ICPC Report

The Rule of Law in Kenya

Opportunities and Challenges for Advancing the Rule of Law through Legal Sector Reforms

March 2013
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Acknowledgment

International Center for Policy and Conflict (ICPC) sincerely thank Dr Thomas Obel Hansen for the research and compilation of this report.

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We appreciate the guidance and input of the ICPC Executive Director Ndung’u Wainaina in this project.

ICPC would also like to acknowledge the John D. and Catherine T. MacArthur Foundation for their generous support, without which the production of this document could not have been possible.
Executive Summary

This Report analyzes the status of the rule of law in Kenya, emphasizing an examination of passed and ongoing reforms relating to the core legal sector institutions, specifically the Judiciary, the Prosecution and the Police. The Report undertakes an analysis of the rule of law from a formal perspective by describing the status of the reform laws and their implementation as well as it provides for a more substantial perspective by undertaking a preliminary assessment of the impact of these reforms.

The overall purpose of the Report is to create a foundation for the development of a comprehensive tool for monitoring and evaluating rule of law reforms in Kenya, including the performance of legal sector institutions. Accordingly, the Report should be seen as the outcome of a first stage in a broader process initiated by the International Center for Policy and Conflict to create a comprehensive and coherent framework for monitoring and evaluating the performance of legal sector institutions and the well-being of the rule of law in the country.

The Report finds that the core legal sector institutions have undergone significant change on paper through the enactment of a series of reform laws, which change the structure of these bodies in ways that typically, but not consistently, comply with principles of separation of powers and accountability. Still, there are significant differences between the success with which the various legal sector bodies have been reformed, with the Judiciary being the institution that was first and arguably most comprehensively restructured. Only more recently has legislation been drafted and enacted enabling a restructuring of the other main legal sector bodies – that is the Prosecution and the Police. Partly, these delays seem the result of lacking political will to fundamentally change the nature of law enforcement, investigation and prosecution in Kenya.

Whereas from a formal perspective there has thus been significant progress promoting the rule of law through legal sector reforms, from a substantive perspective, Kenya still faces significant challenges ensuring that the legal sector promotes fairness and justice for all. The challenges are indeed many, but some of the most significant can be summarized as follows:

While judicial independence has clearly improved, there are still significant challenges ahead giving effect to this principle, a problem which in part relates to the perceptions in other arms of government concerning the notion of separation of powers, and other core legal sector bodies, including the Office of the Director for Public Prosecution and the Police, are still hampered by lack of independence

Despite the passing of relevant reform legislation, in some cases the structure of the relevant legal sector body has not yet fully transformed, as is the case with the Police.
Whereas the Judiciary has created measures aimed at promoting effectiveness, there is still an enormous backlog of cases which must be handled.

Several policies and strategies have been adopted by the various legal sector bodies, but the principles spelled out in these policy documents are not always reflected in the practices of these institutions.

Whereas some progress has been made with respect to promoting professionalism and integrity in the legal sector bodies, additional training is required and other measures such as vetting, the establishment of internal accountability mechanisms and the creation of codes of conduct, are sometimes still pending.

Although with notable differences in between them, understaffing and poor conditions of service continue to pose serious challenges to all of the legal sector bodies.

Corruption and other malpractices, such as arbitrariness and disrespect for human rights, continue to pose a serious challenge to the rule of law in Kenya.

Public awareness of the mandate and role of the legal sector bodies is still limited.

Access to justice is still severely restricted.

Beyond ensuring that all legal sector personnel are vetted according to accepted standards, to remedy these challenges the findings of this Report point, among others, to a need for improving the conditions of service and expanding and improving the training offered to legal sector personnel. In this regard it must be emphasized that it is necessary to promote a deeper transformation whereby the prevailing norms in the legal sector institutions counter, rather than encourage, malpractices such as corruption, arbitrariness, and disrespect for the dignity and rights of those Kenyans who encounter and use legal sector bodies. In essence, this transformation must be one from a perception whereby the legal bodies perceive themselves as rulers over subjects to one where they look at themselves as service providers, committed to principles of equality, transparency, efficiency and rights. Such change in norm sets can obviously not be achieved overnight, but requires commitment among those situated at the top of these institutions as well as political will to promoting fundamental change in the manner in which the legal sector bodies operate. For this to happen, one must enable public scrutiny and pressure, including critical engagement by civil society.
List of Acronyms

Attorney-General (AG)
Chief Justice (CJ)
Commission of Inquiry into the Post-Election Violence (CIPEV)
Criminal Investigations Department (CID)
Deputy Inspectors (DIGs)
Director of Public Prosecutions (DPP)
Governance Justice Law and Order Reform Sector (GJLOS)
Independent Policing Oversight Authority (IPOA)
Inspector-General of the National Police Service (IGP)
International Center for Policy and Conflict (ICPC)
International Commission of Jurist (ICJ)
International Criminal Court (ICC)
International Justice Mission (IJM)
Judicial Service Commission (JSC)
Judicial Training Institute (JTI)
Judiciary’s Transformation Framework (JTF)
Kenya Judicial Staff Association (KJSA)
Kenya Magistrates and Judges Association (KMJA)
Kenya National Dialogue and Reconciliation (KNDR)
Law Society of Kenya (LSK)
Mombasa Republican Council (MRC)
National Civil Society Congress (NCSC)
National Cohesion and Integration Commission (NCIC)
National Police Service Commission (NPSC)
National Prosecution Service Board (NPSB)
National Prosecutions Service (NPS)
National Security Council (NSC)
National Security Intelligence Service (NSIS)
Office of the Director of Public Prosecutions (ODPP)
Orange democratic Movement (ODM)
Party of National Unity (PNU)
Truth, Justice, and Reconciliation Commission (TJRC)
1. Introduction

This Report sets out to examine the status of the rule of law in Kenya, with a specific eye on analyzing past and ongoing reforms relating to the core legal sector institutions, namely the Judiciary, the Prosecution and the Police. Based on an examination of the legal framework, strategies and policies, case law and other material, the Report aims to identify the major achievements made in Kenya since the passing of a new Constitution in August 2010 as well as the major challenges ahead for advancing the rule of law. It is in this spirit that the Report undertakes a preliminary assessment of the impact of these reforms.

The aspiration of the Report is to create a foundation for the development of a comprehensive tool for monitoring and evaluating rule of law reforms in Kenya. Accordingly, the Report should be seen as the outcome of a first stage in a broader process initiated by the International Center for Policy and Conflict (ICPC) to create a comprehensive and coherent framework for monitoring and evaluating the performance of legal sector institutions in Kenya.

This Report has been drafted in the context of the March 2013 general elections, a period in which various legal sector bodies are being put to a real test. In particular, the election period provides a crucial test as to whether the Police will be able to ensure the security of all Kenyans in a tense environment, and whether it will do so in a manner consistent with rule of law standards. Similarly, the Judiciary’s ability to handle election related petitions will send a strong signal concerning the level of judicial independence and efficiency, which will function as a barometer for the public’s trust and confidence in the Judiciary. While the Report makes a preliminary assessment of some of these issues, it is not yet possible to fully assess the success or failure of legal sector bodies with respect to their ability to handle the processes surrounding the March 2013 elections.

The Report is structured as follows: Section 2 describes various conceptions of the rule of law as well as the concept of rule of law reforms. In Section 3, the Report provides for an analysis of the background to the current reforms of Kenyan legal sector bodies, including a brief outline of perceptions of the legal system of the past, an overview of the agreements made in the context of the 2008 internationally-sponsored mediation process, and an outline of key rule of law reforms envisaged in the 2010 Constitution. The central part of the Report is found in Section 4, which analyzes the status and impact of the reforms of the core legal sector institutions, including the Judiciary, Prosecution and Police. Section 5 of the Report concludes by detailing the challenges and opportunities for enhancing the rule of law in Kenya through legal sector reforms and makes a series of recommendations for how civil society can advance this agenda, thereby offering a foundation for creating a comprehensive framework for monitoring and evaluating legal sector reforms in Kenya.
2. The Concept of the Rule of Law

Although the concept of the rule of law has become a common term, it is not always clear what exactly is understood by the notion. Brian Tamanaha points to the problem noting that “the rule of law is strikingly like the notion of the ‘good’, in the sense that everyone is for it, but there is no agreement on precisely what it is”. While the notion of the rule of law is, as a recent journal editorial notes “a profoundly contested concept”, it is therefore also a concept that is sometimes almost empty because its contents are not clearly articulated.

The rule of law has been defined in many ways. However, one can observe three overall understandings of the concept, including a functional, a formal, and a substantive understanding. The functional understanding holds that – contrary to “rule of man” – the “rule of law” simply requires the government to be constrained by law in its exercise of power. This understanding of the rule of law has historically been dominant, and the law’s ability to impose limits on the exercise of government continues to be central to many accounts of the rule of law. As Thomas Carothers notes, “perhaps most important [for the rule of law], the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding”.

The formal understanding is said to “look to the presence or absence of specific, observable criteria of the law or the legal system”. These criteria are usually said to include (at least) 1) a formally independent and impartial judiciary; 2) laws that are public; 3) the absence of laws that apply only to particular individuals or classes; 4) the absence of retroactive laws; and 5) provisions for judicial review of government action. The substantive understanding holds that the rule of law is a concept that requires the legal system to deliver “fairness” or “justice”, and formal dimensions are interesting only to the extent they contribute to such ends. Typically, at least in contemporary accounts, such “fairness” is said to include 1) equal application of the law; 2) procedural fairness; 3) protection of human rights and civil liberties; and 4) access to justice. Formal (and functional) understandings are often seen as being embedded in legal positivism, while substantive understandings are seen as embedded in natural law.

However, many contemporary conceptions of the rule of law combine the three understandings. The common United Nations (UN) understanding of the rule of law, for example, refers to “a principle of governance in which all persons, institution and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure the adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.

In line with this, the present Report will not restrict itself to a formal account of the rule of law in Kenya, but examines substantive issues as well. It does so by focusing on the core legal sector actors’ contribution to advancing the rule of law in a broad sense, as opposed to, say, taking the starting point in an assessment of the level of the executive’s respect for the law, though the latter aspect is examined whenever it is relevant for the analysis of the former. Furthermore, the Report is based on the premise that how the various institutions within the legal sector adhere to the rule of law standards is shaped by a variety of factors aside from prescriptions in formal law. Such factors could include political, cultural and socio-economic factors. As noted in a study by Open Society, such factors may “determine whether or not the rule of law will produce perceptions of justice or fairness among the citizenry”. In other words, if one is to understand the impact of legal sector reforms, one cannot limit the analysis to a formalistic account of legal provisions, but also needs to take into account prevalent norms and practices in the legal sector (and possibly beyond) as well factors such as limited resources.

