceedings. In fact where KDF domestic deployment has been correctly mandated under the law, violations of human rights could still occur. These violations should be prosecuted as criminal or be reprimanded within the court martial process.

A sample of persons who attempted to pursue court martial processes indicated an inability to access army barracks, which were classified as protected areas.³⁹ Even legal representatives pursuing civil cases and constitutional petitions against military personnel where it was thought such personnel had irregularly detained civilians, could not obtain any information whatsoever—whether refuting or confirming the assertions or witness accounts regarding the alleged detentions.⁴⁰

The constitutional commissions whose mandates include protection of citizens' rights have received complaints of violations. However, their interventions have been stalled by the tenuous balance between accountability and national security, which is strictly within the domain of the military.

The legality of a particularly military deployment domestically would be a matter to be addressed distinctly by the National Assembly or a court of law and not be conflated with the violations of the personnel deployed. Personnel can and should be reprimanded separately for their actions should these actions be in violation of the law whether the deployment was regular or irregular.

³⁹ Key informant interview with legal representative of civilian who has interacted with security actors.

⁴⁰ *ibid*

3.2 Attribution of Responsibility in Multi-Agency Operations

3.2.1 Joint Security operations: Who bears responsibility?

The Security Laws (Amendment) Act, 2014 established in Section 40 A (1) a National Counter-Terrorism Centre, an inter-agency body whose function is to co-ordinate national counter-terrorism efforts in order to detect, deter and disrupt terrorism acts. Operationally, this translates to all the disciplined forces working together.⁴¹ In practice on the ground in the research sites, it was established that all Kenya's disciplined forces work as a conglomerate in their counter terrorism activities.

Indeed, the field research established that there was cooperation between the KDF, the General Service Unit, the Kenya Police, Administration Police, the Kenya Prisons Service and Kenya Wildlife Service officers in the four sites of study. These included manning road blocks, 'stop and search' operations, providing security to key government installations including airports (Mombasa and Lamu) and the Mombasa ferry and even detention of terrorist suspects.⁴² For instance, researchers counted at least seven stop and search points on the Mombasa–Malindi highway controlled by uniformed personnel from different disciplined forces.⁴³ It was established that it was particularly difficult for civilians to identify and distinguish members of the different disciplined forces. The researchers found out from key informant interviews that on this highway, mistreatment was quite common, with the different personnel said to subject civilians at roadblocks to punitive physical tasks and arbitrary arrests and detention for long periods before releasing them without proffering any charges. One individual was reportedly detained for 42 days.⁴⁴ Similar reports were made regarding other highways including

⁴¹ http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/Security-Laws_Amendment_Act_2014.pdf

⁴² Key informant interview Mombasa

⁴³ This was both observed during the research period by researchers and confirmed by Key informants

⁴⁴ We were not able to ascertain this aside from an informant interview.

in Garissa⁴⁵ and on the Nairobi–Thika highway.⁴⁶ Civilians referred to the alleged perpetrators as “jeshi” or “askari” (army or soldier)⁴⁷

Confusion of uniforms and insignia significantly contributes to the problem of accountability. The challenge was observed as being even more acute in situations of multi-agency counter-terrorism operations as the different security actors would don variations of combat fatigues. With confusion in uniforms, it is difficult for the public to identify the units and agencies responsible for violations.⁴⁸

The inability to distinguish the actors further translates to KDF sometimes taking responsibility for all other security actors’ violations as they are perhaps the most distinguishable. Indeed, this is a problem that was highlighted by Members of Parliament from the North Eastern region in May 2015 following complaints from the public on alleged extra judicial killings in their constituencies. The MPs highlighted the challenge of not being able to hold security actors to account. While they presumed that it was KDF officers who arrested and detained their constituents in army barracks, they admitted that the personnel and their vehicles were unmarked.⁴⁹

During the course of the research civilians reported violations ranging from harassment at road blocks for lack of identification cards to major infractions including detentions, torture, murder and forced disappearances.⁵⁰ These patterns of violations were reported in Mombasa, Garissa and to a small degree in Wajir, with some victims claiming abduction and disappearances enforced by the officers. They said some victims were abducted for a few days

⁴⁵ Criminal miscellaneous application 142 of 2015, High Court

⁴⁶ Criminal Application number 258 of 2015, Milimani Law Courts

⁴⁷ Key informant interviews Mombasa, Garissa, Wajir; Petitions Criminal miscellaneous application 142 of 2015, High Court

