



January 2011

Country Summary

## Kenya

In a historic move, Kenya's citizens voted overwhelmingly in favor of accountability and reform when they supported a new constitution by a two-thirds majority in August 2010. Constitutional reform was among the steps to which the coalition government agreed after the 2007 post-election violence. It paves the way for restructuring the government, establishing a land commission, and carrying out sweeping changes to the police and judiciary. The year also saw the prosecutor of the International Criminal Court open an investigation into the post-election violence. Kenya continues to suffer the regional effects of Somalia's crisis, with a steady flow of refugees entering the country; some suffered serious abuses at the hands of Kenyan police as they tried to find safety.

### A New Constitution

The new constitution, supported by 67 percent of Kenyan voters on August 4, was the culmination of four decades of effort. The new coalition government committed to a new constitution, among other reforms, after post-election violence in 2007 in which 1,300 people died and hundreds of thousands were displaced.

The new constitution addresses several longstanding concerns, namely the concentration of power in the executive, the absence of checks and balances, and the use of land as a tool of political patronage. It creates a smaller cabinet of ministers who do not have to be parliament members; reforms the legislature by creating an upper house, the Senate; and devolves considerable power to a new tier of county governments and governors. In an effort to address the judiciary's lack of independence, the new constitution creates a new judiciary service commission to nominate judges, creates a new post of director of public prosecutions, and requires parliamentary approval for appointing the attorney general. It also enshrines in law a land commission, which removes the president's ability to allocate land, review existing land holdings, and set minimum and maximum holdings of land.

Celebration of the constitution was marred by the presence of Sudanese President Omar al-Bashir, who is wanted on ICC arrest warrants for genocide, crimes against humanity, and war crimes. The government's invitation to al-Bashir and its failure to cooperate with the ICC to arrest him call into question its commitment to cooperate with the court's investigation.

## Impunity and Accountability for Post-Election Violence

Impunity remains a pervasive problem in Kenya. In 2008 the coalition government promised to establish a national tribunal to investigate and prosecute those most responsible for the post-election violence, or refer the crimes to the ICC. It failed to do either, and in November 2009 the ICC prosecutor sought authority from an ICC pre-trial chamber to begin investigations in Kenya. On March 31, 2010, the chamber granted permission by a vote of two judges to one, after which the ICC prosecutor announced an ambitious agenda to bring at least two cases against four to six individuals by the end of 2010.

While a limited number of cases are being investigated by the ICC, Kenya has not credibly and effectively investigated and prosecuted other perpetrators of the post-election violence.

Witness protection emerged as a key challenge to investigations. Threats against individuals who witnessed post-election violence, including some who testified before the Commission to Investigate the Post-Election Violence, increased after the prosecutor announced that he would seek to open a Kenya investigation. In May the president signed into law amendments to the Witness Protection Act, a key step in reforming Kenya's witness protection system. The amendments create a new witness protection agency with increased independence, but resources and time are needed to implement changes.

There have been no investigations or forthcoming prosecutions for war crimes committed by the insurgent Sabaot Land Defence Force or Kenyan security forces during the 2006-2008 Mount Elgon conflict; abuses by Kenyan army and police units implicated in using excessive force in disarmament operations in Mandera and Samburu districts; or extrajudicial killings and enforced disappearances of suspected Mungiki gang members by police officers. There were no developments in finding the killers of Oscar Kamau Kingara and John Paul Oulu, human rights defenders from the Oscar Foundation Free Legal Aid Clinic who were gunned down in Nairobi in 2009.

There were two achievements in the efforts against impunity during 2010.

In a landmark ruling on February 4, 2010, the African Commission on Human and Peoples' Rights condemned Kenya's government for expelling the Endorois people from their traditional land for tourism. It ruled the eviction—with minimal compensation—violated the Endorois' right as an indigenous people to property, health, culture, religion, and natural resources. It ordered Kenya to compensate and restore them to their historic land. It was the first international tribunal ruling to find a violation of the right to development.

In another unprecedented judgment, Kenya's constitutional court awarded US\$500,000 compensation to 21 political prisoners who were tortured during the government of former president Daniel Arap Moi, who left office in 2002. The court had previously ruled that the case, from the period when Moi was in office, could not be heard.

## **Police Reform**

In January 2010 President Mwai Kibaki set up the Police Reforms Implementation Committee to monitor the progress of reforms. The committee included members of civil society. Key aspects of the reforms, such as establishing an independent police oversight board, are provided for in the new constitution, but other recommendations, such as merging the administration police with the regular force, are not.