Besides clarifying how the Report approaches the concept of the rule of law as such, it is also useful to briefly outline the Report’s understanding of the concept of “rule of law reforms”. This term is elaborated well by Thomas Carothers, who distinguishes between rule of law reforms according to their “depth”. On this basis, Carothers establishes three main categories or types of rule of law reforms. **Type one reforms** relate to the law itself. This may concern any type of law, ranging from commercial law reform to reform of criminal codes and criminal procedure codes, and progress may be observed according to various standards. With respect to criminal law reform, one such standard could involve the protection of basic rights of the accused. **Type two reforms** concern the “strengthening of law-related institutions, usually to make them more competent, efficient, and accountable”. Besides structural reforms, this kind of reform is said to include efforts that aim at increasing the competences of legal sector personnel, such as judges, prosecutors, public defenders, police officers, and prison personnel. **Type three reforms** aim at “the deeper goal of increasing government’s compliance with law”, in which a key component is said to be the pursuit and achievement of “genuine judicial independence”. While both type one and type two reforms may contribute to this objective, the executive’s acceptance of the judiciary as an independent institution is seen as the most crucial benchmark for achieving genuine judicial independence. Institutional reform is perceived vital for placing government officials within the law, but in the end “the success of type three reform [...] depends less on technical or institutional measures than on enlightened leadership and sweeping changes in the values and attitudes of those in power”. Without relying strictly on Carothers’ terminology, one could say that this Report takes the starting point in analyzing type two reforms, namely reforms of the core legal sector institutions, notably with respect to strengthening their independence and efficiency, while “deeper” issues relating to type three reforms, notably the executive’s attitude towards the judiciary, will primarily be addressed in later stages of this project.
3. Background to the Reform Process in Kenya

3.1. Perceptions of the Legal System in the Past

In the past, the core legal sector bodies in Kenya, including the Judiciary, Prosecution and the Police, have generally been seen as corrupt, lacking independence and serving as a tool of those in power, and at times complicit in human rights abuses.

For example, the Police and other security agencies have often been involved in human rights abuses, most visibly excessive use of violence against civilians. This problem is illustrated well by the fact that the Commission of Inquiry into the Post-Election Violence (CIPEV) found that around one third of the total casualties of the 2008 election violence were caused by police shootings. Partly, this problem is recognized to relate to the institutional set-up of the Police. CIPEV found, among others, that existing police legislation failed to provide for clear responsibilities and lines of accountability; that the system for managing staff performance and discipline issues was highly inadequate; and that there was a lack of institutional support for using modern policing tactics.

With respect to the Judiciary, it is commonly accepted that the institution suffered from significant flaws, resulting that in many instances the courts have proven an obstacle to advancing the rule of law. The lack of trust in the courts is generally accepted to have contributed to the post-election violence of 2007/2008, something which is well illustrated by the fact that the 2007 electoral dispute was not taken to the courts, but to the streets. A recent report by Africog concisely states the problems with the judiciary in the past: “Kenya’s Judiciary has long been perceived as opaque, corrupt and lacking in integrity and independence. Its history is littered with attempted reforms that came unstuck. Between 1960 and 1998, eight different committees and/or commissions were established to examine the state of the Judiciary and to make proposals for reform. Most of the recommendations in the reports made by these committees/commissions never saw the light of day. Years of corruption, ineptitude and manipulation by the Executive and prominent personalities had led to a crisis of confidence in the Judiciary’s ability to dispense justice.” These problems are also recognized by the Judiciary itself, which in its Transformation Framework 2012-16 explains as follows: “The overweening influences of the Executive created an enfeebled Judiciary, an arm of government strikingly reluctant to play its classical role in the defence and upholding of the constitutional principle of separation of powers. This capture by narrow interests created an institution plagued by corruption and inefficiency – a veritable figure of scorn at odds with the public interest.”
As a whole, the weak legal system under the prior constitutional order frequently resulted in practices that undermined the rule of law and human rights. For instance, legal sector personnel were often reluctant or unwilling to intervene when government officials acquired public goods through dubious or illegal means. This problem was in part the consequence of legal sector personnel fearing to interfere with the work of the executive since their tenure in office depended on the support of high officials in the government, and in part the result of legal sector bodies being among the most corrupt institutions in Kenya. Further, political elites had little reason to fear punishment for inciting violence because the legal system was not able or willing to handle these sensitive cases. The powers exercised by the executive branch of government over the Judiciary, prosecutorial bodies and the Police appear to have been a key element of this problem. As in the colonial state, the legal system in post-colonial Kenya has thus been a tool of those in power, not a tool that citizens could use to have their rights enforced.

Furthermore, access to justice has been severely restricted, resulting that the majority of Kenyans had no opportunity to use the formal justice system for solving disputes, and the poor have also been disenfranchised in the sense that they have often been subject to arbitrary arrests and suffered from the limited resources of other parts of the criminal justice system. A study by the Governance Justice Law and Order Reform Sector (GJLOS) in 2006 indicated that only 26 percent of the persons who needed legal services actually benefit from this. In part, the problem has been that in places such as Northern Kenya courts are few and cover a very large area; in part that the courts and other legal sector bodies have been understaffed and overworked; and in part that legal instruments have been drafted in a way that make them too complicated for ordinary Kenyans to understand.

3.2. Agreements made in the Context of the 2008 Mediation Process

Following the disputed presidential election in December 2007, where both incumbent president Mwai Kibaki (Party of National Unity (PNU)) and his challenger Raila Odinga (Orange democratic Movement (ODM)) claimed victory, large-scale violence erupted in various parts of Kenya. As a response to the crisis, an international mediation process headed by former UN Secretary-General Kofi Annan was launched. The mediation process (known as the Kenya National Dialogue and Reconciliation (KNDR)), which was officially launched on 29 January 2008, had as its objective to bring about a political resolution which could end the violence as well as to facilitate a dialogue to address the broader structural problems in Kenya that had enabled that level of violence, including rule of law challenges.
The first objective was reached relatively quickly through a power-sharing arrangement which brought the contestants together in a coalition government. The second objective was pursued through a number of agreements, which provided a comprehensive framework for dealing with the causes of the violence and other forms of injustice, including serious rule of law challenges. Among others, the two parties to the dispute signed agreements with regard to criminal prosecutions of those responsible for the violence; a Truth, Justice, and Reconciliation Commission (TJRC); and – most importantly for the purposes of this Report – a constitutional review process. Agenda item number four, which is of particular relevance for this Report, expressed commitment, among others, to undertaking constitutional, legal and institutional reform and addressing issues such as transparency, accountability and impunity. The nature of the tools to be utilized was further clarified in a series of agreements reached on 4 March 2008, including an agreement pertaining to the implementation agencies for constitutional reform and an agreement to create CIPEV, which was mandated to investigate the violence and make recommendations on how to prevent its recurrence, including recommendations relating to the rule of law.

While some of the agreements made in the context of the KNDR were later abandoned or have been seriously compromised, the mediation process laid the ground for a constitutional reform process, which ultimately resulted in the adoption of a new Constitution in August 2010. As will be discussed just below, the Constitution provides a significant step forward strengthening the rule of law in Kenya, in part because it creates a solid framework for reforming hereto abusive and corrupt legal sector institutions.

### 3.3. Key Rule of Law Reforms in the 2010 Constitution

Before turning to a description of the key provisions in the 2010 Constitution with respect to envisaged reforms of legal sector bodies, it should first be noted that the Constitution names the rule of law, equity, social justice, inclusiveness, equality, human rights and non-discrimination as being among the national values and principles of governance, which bind all state organs, state officers, public officers and others when applying or interpreting the Constitution; enacting, applying or interpreting any law; and making and implementing national policies.

Moreover, the 2010 Constitution entails a bill or rights in Chapter Four, which covers a wide catalogue of protected rights, including civil and political rights and social and economic rights. With respect to the first category of rights, the Constitution protects, *inter alia*, the right to life (article 26); equality and freedom from discrimination (article 27); the freedom and security of a person, including a prohibition of arbitrary detention (article 29); prohibition of slavery and forced labour (article 30); the right to privacy (article 31); freedom of
conscience, religion, belief and opinion (article 32); freedom of expression (article 33); and the freedom to make political choices and to participate and free and fair elections (article 38). While some of these rights may be limited by law to the extent that such limitations are “reasonable and justifiable in a democratic society” (article 24(1)), the right to freedom from torture and cruel, inhuman or degrading treatment; freedom from slavery or servitude; the right to a fair trial and the right to habeas corpus may never be restricted (article 25). With respect to social and economical rights, the Constitution protects, inter alia, the rights to the highest attainable standard of health, accessible and adequate housing, adequate food of acceptable quality, clean and safe water in adequate quantities, social security and education (article 43(1)). While the civil and political rights are immediately enforceable, the Constitution does not entail a schedule concerning when legislation with respect to economic and social rights must be enacted. Article 22(1) stipulates that violations of the rights entailed may be adjudicated by the courts, and when ruling in a specific case, the Constitution requires the courts to adopt the interpretation that “most favours the enforcement of a right or fundamental freedom” (20 (3)(b)). The courts must also interpret the law so that it promotes the values that underlie “an open and democratic society based on human dignity, equality, equity and freedom” (article 20(4)(a). It is also important to note that the Constitution allows public interest litigation, permitting a wide range of actors to institute court proceedings in cases where “a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”, regardless of whether they are personally affected by the alleged breach (article 22(1) and (2)).

It is of particular interest for this Report that the 2010 Constitution creates a solid framework for reforming legal sector bodies, including creating a stronger and more independent Judiciary. Unlike its predecessor, the 2010 Constitution explicitly guarantees the independence of the Judiciary (article 160). Further, the independence of the Judiciary is strengthened through new appointment processes. Though the President still maintains the power to appoint judges, the appointment must be based on the recommendations made by the Judicial Service Commission (JSC), on which the President no longer has any direct influence (articles 166(1) and 171-72)). Moreover, though the Chief Justice (CJ) – who is also the president of the Supreme Court and the chairperson of the JSC – is still appointed by the President, his appointment is based on recommendations made by the JSC and requires parliamentary approval (article 166(1)). It is also important to note that the President is no longer substantially involved in the process of removing judges from their office (article 168). With respect to the Judiciary’s finances, the new constitution grants the judiciary financial autonomy (article 173), a factor which is commonly seen as important for guaranteeing the independence of a judiciary. Furthermore, section 23(1) of the Sixth Schedule requires Parliament to enact legislation to establish mechanisms and procedures for vetting of judges and magistrates within one year of the effective date of the Constitution to determine the suitability of all judges and magistrates to continue to hold office.
The Fifth schedule in article 261(1) of the Constitution lays down a timetable for adopting the necessary legislation for implementing these constitutional provisions. The provision stipulates that legislation concerning the system of courts and removal of judges and magistrates from office must be implemented within one year from the constitution taking effect, whereas the Judiciary Fund must be established within two years to give effect to the provisions concerning financial independence. The constitution also includes transitional provisions relevant for the judicial reforms (article 262). For example, it requires that the JSC be appointed within 60 days after the constitution took effect; that the incumbent CJ vacates office within six months after the effective date and a new one be appointed by the President after consultation with the Prime Minister and with parliament’s approval; and that Parliament shall adopt legislation for the vetting of judges and magistrates within one year after the constitution took effect.