⁴⁸ Key informant interviews Mombasa and Garissa

⁴⁹ Northern Kenya leaders accuse army of extrajudicial killings, Daily Nation, Tuesday, December 8 2015, <http://www.nation.co.ke/news/Northern-Kenya-MPs-accuse-army-of-carrying-out-killings/1056-2987764-cehs74/index.html>

⁵⁰ *ibid*, Reconnaissance visit by researchers to these sights.

while others disappeared, never to return. The civilians broadly attributed the violations to the military or the police.⁵¹

Reports by human rights organisations working in Garissa have indicated that security officers from various units (KDF, police and Administration Police) have on various occasions raided homes, business premises and schools to arrest individuals and conduct searches. Sometimes these raids have been made in the middle of the night.⁵²

Persons interviewed could not clearly distinguish the alleged perpetrators.

The Parliamentary Committee on Administration and National Security has twice addressed the matter of disciplined forces being jointly deployed in counter-terrorism efforts. Following the Westgate Mall attack⁵³ and later the attack at the Garissa University College⁵⁴ Parliament conducted an inquiry into the State response to these attacks through the Defence and Foreign Affairs Parliamentary Committee.

With regard to the Westgate Mall attack, the Committee recommended a proper coordination of the various security actors that is anchored in clear policy guidelines under a national inter-agency coordination team.⁵⁵ However, this recommendation is not a *carte blanche* on use of KDF jointly with other disciplined forces as standard operating procedure during terrorist attacks and in law enforcement generally.

⁵¹ Focus group discussions with Garissa residents; Key informant interviews Mombasa

⁵² <https://www.hrw.org/report/2016/07/19/deaths-and-disappearances/abuses-counter-terrorism-operations-nairobi-and> last visited 14th August 2016

⁵³ <https://www.scribd.com/doc/201766369/Report-Of-The-Joint-Committee-On-Administration-And-National-Security-And-Defence-And-Foreign-Relations-On-The-Inquiry-Into-The-Westgate-Terrorist-Attack>

⁵⁴ Report On Investigations In to The Garissa University College Terrorist Attack, Departmental Committee On Administration And National Security, http://www.parliament.go.ke/the-national-assembly/committees/committee-reports/item/download/1907_aef6a56571ccf636c21c0a0dfba38eee

⁵⁵ <https://www.scribd.com/Doc/201766369/Report-Of-The-Joint-Committee-On-Administration-And-National-Security-And-Defence-And-Foreign-Relations-On-The-Inquiry-Into-The-Westgate-Terrorist-Attack>

The Parliamentary Committee on Administration and National Security probing the April 2015 terrorist attack at Garissa University also sought clarity in the Military and other disciplined forces engagements during terrorist incidents. They recommended that the Inspector-General of Police, through the director of Operations in the National Police Service, should oversee such internal security operations comprising of joint disciplined forces.⁵⁶ This arrangement is not only concurrent with the KDF Act but also the Constitution. Pursuant to Article 241(3)(c) of the Constitution, whenever the Defence Forces are deployed domestically in any part of Kenya affected by unrest or instability to restore peace, the Chief of Defence Forces is responsible for the administration control and overall superintendence of the operation.⁵⁷ However, whenever the Defence Forces are deployed in support of the National Police Service in situations of emergency or disaster then the Inspector-General of the National Police Service is to be responsible for the administration, command, control and overall superintendence of the operation.⁵⁸

At any rate, there should be clarity on which specific disciplined force and office is in charge of a particular operation. Any violation of human rights in such operation as well as criminal acts are subject to appropriate accountability and oversight mechanisms either under the national police service⁵⁹ or the military.⁶⁰ This includes operations that are found to have been irregularly mandated.

The joint approach by the disciplined forces as presently manifested renders accountability difficult since it is not clear who is in-charge of any given operation.

⁵⁶ Report on the Investigations into the Garissa University College Terrorist Attack, The National Assembly Eleventh Parliament – Third Session – 2015

⁵⁷ KDF Act section 32

⁵⁸ KDF act section 33

⁵⁹ The Independent Police Oversight Authority, Internal Affairs Units, the Penal System

⁶⁰ The Court Martial process, the national penal system, the National Assembly.