Eight Kenyans were transferred illegally to Uganda following the bombings in Kampala, Uganda's capital, in July and were allegedly mistreated in detention.

## **Refugees**

The overstretched refugee camps in Dadaab, northeastern Kenya, continued to receive thousands of new arrivals during the year, including some 34,000 people between January and September.

Many of the new refugees from Somalia endured serious abuses at the hands of Kenyan police when they crossed the officially closed border. These included violence, arbitrary arrest, unlawful detention in inhuman and degrading conditions, threats of deportation, and wrongful prosecution for "unlawful presence" to extort money from the new arrivals—men, women, and children alike. In some cases, police raped women. Police also failed to diligently investigate and prosecute rapes within the refugee community.

In early 2010 hundreds, and possibly thousands, of Somalis unable to pay extortion demands were sent back to Somalia in flagrant violation of Kenyan and international law. The Kenyan government announced an internal investigation into the allegations. In October the government promised to reconstruct the screening center at Liboi on the Somali border "soon." However, Kenya continued to deny almost 400,000 camp-based refugees the right to free movement in the country, in violation of international law.

## **Women's and Children's Right to Health**

Partly due to health care system failures, tens of thousands of Kenyan women and girls die each year in childbirth and pregnancy, while more suffer preventable injuries, serious infections, and disabilities. Maternal deaths represent 15 percent of all deaths for women of reproductive age—one in 39 women in Kenya die during childbirth according to the United Nations—while an estimated 300,000 women and girls are living with untreated fistula. Kenya's restrictive abortion laws, which criminalize abortion generally, contribute to maternal death and disability. Unsafe abortions cause about 30 percent of maternal deaths.

The Kenyan government fails to provide adequate pain treatment and palliative care for hundreds of thousands of children with diseases such as cancer or HIV/AIDS. Oral morphine, an essential medicine for pain treatment, is currently out of stock. Kenya's few palliative care services, which provide pain treatment but also counseling and support to families of chronically ill patients, lack programs for children.

## **Sexual Orientation and Gender Identity**

Kenya continues to punish consensual adult sexual conduct with up to 14 years imprisonment. On February 11, following unsubstantiated rumors of a "gay wedding" in the coastal town of Mtwapa, influential Muslim and Christian religious leaders demanded the closure of the Mtwapa office of the Kenya Medical Research Institute (KEMRI), which conducts research on HIV/AIDS with men who have sex with men. The religious leaders issued a statement promising to "flush out gays" in Mtwapa.

On February 12, a group of over 200 individuals—armed with sticks, stones, and other makeshift weapons—surrounded KEMRI. Smaller mobs went to the homes of people suspected of being gay. The police attempted to protect the individuals targeted by the mob by taking them into custody. Another mob severely beat up a KEMRI volunteer on February 13. Two individuals were beaten up in Mombasa on suspicion of being gay, on February 13 and 16 respectively.

In Mtwapa, Mombasa, and elsewhere, lesbian, gay, bisexual, and transgender people went into hiding in fear for their lives, and HIV/AIDS outreach, testing, and treatment among men who have sex with men remains compromised by the attacks and the continuing climate of homophobia.

## Key International Actors

Kenya's partners in Europe and North America are united in pushing for accountability for the election violence and an end to impunity, key conditions of the reform agenda that Kofi Annan brokered in early 2008. The United States and the European Union continued to threaten travel bans against key suspects and government members to encourage Kenya to pursue reform. The US continues to support Kenya's military and police, particularly their counterterrorism efforts, and thus has some influence over the conduct of those forces.

Kenya cited a July 2009 decision by the African Union not to cooperate with the ICC in arresting al-Bashir to justify its failure to do so during his August visit. In the face of criticism over al-Bashir's visit, including from many of Kenya's international partners, officials repeated their commitment to work with the ICC in its Kenya investigation. Kenya also concluded an agreement in September with the ICC to facilitate the court's work within its territory. Nonetheless, concerns over Kenya's willingness to fulfill its commitments to cooperate with the ICC persist in the wake of al-Bashir's visit.

Regionally, the conflict in Somalia where the al-Shabaab militia continues to strengthen and the fragility of Somalia's transitional government remain pressing security concerns for Kenya. The 2011 referendum on the status of neighboring Southern Sudan is a key issue that could have major implications for Kenya as a frontline state and host to refugees.