With respect to prosecutorial bodies, the 2010 Constitution transfers the prosecutorial powers from the Office of the Attorney General (AG) to the Office of the Director of Public Prosecutions (ODPP) (article 157). The same provision establishes that the Director of Public Prosecutions (DPP) shall be nominated and, with the approval of the National Assembly, appointed by the President. It follows from the Constitution that the DPP has the power to direct the Inspector-General of the National Police Service (IGP) to investigate specific incidents, and that the DPP may institute and undertake criminal proceedings against any person before any court (other than a court martial) as well as take over and continue any criminal proceedings commenced in any court that have been instituted or undertaken by another person or authority, with the permission of the person or authority. The DPP may not discontinue a prosecution without the permission of the court. The independence of the Office is guaranteed through various provision, including article 157(10), which stipulates that the DPP “shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority”. Further, article 158(11) stipulates that the DPP may only be removed on the grounds specified in the provision and through a process that involves an independent tribunal.

Article 156 of the Constitution deals with the Office of the Attorney General (AG). The AG, who is to be nominated by the President and, with the approval of the National Assembly, appointed by the President, is the principal legal adviser to the government and shall represent the government in court or in any other legal proceedings to which the government is a party, other than criminal proceedings. Article 156(6) explicitly states that the Attorney-General shall promote, protect and uphold the rule of law and defend the public interest. Accordingly, all powers relating to criminal prosecution are removed from the AG’s Office.

With respect to the Police, the 2010 constitution encourages a fundamental change in the way security should be achieved. Article 238(2)(b) stipulates that national security must be pursued in “utmost respect for the rule of law, democracy, human rights and fundamental freedoms”. Further, article 244 requires that the National
Police Service “strive for the highest standards of professionalism and discipline among its members”; “prevent corruption and promote and practice transparency and accountability”; “comply with constitutional standards of human rights and fundamental freedoms”; that staff are trained to the “highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity”; and that the Service “foster and promote relationships with the broader society”. Additionally, article 238(2) stipulates that the composition of national security agencies, including the Police, must reflect the regional and ethnic diversity of the people of Kenya.

In terms of institutional change, it is important that the Constitution creates a single National Police Service, to be headed by an Inspector-General of the Police (IGP), who is appointed by the President, but only after Parliament’s approval (article 245(2)). However, Parliament is not involved in the appointment of the two Deputy Inspector-Generals who will head the Kenya Police Service and the Administration Police Service, and the Constitution does not clarify how the Director General of the National Intelligence Service should be appointed. Article 246 of the Constitution establishes an independent National Police Service Commission (NPSC), mandated to recruit and appoint police officers and to determine promotions and transfers within Service as well as exercise disciplinary control over the Service, including removing officers. Article 240 creates a National Security Council (NSC), allowing a level of parliamentary oversight over security policies. Although the Constitution does not establish a civilian body tasked exclusively with hearing complaints over the Police, the Kenya National Human Rights and Equality Commission is mandated to investigate and report on national security organs’ human rights compliance (article 59). A timetable is laid down in the Fifth Schedule (article 261(1)) of the Constitution, according to which legislation on the national security organs and command of the National Police Service must be adopted within two years after the constitution took effect.

**Fact Box 1: Earlier Attempts at Constitutional Reform in Kenya**

The Constitution adopted at the time of independence was amended numerous times during Jomo Kenyatta’s regime. Amendments were passed to concentrate more power in the Presidency, including the power to appoint and dismiss civil servants, and amendments were made whereby the fundamental rights enshrined in the Constitution were significantly restricted when the President relied on special emergency powers. These and other constitutional changes did not only weaken the authority of the legislature, but also undermined the independence of the judiciary by subordinating it to the executive.
Further, during Daniel Moi’s regime, especially after the attempted 1982 coup d’état, constitutional amendments were passed which in different ways undermined the rule of law and democratic principles, including an amendment which made Kenya a de jure one-party state. Amendments were also made to remove the security of tenure of judges, the Attorney General and the Controller and Auditor General (which was however later reversed). Though a multi-party system was later reinstated, many started to argue that rather than continuing to amend the existing constitution, Kenya needed a new constitution, which could advance democratic principles and the rule of law. The Moi regime first attempted to repress these calls for constitutional change, but later accepted that Kenya needed a new constitution.

Accordingly, in 1997, the Constitutional Review of Kenya Act was passed to facilitate a constitutional reform process. In this context, a number of reforms were discussed, including new rules concerning the appointment and powers of the Electoral Commission of Kenya, the nomination of MPs, the rights of minority groups and a repeal of many of the oppressive laws passed throughout the Kenyatta and Moi regimes. However, these suggestions were never enacted into law. Towards the end of his tenure in the late 1990s, President Moi finally bowed to the pressure from civil society and the donor community and initiated a process to review the constitution.

Hence, in 2001, the Constitution of Kenya Review Act was passed, which created a three-step process for the promulgation of a new constitution, including a process of public consultation and initial drafting of a constitution by a body of experts known as the Constitution of Kenya Review Commission, followed by deliberations on, and revision of, the draft by a national convention known as the National Constitutional Conference, and finally ratification by the legislature. However, it has been alleged that the Moi regime took steps to ensure that persons loyal to the incumbent dominated the various processes, and some have suggested that the Act was deliberately designed to ensure that the review process would eventually fail.

In any event, in October 2002 President Moi dissolved Parliament, ensuring that the December 2002 elections were conducted under the framework of the existing constitution, and the “Bomas Draft” thus remained a draft only. As Mwai Kibaki took office following the elections, his government began to derail the Bomas Draft, which led to a series of litigations (including the Timothy Njoya & 6 others v. Attorney General & the Constitution Review Commission of Kenya, in which the court decided that the applicants had been denied the opportunity to exercise their constituent power to make a constitution through a constituent assembly and to ratify it through a referendum).

In 2004, the Constitution of Kenya Review (Amendment) Act of 2004 was enacted, which empowered the legislature to amend the Bomas Draft before submitting it to a referendum. The new draft Constitution, which
many considered to be seriously flawed, was rejected in a referendum and the Kibaki government subsequently put to a rest the issue of constitutional reform.

In a sense, therefore, one can say that the violent 2007/8 crisis had at least one positive outcome, namely that it created the needed level of consensus that a new constitution was necessary to overcome the structural problems – including weak checks-and-balances, lack of judicial independence and other rule of law related challenges – which had played a central role in allowing the violent crisis to unfold. Accordingly, the Kofi Annan headed mediation process succeeded creating a framework for a constitutional review process, and by August 2010 Kenya had a new constitution, which as mentioned above presents a significant step forward reforming legal sector institutions and in other ways promoting the rule of law.

4. Status and Impact of Legal Sector Reforms

This main Section of the Report sets out to describe the status of reforms with respect to the core legal sector bodies and offers a preliminary discussion of the impact of these reforms. While the Section is structured so that reforms of the core legal sectors are discussed in turn, it is important to note that there is obviously interplay between these reform – something which will be elaborated further in Section 5 of the Report.

Moreover, though this Report focuses on the core legal sector bodies, including the Judiciary, the Prosecution and the Police, it is important to note that several other actors are involved in the administration of justice and the rule of law in Kenya. As follows from the Fact Box below, GJLOS includes a variety of actors, which are not specifically dealt with in this Report.

Fact Box 2: The Governance, Justice, Law and Order Sector (GJLOS)

4.1. The Judiciary

4.1.1. Status of the Reform Legislation
The reforms of the Judiciary stipulated in the Constitution have generally been implemented by a series of laws passed over the last two years. Notably, the Judicial Service Act adopted in 2011 establishes the mandate and membership of the Judicial Service Commission (JSC), creates a Judiciary Fund, and regulates appointment and removal of judges, among other things. Additionally, in 2011 the Vetting of Judges and Magistrates Act was enacted, providing a framework for vetting judges and magistrates to establish their suitability to continue to serve in the judiciary, including an assessment of their academic qualifications, professional competence, integrity, and other criteria. Further, the Supreme Court Act was passed by Parliament in 2011, and the Supreme Court was subsequently established and is now fully functional.

4.1.2. Key Appointments
Another important aspect of the judicial reform process concerns appointments for key posts in the new Judiciary. Although the judicial appointments were both a lengthy and a controversial affair, by June 2011 Parliament approved the nominations of Willy Mutunga and Nancy Baraza, for Chief Justice (CJ) and Deputy Chief Justice (CJ) respectively, and they were soon after sworn into office. The appointment process was generally seen as transparent and credible, which is perhaps why influential powers, including clergymen and some prominent politicians, did not succeed halting the appointment of the candidates, which they argued should be rejected on “moral” grounds.

4.1.3. New Structure of Court System
Following the appointment of a CJ, significant efforts have been made to reform the structure of the Judiciary. The new structure of the courts, which is described in further detail below in Fact Box 3 is seen as more decentralized, with the Supreme Court and the Court of Appeal having their own Presidents and the High Courts having a Principal Judge at their respective helms.

Fact Box 3: Structure of Kenya’s Judiciary

Chapter 10 of the Constitution sets out the system of courts. It establishes two categories of superior courts. The first category consists of the Supreme Court, the Court of Appeal and the High Court. The second category consists of special courts with jurisdiction over matters relating to employment and labour relations, and the environment and land. These special courts have the status of the High Court. The following
subordinate courts are established: Magistrates courts, Kadhi courts and Courts martial. The Constitution allows the legislature to establish other subordinate courts by law.