3.2.2 *Complete camouflage: who is responsible?*

The challenge of accountability is further compounded where the security actors operate under camouflage as has been the practice in many of the recent instances narrated. Members of oversight commissions on the ground⁶¹ pointed out that on specific instances, vehicles they identified as belonging to the KDF, used in operations such as an attack on Garissa market had their number plates covered up and the soldiers' faces concealed in balaclavas.⁶²

Further, both Key informants and civilians interviewed confirmed that information on the military, their rank and file as well as their structures generally – unlike the police – are largely not known to the public. Therefore, where violations occur in the course of operations, civilians have no information on who to liaise with, within the military for purposes of reporting the violation or seeking redress. Civilians are not allowed within army barracks or established camps to seek clarification or file complaints as these areas are secured.⁶³

Civilians interviewed during this study simply referred to the uniformed officers or those in camouflage fatigues either as police or army personnel and could not tell them apart.⁶⁴ The only distinction made by civilians was that of the arms carried by different actors, with some appearing more sophisticated than others. This led civilians to assume that officers with what appeared to be more sophisticated weapons were most likely KDF personnel.⁶⁵ It was impossible to attribute any of these violations exclusively or specifically to KDF. It was therefore difficult to hold specific individuals accountable or specific arms of the disciplined forces specifically responsible.

⁶¹ Key informant interviews

⁶² Key informant interviews

⁶³ Key informant interview Mombasa -Likoni

⁶⁴ Key informant interview Mombasa; Focus Group Discussion Women Garissa

⁶⁵ Key informant interviews in Wajir, Mombasa

3.3 KDF-Civilian interface?

Key informants indicate that a mechanism for coordination in theory existed between KDF and local county authorities before any military operation can be undertaken. This is particularly activated when the military undertakes training exercises and information is shared with the public to avoid injuries.⁶⁶ Such coordination appears not to be exercised for other operations such as those in Mombasa and Garissa.⁶⁷ In those two places for instance, as well as in Wajir, the local communities were not informed of the presence or operations of the military in their areas. Further, civilians in all the four research sites did not know where to file complaints in the event of violations occasioned by KDF personnel.⁶⁸ A majority of complainants in these areas ultimately reported to human rights actors and civil society groups, who were equally unaware of mechanisms for lodging complaints against the military.

Key military informants as well as a review of the KDF Act indicate that criminal acts by KDF personnel attract criminal sanctions, including within the court martial system.⁶⁹ Key informants said that civilians are expected to report incidents of misconduct by military personnel to the police, who are in turn obligated to act.⁷⁰ The KDF Act further provides that persons who are subject to the KDF Act, such as soldiers who engage in criminal activities, should be reported to their commanding officers.⁷¹ Those interviewed in the research sites, however, pointed out that in practice, the police are afraid of taking up any complaints against the military or following up such complaints

⁶⁶ Key Military Informant Interview

⁶⁷ focus Group Discussion Garissa; Key Informant interviews Mombasa

⁶⁸ Focus group discussion with elders – Garissa, Community leaders, Wajir. Key informants in Mombasa and Nairobi revealed all did not know where to report violation where conflicts occurred between the military and civilians.

⁶⁹ Key informant interview Nairobi; Section 160 KDF Act

⁷⁰ Key military informant interview

⁷¹ Section 150 KDF Act, Section 71. The KDF Act, however, only contemplates a civilian population to be a foreign civilian population.

when they have been filed. This observation was made quite specifically in the Likoni area of Mombasa and in Garissa.⁷²

Civilians mainly report to both State and non-State human rights groups and agencies. These include, Muslims for Human Rights (MUHURI), Haki Afrika and the Kenya National Commission on Human Rights among others not listed.⁷³ Given the limited capacities of these actors to address military issues as well as the practical challenges they themselves face in dealing with the military, the effectiveness of their interventions remains limited. In addition, some of these organizations such as MUHURI and Haki Africa were faced with deregistration threats by the Non-Governmental Organization Coordination Board throughout 2015, creating a chilling effect in their enthusiasm to take up such complaints.⁷⁴

3.4 National Assembly oversight

Operationally, the National Assembly also have the mandate to oversight any engagements domestically.

The Constitution provides in Article 241 (b) and (c) that on both instances where the KDF are to be deployed domestically whether it is in cooperation with other authorities in situations of emergency or disaster, or to restore peace in any part of Kenya affected by unrest or instability, approval of the National Assembly is mandatory.