The Supreme Court has exclusive original jurisdiction over matters relating to the elections to the Office of the President. Further, it has the power to issue advisory opinions on matters concerning county government. It also has appellate jurisdiction over appeals from the Court of Appeal. In turn, the Court of Appeal has unlimited and appellate jurisdiction to hear appeals from the High Court and other courts or tribunals. The High Court has original jurisdiction in all civil and criminal cases, aside from the above mentioned. The court structure, as mentioned in Chapter 10 of the Constitution, is exhaustive.

Key Judicial Bodies

The reformed judiciary is made up of the following key bodies:

- The Supreme Court
- The Court of Appeal
- The High Court
- Magistrates Courts
- Kadhis’ Courts
- The Judicial Service Commission
- The National Council for Law Reporting
- The Auctioneer’s Licensing Board
- Tribunals and Boards
- Alternative Dispute Resolution mechanisms

In the October 2011 Progress Report on the Transformation of the Judiciary, the CJ stated that the divisions of the High Court had been reorganized and reconstituted. Accordingly, divisions for Land and Environment, Judicial Review, Commercial and Admiralty, and Constitution and Human Rights had been set up. The CJ explained that the Commercial and Admiralty division will accelerate the adjudication of commercial disputes
and reduce the transaction costs of justice for the private sector, while the Constitution and Human Rights division will be the court of first instance in constitutional cases; and will play a leading role in addressing the many issues around the interpretation and enforcement of our expanded Bill of Rights. The Land and Environment division will deal with the critical issues of sustainable development and equitable distribution of resources.

4.1.4. The Vetting Process

The Vetting of Judges and Magistrates Act mentioned above establishes an independent vetting board (the Vetting of Judges and Magistrates Board), mandated to “inquire into and determine the suitability of serving judges and magistrates to continue serving in the Judiciary”. Undertaking this assessment, the Board must consider any pending or concluded criminal cases before a court of law against the concerned judge or magistrate; whether there are any pending recommendations for prosecution made by the Attorney-General or the anti-corruption bodies; the track record of the concerned judge or magistrate including prior judicial pronouncements, competence and diligence. The Board must also consider any pending complaints concerning specific judges or magistrates made by various bodies, including the Law Society of Kenya (LSK), the Disciplinary Committee, the Ethics and Anti Corruption Commission, the Advocates Complaints Commission, the AG, the Public Complaints Standing Committee, the Kenya National Commission on Human Rights, the National Security Intelligence Service (NSIS), the Police and the JSC.

The vetting process commenced in June 2011, receiving intense media coverage and extensive public interest. While some bodies, including the Kenya Magistrates and Judges Association (KMJA) have been critical of the process, most observers held that the process has been carried in a transparent and credible manner.

Still, several concerns have been expressed with respect to the credibility of the process. In November 2013, the National Civil Society Congress (NCSC) argued that some judges seem keen to derail the process, with NCSC president Morris Odhiambo noting: “Judges are fast becoming a hindrance to judicial reforms. Judges are deliberately misinterpreting the Constitution and making nonsense of the vetting process”. The NCSC implied that a ruling by the High Court, which overturned a decision of the Vetting Board, which had found judges Riaga Omollo, Samuel Bosire, Joseph Nyamu and Emmanuel O’Kubassu and Jeanne Gacheche unfit to serve, was unconstitutional.

Moreover, some commentators have expressed concerns that too much faith was being put in the vetting process, while more sustainable solutions needed to achieve accountability are overlooked. Phoebe Nyawade, during her interview for the post of Deputy Chief Justice, noted with concern that the sacking of judges found unsuitable by the Judges and Magistrates Board alone cannot achieve the desired reforms in the Judiciary,
further stating that she strongly recommends “the introduction of routine accountability of judicial officers rather than the vetting affair […] I believe the routine accountability will deal with minor cases of misconduct on the part of judicial officers, which might not warrant sacking as done by vetting process.”

4.1.5. Other Staffing Issues

Alongside the vetting process, the Judiciary embarked on a major recruitment drive. In the October 2011 Progress Report, the CJ stated that the Judiciary had hired 28 new High Court Judges, bringing the total number to 80, and that it had advertised for 7 additional Court of Appeal Judges and another 160 magistrates. A 2011 amendment to the Judicature Act requires that there must be at least 120 High Court judges and no less than 30 Court of Appeal judges.

In October 2012, the CJ stated that the Judiciary had hired 251 senior staff, further noting that “during the period under review, the justice-to-population ratio was one judge for every 500,000 Kenyans and one magistrate for every 90,000”. The CJ said that over the next 10 years, the Judiciary aims at hiring an additional 147 magistrates to address the staff shortage.

Moreover, efforts are being made to train judges and other personnel in the judiciary. In the October 2011 Progress Report, the CJ explained that the Judiciary “wholeheartedly embrace the culture of continuous learning, vigorous debate and peer review…Until now, there has been no organised training for judicial officers. A curriculum is under development for the Judicial Training Institute (JTI) and a full time Director has been appointed.” The CJ has appointed Justice Paul Kariuki as director of the JTI. The Institute will have its own conference and residential facilities and staff as it moves towards awarding degrees. The CJ explained that the JTI is intended as a “judicial think tank, an institute of excellence, the nerve centre of robust and rich intellectual exchange, where the interface between the judiciary and contemporary developments in society occurs”. The CJ envisage that the JTI will host conferences on critical issues, attended by judges, magistrates, and paralegals, allowing that the Judiciary’s “collective intelligence can be harnessed for the benefit the country”. It is also important to note that the JSC has released a Code of Ethics and Conduct for judicial officers, and established a standing committee to handle enforcement and disciplinary issues.

With respect to reforming the administrative limb of the Judiciary, the CJ recently stated as follows: “The work that judicial officers do is determined to a large extent by the quality and efficiency of the support system that they have. However, this part of our human resource needs immediate attention. We have launched an accelerated professionalization programme of the administrative staff of the Judiciary. We have advertised for six positions of Directors for Finance, ICT, Procurement, Administration and Chief Accounts Controller and five Registrars, each to serve the Supreme Court, the Court of Appeal, the High Court, the
subordinate courts and the Judicial Service Commission. I appeal to Kenyan professionals to make applications for these jobs as the cause of justice would only be better served if our country’s best and brightest offer to serve in its bastions. We have also launched the Sexual Harassment Policy to protect our own staff from predatory social behaviour that not only undermines our professionalism, violates staff rights but also creates artificial barriers to career growth and development.”

4.1.6. Measures aimed at Strengthening Accountability in the Judiciary

In an effort to stamp out corruption from the judiciary, an Ombudsman has been appointed to receive and respond to complaints by staff and the public. In just three months the office is said to have received over 700 complaints. In addition to this, an online customer care system has been introduced, allowing Kenyans to SMS inquiries relating to the work of the Judiciary.

Furthermore, in order to strengthen accountable “use of the power envisaged in our constitutional architecture”, in October 2012 the CJ announced that a decision had been made to set up a Leadership Committee, which will act as a management team for the entire Judiciary. The CJ noted that its composition, including the CJ as Chair, DCJ, President of Court of Appeal, Principal Judge of the High Court, as well as representatives from the magistracy and the paralegal fraternity, “permits all the voices of the Judiciary to be heard in the management of this important institution”. The CJ stated that this committee will commence its work once the vetting process is completed, new judges are on board, and elections held for each level of representation.

4.1.7. New Technology

In October 2012, the CJ promised that the public will soon be able to access case information by SMS, and that a major computerisation of the Judiciary is being embarked upon, in order to ensure that proceedings are recorded electronically. The vision is that the Supreme Court will be established as a paperless court, and that a modern e-library will be created. Furthermore, the judges of the High Court and the Court of Appeal shall, “from now henceforth, be empanelled automatically using computer software that removes the human hand from the choice of those who hear cases.” Moreover to promote independence and impartiality, the CJ promised that “in future, cause lists will not contain the name of the judge, to shield judges from undue influence or being hunted down by litigants.”

Table 1: Major Achievements in Judicial Reforms Identified in the Gilos 2012 Report
<table>
<thead>
<tr>
<th><strong>Sub-Programme</strong></th>
<th><strong>Intended Output</strong></th>
<th><strong>Output Achieved</strong></th>
<th><strong>Remarks</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Promote law and Order</td>
<td>Judicial Service Commission Act</td>
<td>The Act has been passed</td>
<td>The Act is in operation</td>
</tr>
<tr>
<td></td>
<td>Restructured Judicial Service Commission</td>
<td></td>
<td>Membership expanded</td>
</tr>
<tr>
<td></td>
<td>Number of magistrate trained on case management and other staff trained.</td>
<td>150 magistrates trained</td>
<td>The Judicial training institute needs to be fully funded</td>
</tr>
<tr>
<td></td>
<td>Establish court users committee in all court stations</td>
<td>150 members of staff trained in various matters</td>
<td>Needs to be fully utilized by all stakeholders</td>
</tr>
<tr>
<td></td>
<td>Number of registries automated</td>
<td>[no output indicated]</td>
<td>Needs to be fully utilized by all stakeholders</td>
</tr>
<tr>
<td></td>
<td>Establish court stations in all districts</td>
<td>All high courts</td>
<td>More funds allocated in order to automate all courts</td>
</tr>
<tr>
<td></td>
<td>Develop an ICT strategic Plan</td>
<td>Milimani court (formerly income tax bldg) and kyuso court opened</td>
<td>It has over 56 court rooms the largest in E.Africa</td>
</tr>
<tr>
<td></td>
<td></td>
<td>ICT infrastructural /cabling rolled out in all High stations.</td>
<td>Due to increase funding the ICT reforms agenda is progressing positively.</td>
</tr>
</tbody>
</table>
4.1.8. The Judiciary Transformation Framework

The Judiciary’s Transformation Framework (JTF) plays a key role in reforming the Judiciary and aims at achieving three major objectives: First, it must reset the relationship between the Judiciary and other arms of government. Premised on the principle of robust independence and constructive interdependence, the Judiciary will reposition itself as a strong, effective and equal independent arm of government, while engaging other agencies in the administration of justice within acceptable confines of the Constitution. Second, the Judiciary must reorient its organizational culture to customize it with the exigencies of its social realities, and its institutional design and leadership style need to reflect known models of modern management science. Third, and most important, it must emerge and operate as a service entity which serves the people. It must win back public confidence; express itself with such authority and integrity that the public will always respect its opinions and decisions even – in fact, particularly – when they disagree with those opinions and decisions. The Judiciary must recapture public imagination, not through its outdated aristocratic poise and rituals, but rather through the rigour of its jurisprudence.

The totality of the JTF includes the Judiciary Strategic Plan, Strategic Plans of other Judiciary Institutions that have been developed (such as the JTI, KMJA and Kenya Judicial Staff Association (KJSA)), and the Plans, Policy and Instructional Manuals that will emerge from the Directorates as informed by this Framework.