Once the National Assembly issues authorization for deployment of KDF personnel in support of the National Police for example, the KDF Act further specifies the procedure for such deployment including the issuing of a gazette notice by the Cabinet Secretary in-charge of defence on the commencement and discontinuation of such an operation.⁷⁵

⁷² Key informant interviews

⁷³ Focus group discussion Mombasa (Likoni area)

⁷⁴ NGOs lose license over terrorism claim, *Daily Nation*, Wednesday May 27, 2015: <http://www.nation.co.ke/news/NGOs-lose-licences-over-terrorism-claim/1056-2731888-nudb7c/index.html>

⁷⁵ Section 34 (3)KDF Act

Section 8 of the KDF Act further requires a reporting back to the National Assembly.

With specific regard to civil –military interactions in the context of violent extremism in Kenya, the National Assembly has had three clear instances of exercising oversight over the military.

The committees have called for clarity of command and recommended the use of police and even the General Service Unit (a paramilitary unit of the police) as opposed to the KDF. Specifically, the Parliamentary Committee on Administration and National Security probing the April 2015 terrorist attack at Garissa University recommended that the Inspector-General of Police, through the Director of Operations in the National Police Service, should oversee such internal security operations. The committee insisted that KDF should only be used as a last resort.⁷⁶ The Committee was also of the view that the Reconnaissance Squad (RECCE Squad), a paramilitary unit under the National Police Service that is trained for urban combat, was better suited to respond to similar terrorist attacks.⁷⁷ To this end, the committee recommended that “The National Police Service should decentralise the RECCE Squad operations to county headquarters, in areas which are vulnerable to terrorist attacks such as North-Eastern and Coast regions.”⁷⁸

⁷⁶ Report on the Investigations into the Garissa University College Terrorist Attack, The National Assembly Eleventh Parliament – Third Session – 2015 https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi4-q7Z6vrPAhUE1hoKHZfpAAQQFggeMAA&url=http%3A%2F%2Fwww.parliament.go.ke%2Fthe-national-assembly%2Fcommittees%2Fcommittee-reports%2Fitem%2Fdownload%2F1907_aef6a56571ccf636c21c0a0dfba38eece&usg=AFQjCNHRuqtGPL0IUq9StfPBC5vncsryAw&sig2=lSpEZfezkMvkhy1VaEPHLQ

⁷⁷ Report on the Investigations into the Garissa University College Terrorist Attack, The National Assembly Eleventh Parliament – Third Session – 2015: https://www.google.com/url?sa=t&rcct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi4-q7Z6vrPAhUE1hoKHZfpAAQQFggeMAA&url=http%3A%2F%2Fwww.parliament.go.ke%2Fthe-national-assembly%2Fcommittees%2Fcommittee-reports%2Fitem%2Fdownload%2F1907_aef6a56571ccf636c21c0a0dfba38eece&usg=AFQjCNHRuqtGPL0IUq9StfPBC5vncsryAw&sig2=lSpEZfezkMvkhy1VaEPHLQ

⁷⁸ Report on investigations into the Garissa University College terrorist attack: November 2015 *ibid*

However, the Parliamentary Committees that have investigated Kenya's responses to terrorist attacks are yet to pronounce themselves on the question of the use of the military beyond what is perceived as emergency and into the realm of law enforcement. To that extent, the opportunity by the National Assembly to provide clearer guidance has not been seized.

Regarding the matter on the retaliatory attack in Garissa by KDF soldiers following the death of three of their colleagues, the Parliamentary Committee was able to obtain on record a revelation that in fact KDF had not been deployed in Garissa but that some soldiers had acted out of turn.⁷⁹ This specific session illustrated perfectly the purpose for National Assembly's oversight role, as civilians in Garissa had not been able to obtain responses for this incident on the ground up to that point. However, the follow through requiring the Cabinet Secretary to report back on the prosecution or reprimand of the said soldiers has not been forthcoming.

3.5 KDF suitability to engage in law enforcement

A key question that constantly emerged throughout the study was the suitability of the military in engaging in law enforcement albeit at an elevated level. Countering violent extremism requires investigation and interaction with local communities, resulting in prosecution of perpetrators and quelling of threats. Indeed, intelligence gathering, surveillance, tactical operations, negotiations, forensics and investigations' follow up, which are necessary in preventing terrorist attacks, fall squarely within the ambit of law enforcement.