While it still premature to evaluate the full impact of the reforms in Kenya’s Judiciary, the JTF offers a foundation for making some preliminary observations. Three important issues relating to possible progress made as a consequence of the reform agenda include: 1) possible effects of strengthening the independence of the Judiciary as indicated by the jurisprudence of the Kenyan Judiciary; 2) possible changes in public trust and confidence in the Judiciary, which may be correlated to the reform agenda; and 3) possible progress made with respect to advancing access to justice in Kenya. These topics are discussed in turn in the following three subsections.


Arguably, the most visible change in the Judiciary over the last couple of years relates to its increased willingness to challenge the executive branch of government. In a series of rulings, the Judiciary under Willy Mutunga has proven that it has become more inclined to render decisions made by the executive unlawful.

The first indication of this change could be traced to Justice Ombija’s ruling in the case of *Kenya Section of The International Commission of Jurists (ICJ) v. the Attorney General & Another*, in which the court held that international law applies directly in Kenya and that by failing to take measures to arrest Sudan’s President
Omar al-Bashir, against whom the International Criminal Court (ICC) had issued a warrant of arrest for war crimes, crimes against humanity genocide as well a request for cooperation to all State Parties to the Rome Statute for the arrest and surrender of President, the government of Kenya was in breach of its duties. Having noted that “it is axiomatic that the Kenyan State has no autonomous existence outside the framework of the community of nations, and that on this account, its regime of law and Constitutional order interface with the other states under the auspices of international law”, the court found that “the good Government of Kenya has refused, neglected and/or ignored to comply with the ICC request even when the said President was in Kenya on 27th August, 2010.” Accordingly, ICJ was granted the right to bring an application for the prerogative order of mandamus, for an order directed at the Minister in charge of Internal Security to arrest the Sudanese President “should he set foot in Kenya in future”.

The ruling is noteworthy because it strengthens the ability of civil society actors to remedy the government’s breaches of law, but also because it critiques the government’s (in)actions in so clear terms: “The hosting of the said President in Kenya in violation of Kenya’s obligations under the Rome Statute [ICC] and the International Crimes Act, 2008, and the Constitution of Kenya, 2010 raises serious concern over Kenya’s commitment to combating impunity for the most serious crimes against humanity.” Moreover, the ruling consolidates the view that international law is directly applicable in Kenyan courts, noting that article 2(5) of the Constitution, which provides that the general rules of international law shall form part of the law of Kenya, means that the Constitution incorporates the general rules of international law in the law of Kenya. The court held that “The Rome Statute is an International treaty and hence embodies rules of International law.”

Under the prior Constitution – which did not entail a rule similar to article 2(5) in the 2010 Constitution – the Judiciary had a mixed record with respect to giving international law direct effect in Kenyan law. As noted by some observers, “for a long time, the courts have been reluctant to apply principles of international law contained in the international human rights instruments that Kenya has ratified, largely because they have adopted an extreme dualist approach to the implementation of international law.” In Okunda v. Republic, the CJ ruled that international law and domestic laws are different legal systems, explaining that “[t]he provisions of a treaty entered into by the government ... do not become part of the municipal law of Kenya, save in so far as they are made such by the Laws of Kenya”. While this position continued to prevail in the Judiciary’s decision under the prior Constitution, in some cases the Judiciary did take into account international human rights law when interpreting the rights protected by the Constitution.

Still, the decision also points to challenges with regard to the executive’s perception of the judicial branch of the government. Following the ruling, in December 2011, government officials criticized the High Court’s decision and stated that the government had no intention of implementing the High Court decision. Such resistance to respecting and implementing court decisions has a long legacy in Kenya. As noted in a recent
Report by the Open Society, the executive has tended to ignore court orders, and there is a “general perception among Kenyans that there is a widespread culture of defiance of court orders… In 2003 for instance, the Minister for Tourism and Information defied a court injunction restraining the government from taking over a building whose ownership was in dispute. The same government minister subsequently defied a court order requiring him to disband a committee he had constituted to investigate the affairs of a radio station. Again in 2003, the Minister for Local Government defied a court order which sought to prevent him from revoking the nomination of a councillor of the Mombasa City Council. In a repeat action, the same minister defied a court order quashing the nomination of an individual to serve in the Kisumu City Council. No action was taken against these defiant government ministers.” Nonetheless, it might be a sign of progress that some parliamentarians firmly spoke out against the executive’s interference with the judiciary’s independence in the al-Bashir ruling. Furthermore, the Court of Appeal seemed to resist the political pressure when it soon after confirmed the High Court’s ruling.

In a more recent ruling, the Judiciary confirmed its willingness to challenge the decisions made by the executive, as Justice Odunga overturned the decision made to appoint Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission on the grounds that it was unconstitutional because the appointment “offends the requirements of the Constitution, and in particular Article 73.” The ruling is important for several reasons. First, the decision notes that “anybody has a right to bring a Petition challenging the constitutionality of an action, and it should not matter that the Petitioner did not present any complaints during the selection or vetting process.” Second, following the precedence of *FIDA-K & Others v The Attorney General & Another (Constitution Petition No. 102)*, the High Court found that the Constitution “does not rule out the possibility of the Court reviewing the constitutionality of a decision by a coordinate arm of government beyond procedural matters: the Court merely advises that it must exercise an abundance of caution in doing so where procedural infirmity is not alleged or proved in the decision-making process”. In this regard the High Court further noted that “because the courts have the ultimate and sole responsibility of the interpretation of the law the Court is entitled to determine whether the political body’s “interpretation of the provisions of the Constitution is unconstitutional.” Finally, the decision makes an important contribution to the understanding of the integrity requirements in Chapter 6 of the Constitution, including
article 73(2) which provides that “the guiding principles of leadership and integrity include -
(a) selection on the basis of personal integrity, competence and suitability, or election in
free and fair elections”. The decision holds that while the court is not in a position to make
any findings as to whether the serious allegations made against the appointed chairman are
correct, “we are prepared to hold at this point is that the allegations are serious enough and
sufficiently plausible to warrant any reasonable person who is charged with the
constitutional responsibility of assessing the integrity or suitability of the Interested Party
for an appointment to a State or public office, especially one which is as sensitive as the
Chairperson of the Ethics and Anti-Corruption Commission, to conduct a proper inquiry
before such an appointment.” The ruling further noted that “a cursory assessment of the
evidence made available to us – which includes a letter by a Criminal Investigations
Department (CID) Officer who wrote to the CID Director stating his opinion that there was
substance in some of the allegations and urging the CID Headquarters to dedicate more
resources including experts in forensic science and auditing and computer analysis – to the
case.” Specifically with respect to the integrity test, the court concluded in general terms as
follows: “To our mind, therefore, a person is said to lack integrity when there are serious
unresolved questions about his honesty, financial probity, scrupulousness, fairness,
reputation, soundness of his moral judgment or his commitment to the national values
enumerated in the Constitution. In our view, for purposes of the integrity test in our
Constitution, there is no requirement that the behavior, attribute or conduct in question has
to rise to the threshold of criminality. It therefore follows that the fact that a person has not
been convicted of a criminal offence is not dispositive of the inquiry whether they lack
integrity or not.”

However, while the two examples mentioned above could be seen to point to a significant
progress with respect to judicial independence and impartiality, other recent decisions
could, arguably, be seen to point in the other direction. A recent decision made by the High
Court in the case, The International Center for Policy and Conflict (ICPC) , International
Commission of Jurist (ICJ-Kenya), and Kenya Human Rights Commission v. the Attorney-
General et al challenged the eligibility of Uhuru Kenyatta and William Ruto, presidential candidate and running mate respectively, who are facing crimes against humanity at the International Criminal Court (ICC) stemming from the 2007/08 post-election violence that followed a disputed presidential election. The High Court bench, composed of Justices Hellen Omondi, Mbogholi Msagha, Luka Kimaru, Pauline Nyamwea, and George Kimondo, held that the Court has no jurisdiction to determine the matter and that on matters of elections to the office of the president, the Supreme Court has original and exclusive jurisdiction. Whether or not one would agree with this finding, it is curious that the High Court then moved on to elaborate on substantial issues, including the question of integrity. Moreover, the court suggested that it was incumbent upon the petitioners first to file complaints on eligibility with the IEBC before approaching the High Court, though the IEBC has previously suggested that it was for the court to make a decision on this point. As noted in the Kenyans for Peace with Truth and Justice (KPTJ) response to the ruling, “The effect of this finding is that the court asserts that it is the responsibility of the IEBC to pronounce on integrity, while the IEBC says this is the responsibility of the court”. Finally, as the court ordered that the petitioners pay the costs of the petition to the respondents, including Kenyatta and Ruto, this may have negative consequences for the ability of civil society organisations and others to conduct public interest litigation in the future.

Regardless of the court’s conclusions, it is noteworthy that the attempts that were made to intimidate the Judiciary, including threats against the person of the CJ, to force about a specific ruling on the matter were dismissed in public and the CJ stood firm stating that no such attempts will influence the Judiciary’s manner of dealing with election related petitions or any other decisions, and that the CJ is ultimately willing to sacrifice his life to safeguard the independence of the Judiciary.

Besides the rulings that have actually been made, one could question whether not the absence of rulings in certain types of cases point to continued problems with judicial independence and impartiality. Most obviously, despite continued promises to the contrary, the Judiciary still needs to take concrete steps to operationalize a framework for
adjudicating criminal cases arising out of the 2007/8 post-election violence. However, as will be discussed in the Sections below, the lack of action taken by other legal sector bodies may ultimately be what best explains the failure to prosecute and adjudicate these crimes.

4.1.10. How does the Reform Agenda Impact on Issues of Integrity and Public Confidence in the Judiciary?

While it is beyond the scope of this Report to undertake a detailed assessment of integrity and the public’s confidence in the Judiciary, some observations can be made on the topic which could advance the understanding of the impact of the reform agenda.

A recent survey conducted by the ICJ is interesting in this regard. The September 2012 survey found that 70 percent of the surveyed respondents have confidence in the CJ, Dr. Willy Mutunga and other newly appointed judges. Elaborating the reasons for increased confidence, 43 percent stated that vetting process had contributed thereto, whereas 24 percent stated that impartiality and fairness in recruiting was the major reason for increased confidence. Other reasons identified in the survey includes a “good track record” (21 percent); “persons of high integrity” (17 percent); “they are best qualified and experienced (16 percent). However, as the table below indicated the survey also pointed to important regional differences in the level of trust:

Table 2: Kenyans’ Trust in the Judiciary
Still, the same survey also indicates that the public has serious reservations about Kenya’s Judiciary. The most serious concerns mentioned by the respondents include:

- Delay in handling cases (45%)
- Easily corruptible (44%)
- Courts are expensive avenues (22%)
- Politically influenced (14%)
- Rampant nepotism (7%)
- Poor working environment (4%)
- Can’t enforce their decisions easily (4%)
- Very disorganized (3%)
- Kenyan courts are redundant (2%)
The public’s confidence in the Judiciary thus depends on a variety of factors. While some of these issues, including access to justice concerns such as delay in handling cases and the costs associated with relying on the courts as a forum for dispute resolution, are discussed below in this Report, other issues pertaining directly to the integrity of the Judiciary deserve some additional mentioning here.

Whereas few would dispute that the vetting process and other initiatives launched by the CJ have contributed to overcoming the rampant corruption which characterized the Judiciary of the past, concerns have been raised with respect to certain decisions made by the Judiciary under Willy Mutunga. For example, questions have been asked with respect to the decision to provide judges with certain benefits. One observer notes: “The JSC through Justice Lenaola this week did a very strange thing. They found a way to interpret the purchase of luxury vehicles for Judges as a constitutional right. Quoting article 160(4) of the constitution which states that the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of the judge, the JSC thus interprets the purchase of expensive guzzlers as a constitutional right of every Judge in Kenya.”

Notwithstanding these continued challenges to the integrity of the Judiciary, perhaps the single most important indicator that the integrity of the Judiciary as an institution has improved relates to the increased level of trust with respect to the institution’s ability to render decisions in an independent and impartial manner in high-profile and politically sensitive cases. In this light, it is of utmost importance that this time around, politicians have chosen to rely on the courts dealing with disputes relating to the March 2013 elections. While various petitions have been made, the most notable is obviously that the Raila Odinga and his CORD coalition decided to file a petition with the Supreme Court, following the IEBC’s declaration that Kenyatta had won the presidential elections.

**Fact Box 4: Institutional Framework for Solving Election Disputes**

The Political Parties Act, 2011 established the Political Parties Disputes Tribunal, empowered to determine disputes between the members of a party; disputes between a member of a party and that party; disputes between parties; disputes between an independent candidate and a party; disputes between coalition partners; and appeals from decisions of the Registrar. However, the law states that the Tribunal may not hear disputes between members of a party, between a member and a party or between parties unless that dispute has first been heard by the relevant political party’s own internal dispute resolution mechanism. Aggrieved parties who are still unsatisfied can appeal the Tribunal’s decision to the High Court, the Court of
Appeal and the Supreme Court. The law makes it clear that the judiciary is only to be consulted when all other avenues have been exhausted. This system is important, because until now political parties would first turn to the courts to resolve their disputes, resulting in significant case overloads. Moreover, Chief Justice Willy Mutunga has set up an Electoral Dispute Resolution Court to handle all pending election petitions, and he has established a Supreme Court justice-led committee to handle any petitions arising from the 2013 polls.

4.1.11. Are the Reforms Advancing Access to Justice?

As noted above in this Report, access to justice has in the past been limited in Kenya, especially for the poor. Although the Judiciary itself was only part of the problem, it is worth discussing whether the ongoing reforms have helped remedy some of these challenges. It is notable in this regard that one of three major policy objectives identified by the CJ in 2011 involves increasing access to justice, and another involves improving the Judiciary’s ability to address the specific needs of the poor. With respect to access to justice, ICJ has identified three main obstacles which prohibit public access to justice for the poor and marginalised, namely economic, psychological and information barriers.

One indicator of access to justice thus involves awareness of the law and the legal system. In this light, one could start by asking to what extent ordinary Kenyans are actually aware of the reforms. The ICJ survey cited above offers some insight in this regard, finding that as of June 2012, 59 percent of those interviewed were aware of the reforms. Concerning the types of reforms that the respondents were aware of, the study found that 25 percent were aware of the “transparent appointment of Judicial Officers”; 23 percent were aware of “the automation and digitalization of court processes”; 23 percent were aware of the “vetting of Judges and Magistrates”; 15 percent aware of the “reconstitution of Judicial Service Commission”; 14 percent aware of efforts aimed at “ending impunity and disrespect of court orders”; 14 percent aware of “the establishment of the Supreme Court”; 9 percent were aware of reforms relating to the “financial autonomy in the Judiciary; and 5 percent were aware of “mechanisms for a broader access to justice”. This does not appear to be a particularly impressive record for the Judiciary: More than one third of the population might thus not be familiar with the reform agenda at all, and less than one out of five are familiar with the existence of the highest court in the country. This could point to a need for communicating the reform agenda in a different manner, for example by targeting marginalized communities directly.

Another indicator for the level of access to justice concerns its affordability. In the ICJ survey, only 35 percent of the respondents found that the current costs are affordable, with the majority (68 percent) of the respondents who found the costs not affordable coming from rural areas. Still, the majority of Kenyans (61 percent) state
they have no access to legal services, including the courts. Again, this implies that the Judiciary should do much more to improve access to justice, though of course it must be acknowledged that the creation of solid legal aid schemes requires the participation of other legal sector actors and that funding for such schemes must be obtained.

Still, of course, it must be acknowledged that continuing problems with access to justice do not necessarily mean that no progress has been made or no initiatives put in place to enhance access to justice. In the October 2011 Progress Report, the CJ stated that 14 new courts are being established in places where the Judiciary has never before had a footprint, and in addition 8 mobiles courts have been set up and 38 new vehicles released to serve court stations in historically marginalised areas. The CJ promised that court stations will be established in Lodwar, Isiolo and other marginal districts including Archer’s Post, Wamba, Kakuma, Lokitaung, Lokichoggio and Loitokitok, as a way to reduce the cost of justice for litigants. Another initiative launched by the CJ to strengthen access to justice involves the so-called “Judicial Marches Week”, an event launched in August 2012 and to be held once every year around the country, as part of the Judiciary’s transformation programme, aimed at making the Judiciary more accessible to the public, and “to remind [the Judiciary] of the constitutional edict that judicial authority come”.

One of the biggest remaining challenges for access to justice involves the enormous case backlog which has been created over the years, in part due to mismanagement of the Judiciary and in part due to a lack of resources. In 2012, the CJ addressed the problem noting as follows: “An initial analysis of the case backlog lays bare the anatomy of the problem: close to two thirds of the cases are traffic-related. As an immediate response, I have appointed a Chief Magistrate to specifically deal with this issue in a comprehensive and speedy manner. Further, I will be writing to the Commissioner of Police asking him to indicate to us those cases he thinks his officers can no longer sustain so that we clear them out of our system.” The CJ further noted that at the High Court alone, there are currently 2,015 pending criminal appeal cases, some of which have been not been heard for as long as 20 years because their files are missing or the records are incomplete. Steps taken to remedy the situation include digitizing cases (by now 60 million pages of cases for the High Court and 10,000 records for the Court of Appeal have been digitized, covering the years 1999 to 2010. The CJ further explains: “Some 1,042 cases that should be progressing in the High Court are waiting arguments at the Court of Appeal while some 942 main appeals are yet to be heard. We have asked parties in the oldest cases, filed as far back as 2004, to take dates within the month so that their matters can be disposed of. Within six months, I expect the Court of Appeal to be handling only fresh applications. I intend to reduce the waiting period for appeal cases from the current average of six years to less than a year.” Furthermore, the ICT department is in the process of creating an electronic-based system for monitoring and tracking overdue judgments and rulings with a view to taking remedial action. To end delays and reduce case backlogs, the
judiciary will embrace technology to help classify cases for expeditious ruling, Mutunga said, adding that the judiciary also aspires to establish at least one high court in all 47 counties over the next 10 years and hire an additional 147 magistrates to address the staff shortage. It is the policy of the Judiciary that once proceedings begin, cases will be heard back-to-back on a first filed, first heard basis. Queuing of cases, it is though, will take away the incentive for corruption. Overall, Mutunga has stated that in the past year the judiciary recorded tremendous progress, finalising 421,827 of the 428,827 cases logged between June 2011 and June 2012. It is worth noting that in November 2012 the World Bank approved a 10.2 billion KSH loan to, among others, enable Kenya’s judiciary to automate the courts and clear the backlog of cases.

4.2. The Prosecution

4.2.1. Status of the Reform Legislation

On 1 July 2011, the Office of the Director of Public Prosecution (ODPP) became operational with the appointment of Keriako Tobiko as Director of Public Prosecution (DPP). While article 157 of the Constitution stipulates that the ODPP must be independent, in reality the Office has until very recently lacked such independence due to the late passing of the National Prosecution Service Bill. However, in March 2012, The National Council on Administration of Justice meeting recommended that the Bill be fast tracked, and the CJ and the AG agreed to co-sponsor it before the Cabinet. This followed a consultation process with civil society organisations under the GJLOS, during which the Bill was discussed. Until the passing of the Act, the DPP acknowledged that “our staff are civil servants answerable to the PSC [Public Service Commission] yet we are supposed to be an independent entity. This puts us in an awkward position”. In January 2013, however, Parliament signed the National Prosecution Service Bill, thus finally giving the ODPP financial independence, creating a structure that allows for more flexibility, and the ability to set the terms of service for its staff.

In short, the Act makes provisions for the establishment of the National Prosecutions Service (NPS), providing for the independence, organization, management, monitoring, supervision and control of prosecutions, functions of the Service, functions and powers of the DPP and other officers in the NPS. Article 5 of the Act establishes a National Prosecution Service Board (NPSB), comprising the Director, Senior Deputy Director of Public Prosecutions/Secretary, Deputy Directors of Public Prosecutions and three Chief County Prosecution Counsels elected by the Prosecution Counsels in the county offices, mandated to recruit and appoint staff, and deal with matters of promotion, discipline, and determine terms and conditions of the service. Further, the Act spells out how the independence of the Office is to be achieved (section 6); makes provisions for promoting accountability in the service (section 7); and details how the Director is appointed and may be removed (sections 8-9). Section 14(1) creates an amount of prosecutorial discretion by stipulating that the Director may
“decide to prosecute or not to prosecute in relation to an offence” (a), and to discontinue a prosecution at any stage before delivery of judgement (d). Section 20 grants the Director the Power to appoint Public Prosecutors; section 20(1) stipulates that the Service shall establish County Prosecution Offices; and section 28 requires the Director to appoint a team of inspectors to visit and inspect all public prosecutions offices and operations within Kenya. Moreover, the Act requires the Director to conduct and submit to the President and the Speaker of the National Assembly an annual report on the performance of the Service (section 29(1)), and section 51 requires the service to hold an annual National Prosecution Service Convention, during which strategic issues and the standards of prosecution and service delivery are discussed, leading to the publication of an annual public report. It is also worth noting that the Act requires that the composition of the staff of the NPS reflects the ethnic diversity of the people of Kenya, gender equity and persons with disability (section 33).