While interviews with KDF sources established that there are intelligence units within the military,⁸⁰ their capacity, suitability and flexibility to conduct investigations within civilian populations and within a human rights framework remain doubtful. KDF also lacks the corresponding infrastructure (in law,

⁷⁹ Report Of The Joint Committee Investigating The Matter Of The Adverse Security Situation, Loss Of Property, Loss Of Lives Of Security Personnel And Civilians In Garissa And Eastleigh Towns, and The Baragoi Environs

⁸⁰ Key military informant interview

institutions and human resources) to undertake what are to a considerable extent, law and order operations.

Many of the Counter terrorism operations in Mombasa, Wajir, Garissa and specific sections of Nairobi have been largely about mass arrests of male youth, who are then interrogated and allegedly tortured, after which some are released.⁸¹ There was no indication that the operations collected information that could lead to arrest and prosecution of suspected terrorists. It is also uncertain that KDF personnel are trained or equipped for this kind of policing work.

3.6 Protection of Institutional Integrity of the Military

The military remains a highly respected institution in Kenya. Indeed, as the Afrobarometer study indicates, 69 per cent of Kenyans view KDF as being highly professional and competent.⁸² It will also be remembered that unlike the police, KDF remained unsullied by the 2007-2008 post-election violence (PEV).⁸³ It is, therefore, important that military deployments in countering terrorism are conducted in such a manner that this public confidence and respect are not eroded. Violations, such as the Garissa incident where the military was accused of rounding up and beating up residents after the killing of three soldiers, threaten that credibility.

The increased engagement of KDF within the research sites has seen an increase in acrimonious relations with communities while in pursuit of terrorists and radicalised youth, further eroding the reputation of the military within these communities.

⁸¹ Key informant interview –Mombasa; Business Men group discussion Garissa

⁸² 2015 Afrobarometer survey, <http://www.afrobarometer.org/>

⁸³ Elections in Kenya 2007 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67654/elections-ke-2007.pdf

4. Recommendations

4.1 KDF

4.1.1 *Development of policy and administrative directives on collaboration between KDF and law enforcement officials*

- i. Collaborations between the KDF and other security actors is sanctioned in law, both through the Constitution and subsidiary legislation (KDF Act, National Police Service Act). These provisions are very specific on context and timeframes. Terrorist attacks can fall within the ambit of national emergencies requiring the support or backing of the military to resolve them. There is need, therefore, for the development of clear policy guidelines regarding inter-agency coordinated operations, both generally and specifically in response to these attacks. Such guidelines should detail specific roles and responsibilities including oversight or in-charge offices. Such clarity, especially in the context of terrorist attacks, will not only prevent the over-reaching of agencies but facilitate harmonious and effective counter-terrorism work with effective oversight of the respective agencies.

The Ministry of Defence should publish directives establishing policy and assigning responsibility for providing military assistance to civilian authorities outside an emergency context. These support operations need to obtain approval from the National Assembly.

- a) Military involvement in direct law-enforcement activities should be prohibited in law and policy. The Ministry of Defence needs to establish a policy providing operations/activities which military personnel cannot under any circumstances engage in within civilian law enforcement contexts. This list should necessarily include evidence collection and detention of suspects.

4.1.2 Give visibility and provide public information on courts martial system

Courts martial are constituted for the purpose of trying persons who are subject to the KDF Act for an offence under the Act and to mete out a punishment provided for under the law.⁸⁴ A court martial is convened to deal with a specific matter and is, therefore, not permanent in nature. The Constitution and the KDF Act further streamline the court martial system within the broader Judiciary, allowing for appeals to be brought from this system into the High Court, Court of Appeal and Supreme Court.⁸⁵

KDF has not made public any of the courts martial it may have set up to deal with disciplinary issues arising from operations conducted domestically in response to the threat posed by terrorism. Therefore, the public presumes accountability has not been meted out for misconduct by KDF personnel. The police should also be active within military operations in civilian contexts to ensure accountability of the military personnel involved.

There is need to make public the proceedings that relate to violation of civilians' rights in order for the public to believe in the efficacy of the military's self –regulation.

⁸⁴ KDF Act Section 160

⁸⁵ KDF Act section 186

4.1.3 KDF should establish an interface between the military and the public

The increasing deployments of KDF personnel in counter terrorism and other security operations require a strategy for community engagement to ensure there are reduced violations, violations are reported through the military systems as well as to ensure that operations are successful. A public engagement strategy is necessary if the public is to support its military but also if civilian casualties are to be minimised. Borrowing from Nigeria, which has set up an office of the ombudsperson to receive complaints from the public against military personnel, it would be beneficial if KDF set up such an office for example, to complement their court martial system so as to fully regulate themselves and ensure oversight over soldiers. Nigeria explained their human rights desk, thus: “The establishment of the desk office was borne out of the increasing interest of the local and international human rights bodies on what we are doing in the North-east and other parts of the country”.⁸⁶ “...There is no doubt that one of the significant decisions of the current army leadership to improve its image is the establishment of Human Rights Desk under the Department of Civil Military Relations...”⁸⁷

4.2 National Assembly

- 4.2.1 Parliament, through its relevant oversight committees, should regularly investigate operations where KDF has been deployed domestically and follow up on their recommendations to ensure implementation by the military and the Executive.
- 4.2.2 Parliament should put in place mechanisms that would allow appropriate security clearance for some of its relevant oversight committee members to allow them to access classified information which can inform their investigations into the conduct of the military’s domestic security operations.

⁸⁶ <http://www.thisdaylive.com/index.php/2016/03/14/path-to-improved-civil-military-relations/>

⁸⁷ *ibid*

4.3 Police

4.3.1 *There is need to strengthen police competence to investigate violations by the military*

Where civilians' rights have been violated, the police have the responsibility to investigate such violations and ensure accountability even where a soldier is involved. The current situation where the police do not receive complaints against KDF personnel is unacceptable. Police roles and powers to investigate complaints against the military should be spelt out as part of the guidelines on the management of military/police support operations.

4.4 Strengthen the role of State oversight and accountability institutions

4.4.1 The military should extend cooperation with constitutional commissions that receive complaints and investigate allegations of violations by the military. This is in keeping with the constitutional principle that security should be subject to the rule of law and principles of human rights.

4.5 Civil Society

Civil society organisations have a role in enhancing good civilian/military relations in the wake of terrorism threats. This role is in institutional reform and building. This means creating civilian expertise in defence matters and providing legislative offices with the capacity to review and exert oversight on military operations in civilian areas. The organisations should work to change the narrative or understanding of the public of the military and defence. Through helping civilians to understand military roles, they can monitor military conduct. Citizens can then engage the Defence Cabinet Secretary, whose powers are derived from the people.

5. Conclusion

The threat of terrorism on Kenya's national security is real and requires a multipronged approach in response. There is need therefore to analyse and assess the context Kenya currently finds herself in to squarely understand whether terrorism as manifested domestically falls within the purview of law enforcement or threat to national security. Whereas this is not an 'either or' categorisation, such analysis would enable the government to understand the continuum that is represented by terrorism as well as the roles to be played by the various security actors. The cold-blooded and indiscriminate nature of acts of terrorism trigger a desire by nations to act swiftly and decisively with force.⁸⁸ However, there is a role for all security actors including intelligence officers, police, prosecutors, prison warders and the military as provided for in law. The Constitution already recognizes this by providing that National security organs include both the National Police Service and the Kenya Defence Forces amongst other actors.⁸⁹

An analysis of the Kenyan context in this regard therefore, will enable the government to develop an effective national security strategy with a range of responses based on recognizing the relationship between national security powers and law enforcement powers in light of Human rights. Such a strategy will also allow the military to maintain their professionalism as well as their stature as defenders of the nation state. All actors will understand their

⁸⁸ Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror: <https://books.google.co.ke/books?id=WgQHDAQAQBAJ&pg=PA202&dq=moral+adequacy+of+military+response+to+terrorism&hl=en&sa=X&ved=0ahUKEwjgmbrz8MrOAhVCJcAKHRxDAfkQ6AEIHDA#v=onepage&q=moral%20adequacy%20of%20military%20response%20to%20terrorism&f=false>

⁸⁹ Constitution of Kenya Article 239

specific roles collectively and individually and this will result in management of the challenge as opposed to knee-jerk responses in moments of crisis. A strategy to calibrate each intervention should be developed without using all disciplined forces simultaneously.

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