**Fact Box 5: The Mandate of the Attorney General**

- Acting as the principal legal adviser to the Government
- Representing the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings
- Undertaking civil litigation, arbitration, and alternative dispute resolution on behalf of the government
- Reviewing and overseeing legal matters pertaining to Public Trustee and administration of estates and trusts
- Negotiating, drafting and vetting of local and international instruments, treaties and agreements involving the government and its institutions
- Adjudicating complaints made against practising advocates, firms of Advocates, a member or employee thereof and where necessary ensuring that disciplinary action is taken
- Drafting bills, subsidiary legislation, notices of appointment to state corporations, constitutional offices and public offices and review of laws
- Reviewing and overseeing legal matters pertaining to registration of companies, business names, societies, adoptions, marriages, among others.
Fact Box 6: The Mandate of the Director of Public Prosecution

- Exercising prosecutorial powers, including instituting and undertaking criminal proceedings against any person.
- Deciding to take over and continuing any criminal proceedings instituted or undertaken by another person or authority.
- Deciding to discontinue any criminal proceedings at any stage before judgment is delivered.
- Directing the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct.
- Advising government ministries and departments on matters pertaining to the application of criminal law.
- Monitoring the training, appointment, and gazettement of Public Prosecutors in Statutory Corporations.

4.2.2. Appointment of Director

Before the promulgation of the new Constitution on August 27, 2010, the Office of the DPP was occupied by Mr Keriako Tobiko having been appointed by President Kibaki in May 2005. The AG, Amos Wako relinquished the authority of the Office to Tobiko on an acting arrangement awaiting appointment of the new DPP. On January 28, 2011 President Kibaki announced the appointment of Kioko Kilukumi as the new DPP. This appointment was challenged in the High Court, and in various other quarters on its constitutionality and ultimately the President reversed it. The position of DPP was instead advertised in public, and following a transparent but tense process, Tobiko was elected for the post. Throughout the interview Tobiko had to defend himself against allegations of corruption, incompetence and lack of commitment to reforms. The ODPP eventually became operational on July 1, 2011 with the appointment of Tobiko as the DPP.

4.2.3. Cooperation with other Actors

By the end of 2012, the International Justice Mission (IJM) and the ODPP established a partnership according to which IJM and ODPP staff will investigate and prosecute cases of child sexual assault and law and order.
together. This is the first time that the ODPP established a partnership with an NGO. According to the agreement, IJM and the ODPP aim at developing specialized training and advocate for policy changes to bring justice to those who need it, particularly the poor and vulnerable. IJM has worked with the newly independent ODPP since 2011, and previously worked with its predecessor in the State Law Office.

4.2.4. Training

On August 28, 2012 the ODPP Training Committee held a meeting with the heads of field stations and another meeting was held on 18 September 2012, during which it was agreed that all Heads of Subdivisions/Sections and field stations should start preparing and submitting training projections for staff working under them by 30 September 2012 in order to enable proper planning of training activities for this financial year. The Training Committee agreed that the following training activities will be undertaken in course of the financial year:

- Fraud Investigation to be conducted from 23-27 July 2012 (targeting 20 Legal Officers)
- Computer Training to be conducted from 2-15 September 2012 (targeting 20 Senior Staff)
- Induction Course to be conducted from 2-15 September 2012 (targeting newly recruited Prosecution Counsels)
- Sensitization of the Training Committee Members to be conducted from 1-5 October 2012 (targeting 15 ODPP TC members)
- Finalisation on Training Needs Assessment (involving Task Team No. 8)
- Customer Care/Ombudsman Course to be conducted from 29-31 October 2012 (targeting 20 members of the Complaints Units)
- Performance Management Seminar to be conducted from 26-30 November 2012 (targeting 20 ODPP Staff)
- Colloquium (US DOJ-Sponsored) to be conducted from 10-14 December 2012 (targeting 150 legal staff)
- Development of Competency Policy on an unspecified date (involving the Task Team)
- Review of Training Manual on an unspecified date (involving Task Team)
- Police Prosecutors Induction on an unspecified date (targeting 136 absorbed Police Prosecutors)
- New Prosecutors Induction on an unspecified date (targeting 140 prosecutors)
- Safety and First Aid Training on an unspecified date (targeting all DPP staff (250))
4.2.5. Structure
The ODPP currently has four thematic directorates, namely Offences against the Person Directorate; the Economics, International and Emerging Crimes Directorate; the County Affairs and Regulatory Prosecutions Directorate; and the Central Facilitation Services. Each Directorate is headed by a Deputy Director. It is envisaged that each Directorate will be divided into a number of specialised divisions headed by a Senior Assistant Deputy Director, while sections and units under them will be headed by Assistant Deputy Directors. In the restructuring proposal, the position of Secretary of Public Prosecutions has been created, which will deputise the DPP and oversee the function of the resource centre. The Director of Public Prosecutions has recently proposed to hire more than 500 state counsels to replace police prosecutors. Adverts were posted in Kenyan newspapers in late January 2013.

4.2.6. The 2011-2015 Strategic Plan
In March 2012, the ODPP finalised the Strategic Plan for the Office covering the period of 2011-2015. The Plan sets out to describe the Office’s vision and mission. The vision involves “an independent, professional, efficient and effective prosecution service that draws public confidence and meets best international standards, principles and practices”, whereas the mission is “to serve the public by providing quality, impartial and timely prosecution services anchored on the values and principles enshrined in the Constitution.” Further, the Plan outlines the core values of the Office, including “impartiality and fairness, respect and promotion of human rights and the rule of law, integrity and ethics, professionalism, courtesy and respect, and teamwork”. The Plan also states that “in discharging it functions the ODPP shall at all times observe, respect and promote human rights and the rule of law in line with the Constitution and international human rights conventions and instruments”. Moreover, the Plan emphasizes the Office’s independence, noting that “the office of the Director of Public Prosecutions in the exercise of its functions is not subject to any control or direction of any person or authority. The DPP carries out his duties in an independent, impartial and competent manner engendering public confidence in the implementation of the rule of law.”

The implementation of the Strategic Plan 2011 – 2015 will be guided by the identified key policy priorities, including:

Restructuring and reform of ODPP in line with the Constitution
Professionalization of prosecution services
Witness and victim care and support
Decentralization of prosecution service to promote access to justice
Enactment of enabling and facilitative legislation for the ODPP
Review and revision of key prosecutorial instruments
Automation and modernization of processes and procedures
Capacity building and staff development
Rebranding and repositioning of the ODPP
Promotion of inter-and intra-agency cooperation and collaboration
Promotion of international cooperation in criminal matters
Promotion of strong organizational culture
Improvement in the criminal justice system
Performance management system
Monitoring and evaluation

On the basis of these policy priorities, the ODPP further identifies various strategic issues that it seeks to address in order to effectively discharge its mandate and attain its vision. These involve:

Limited prosecutorial independence
Weak legal and institutional framework
Inadequate organizational capacity
Over reliance on manual systems
Weak inter-agency collaboration
Delay of prosecution services
Negative public perception
Poor facilitation of victims and witnesses
Submission of poorly investigated cases

Inadequate mainstreaming of cross cutting issues

The Plan further undertakes a so-called SWOT analysis, in which it recognizes both strengths and weaknesses related to creating an independent and efficient prosecutorial body. Among the strengths, the Plan notes that the 2010 Constitution creates a solid framework for ensuring autonomy and independence. Among the weaknesses, the Plan states that understaffing is a serious concern; that the Office may not have the necessary skills with respect to management skills; that the processes and procedures used by the Office have been overly cumbersome; lack of financial resources; inadequate and unequal infrastructure; lack of coaching and mentorship programmes; ineffective performance management systems; lack of a monitoring and evaluation frameworks; weak collaboration and coordination with other stakeholders; and limited adoption of Information and Communication Technology. Concerning external threats, the Plan mentions, among others, unpredictable political goodwill; politicization and ethnicification of the fight against crime; state bureaucracy; conditional ties with development partners; escalation and complexity of emerging crime; competition for limited resources; challenges and capacity constraints within other criminal justice agencies; and weak inter-agency collaboration and cooperation.

Beyond the Strategic Plan, the ODPP has also embarked on reviewing its Prosecution Manual for Economic and International crimes as well as reviewing the National Prosecution Policy and the Training Manual. However, from the ODPP’s website it appears that the Office is still relying on the Code of Conduct and Prosecution Policy adopted under the prior constitutional arrangement in 2007.

Fact Box 7: Overview of Recently Conducted Activities in the DPP

The organizational structure of the ODPP has been established and approved and the optimal staffing levels determined

A draft National Prosecution Service Bill has been prepared and circulated for stakeholders’ input (and forwarded to Parliament)

The ODPP Strategic Plan for the period 2011-2015 has been prepared and is ready for stakeholders’ validation (and, as discussed above, since adopted)

A task team is finalizing proposals for improvement of terms and conditions of service for staff to make the ODPP competitive and able to attract and retain the best
All Police prosecutors in the country have been audited to determine their experience, competence and suitability and have been individually gazette, and a task team is finalizing modalities for absorption of these prosecutors into the ODPP.

In order to address the managerial gap that presently exists in the ODPP, authorization has been obtained from the Public Service Commission and the Treasury to immediately recruit 3 Deputy Directors of Public Prosecution and an additional 63 prosecuting counsel of various ranks (additionally the ODPP is engaging both Public Service and Treasury for approval and funds to recruit an additional 350 prosecuting counsel in order to enable the ODPP to match the massive expansion of the judiciary and better serve the public).

Subject to availability of funds and necessary authorization, the ODPP plans to establish County Offices, each to be headed by a Chief County Prosecutor in line with the devolved structure of the new constitution.

In order to build capacity and enhance professional skills and expertise of staff, the ODPP has organized and conducted a number of specialized group training programmes and some staff members are undertaking Strategic Leadership Management and Postgraduate courses locally and abroad.

**4.2.7. The DPP and the Failure to Prosecute the Post-Election Violence Related Cases**

Since the structural reforms discussed above have only recently been implemented, it is for obvious reasons not possible to fully examine their impact yet. Still, an assessment of how the DPP has performed with respect to specific issues since coming into office in July 2011 can be made, which could point to more general challenges for the Office, some of which may be likely to persist in the future. The following analysis of impact takes the starting point in analyzing the role of the ODPP in prosecuting the sensitive post-election violence cases, focusing on whether the ODPP has become less influenced by the political system and is able to initiate prosecutions in sensitive cases with political implications.

Despite the numerous claims made by various government officials that a domestic accountability process is in progress, there has been almost no accountability for post-election crimes, and the steps that have nonetheless been taken by legal sector bodies to promote prosecution of post-election violence cases have tended to be flawed and half-hearted. At present, there appears to be no feasible and credible plan for how to systematically deal with the files and cases relating to the post-election violence, and as follows from the analysis below, the DPP is partly responsible therefore.
Following the installation of a coalition government in 2008, newly appointed Ministry of Internal Security George Saitoti had drawn up a list of post-election violence related cases to be treated with particular speed, and ordered the Police to speed up investigations and prosecutions of the remaining cases. Furthermore, in June 2008, the AG instructed the DPP to appoint a team of State Counsel tasked with identifying all post-election violence cases that had been filed. However, the DPP never managed to follow up on this.

In its admissibility challenge of the ICC cases of March 31, 2011, the government argued that ongoing judicial reforms meant that the “[n]ational courts will now be capable of trying crimes from the post-election violence, including the ICC cases, without the need for legislation to create a special tribunal, thus overcoming a hurdle previously a major stumbling block”. At the same time, the government argued that national proceedings were in fact already ongoing. For example, the government stated that “[i]n Kenya to date there have been investigations and prosecutions mostly of low level offenders involved in the 2007/8 violence”, and these proceedings relating to the investigation and prosecution of lower level perpetrators would soon “reach up to those at the highest levels who may have been responsible”.

In the admissibility challenge as well as the appeal of Pre-Trial Chamber II’s decision to reject the admissibility challenge, the government cited reports conducted by the AG (which at the point maintained prosecutorial powers), which implied that national proceedings with regard to high-level perpetrators, including the six ICC suspects, were in fact already ongoing. For example, the government noted that: “A vital new post for the purpose of progressing the investigative process has been created under the new Constitution to direct and oversee all investigations and prosecutions, namely the Director of Public Prosecutions (DPP). This position had previously been filled by the Attorney-General, Under the new Constitution it has been separated from the AG's office to create a new office entirely independent of Government (as is common in most democratic systems) with all the necessary safeguards to guarantee independence of investigations and prosecutions at all levels”. The government further stated that “The findings and recommendations of the
February 2009 Report to the Attorney General by the Team on the Review of Post-Election Violence Related Cases in Western, Nyanza, Central, Rift Valley, Eastern, Coast, and Nairobi Provinces, are presently being taken forward by the Directorate, As was noted in this Report, the investigation processes were not concluded - they were a first stage. The Report clearly recommended that speedy investigations of all allegations were required, and in particular that co-ordination and resources were needed to achieve this objective. As a result, investigators continue to be dispatched into the field to collect evidence and lay the groundwork for local trials. In addition, the investigations and findings of various international and national bodies, including the Waki Commission, are being relied upon to guide national investigations.” Moreover, the government promised that “at the end of July 2011” a report will be submitted covering the investigations undertaken by the new DPP and the timetable for further investigations.”

Moreover, in March 2011, Police spokesman Eric Kiraithe stated that: “We’ve a lot of evidence and it has always been updated. The cases have been pending because the prosecutions are supposed be done by a special tribunal, as recommended in the Waki report”. The spokesperson also indicated that since January 2011 there has been increased police activity in areas that were worst affected by the post-election violence, with the aim of reviving cases that otherwise had “become cold”, and that detectives are reconstructing files relating to murder, rape and arson and other serious offences, involving around 6,000 suspects, that were originally opened at individual police stations. In line with this, a March 2011 progress report, which was forwarded to the ICC in connection to the admissibility challenge, the DPP stated that almost 3,400 cases were “pending under investigation”, the vast majority of them in the Rift Valley. The DPP also claimed that there had been 94 convictions for post-election related crimes, while 57 cases had led to acquittals, 179 had been withdrawn, 21 were pending the arrest of known persons, and at least 62 were pending before the courts. However, a comprehensive Human Rights Watch report of December 2011 on the progress of the domestic accountability process concluded that the DPP report appeared to have been “compiled hastily, with little concern for accuracy”, noting that “a
number of cases included in the report have nothing to do with the election violence” and “[t]he actual number of known post-election violence convictions is significantly lower than the report indicated”. For example, Human Rights Watch research showed that many of the claimed convictions for the post-election violence were in fact acquittals, unrelated to the post-election violence or for minor offences, such as “taking part in a riot” or “handling stolen property.” Of the 47 cases clearly related to the post-election violence that Human Rights Watch found to have reached the courts – many of them high-profile cases and cases involving serious crimes – it was found that only in eight cases had there been a conviction. Human Rights Watch also observed that of the post-election violence cases that have actually been brought to court, none of them involves local politicians who allegedly incited the violence, and none relates to the police violence that took place during the 2007/8 crisis.

Concerning the priority cases created in 2008, Human Rights Watch found that they had usually not resulted in convictions, though there has been one minor assault conviction linked to the killing of Hassan Omar Dado, one suspect was convicted of manslaughter in the killing of David Too, and a number of convictions for the murder of police officers in Bureti.

As the ICC Appeals Chamber rejected Kenya’s appeal (and thereby conclusively dismissed the admissibility challenge), it seemed clear that the DPP similarly lost its interested in prosecuting the post-election violence cases. The investigatory steps taken against the ICC suspects thus appear to have been purely formalistic and exclusively aimed at succeeding with the admissibility challenge, not to bring to account those responsible for organizing the post-election violence. The Police stated in July 2011 (and thus before the Appeals Chamber delivered its ruling in August 2011) that is has opened files and has been questioning (some of) the ICC suspects in connection to the post-election violence, but there are no indications whatsoever that national proceedings against the ICC suspects have since progressed.

However, in April 2012, the DPP created a multi-agency taskforce to review the post-election violence files. At a meeting in Naivasha on June 12, 2012 hosted by ICJ (Kenya
Section), members of the task-force made a presentation, offering an update on the progress made. According to this presentation, the taskforce – which consists of 20 staff members from the DPP, the State Law Office, the Ministry of Justice, the National Police Service and with Witness Protection Unit – had reviewed the first of a total of three batches of post-election cases, amounting to around 1,400 hundred files, and made recommendations to the DPP on how to processes these files. The remaining files, approximately 4,500, were said to either still be with the relevant police stations, or had been handed over to the taskforce, awaiting its review. According to the presenters, the crimes mentioned in the files involved, among others, murder, arson, housebreaking, burglary, theft and sexual offences. When asked whether the files pointed to the commission of international crimes, the presenters explained that they would not rule out the possibility that such a conclusion could eventually be made, but at present the focus was on the domestic law offences. The presenters mentioned a series of locations covered by the files, but it was not immediately clear whether all police stations were fully cooperating with the taskforce. The presenters noted that many of the files were of poor quality, some still pending investigation, and implied that in many cases it would likely prove difficult to obtain a conviction. When asked what types of perpetrators were likely to be prosecuted, the presenters noted that “the kind of perpetrators [to be prosecuted] depends on the files”, which would seem to imply that only the actual perpetrators of the crimes, and not those who planned or organized the crimes would be involved, will be prosecuted should any progress be made on the basis of the work of the taskforce. The presenters further explained that the taskforce had not (yet) established a mechanism for offering feedback to the complainants. The overall picture that emerged from the presentation, and the participants’ interactions with the presenters, was that the efforts of the taskforce were, at best, a half-hearted effort aimed at prosecuting some of the low-ranking perpetrators, but clearly not the planners and organizers of the violence. This picture has since been confirmed by the taskforce’s statements: In mid August 2012, the taskforce stated that most of the cases fall “below the prosecutable level”, as the files lack “essential information such as witness statements of complainants or investigating officers” or identification of the crime scene. The taskforce did not indicate what, if any,
further steps will be taken to obtain additional evidence, nor did it clarify how the files that can actually be prosecuted will be moved forward in the system. Since then, no progress has seemingly been made, and it seems clear that the DPP has in essence given up the idea of prosecuting those responsible for the post-election violence.

In sum, while the failure to ensure accountability for the vast majority of post-election cases cannot be attributed to one single legal sector body, it is obvious that the ODPP has not taken the steps necessary to promote a genuine pursuit of accountability for the violence, and that the Office is unlikely to do so in the near future. In part, this may have to do with lack of sufficient resources and personnel in the ODPP. Arguably, however, the broader problem relates to continued political influence on the work of the Office.

4.2.8. Prosecuting other High-Profile Cases

Notwithstanding the failure to prosecute post-election violence related cases, the DPP has played some role in preventing a recurrence of election violence in the context of the March 2013 elections. Notably, political leaders and others who have engaged in hate speech have on some occasions been warned by the DPP, and on some occasions the Office has prosecuted those behind these violations. In August 2012, for example, the DPP announced that the Office, relying on a report from the National Cohesion and Integration Commission (NCIC), had approved the prosecution of Nairobi Metropolitan minister Jamleck Kamau for hate speech. Tobiko said he had received a report from the commission with two separate recommendations and decided to approve one, noting that “I relied on the evidence available to approve the recommendation of the legal team at the commission”. Kamau is said to have made hate speech in Meru during a prayer rally that was organised in the area. At the same time, the DPP decided to prosecute MP Peter Mwathi, but stated that he did not find sufficient evidence to warrant charges against Makadara MP Gidion Mbuvi alias Sonko. Later, in September 2012, the DPP used his powers to order the immediate arrest of Embakasi MP Ferdinand Waititu for hate speech. The MP is alleged to have ordered Kayole residents to evict Maasai people from his constituency after a young man was allegedly killed by some Maasai watchmen.

However, the DPP has been less efficient prosecuting those responsible for organizing the clashes that occurred in the run-up to the March 2013 elections. As will be discussed further in the Section below, politically instigated violence broke out in various parts of the country in late 2012. In Isiolo and Moyale counties, at least 21 people were killed and some 20,000 displaced in inter-ethnic violence that persisted for
weeks without decisive government intervention. While 26 people were charged with participating in the violence, allegations that members of parliament were implicated in the violence have not been acted on. Moreover, the violence in Tana River, where more than 100 people were killed and some 200,000 displaced, have led to charges being broad against only one political leader, Dhadho Godhana who is a member of parliament, though several other politicians were also believed to be involved in the violence.

4.3. The Police

4.3.1. Status of the Reform Legislation

Vide Gazette Notice No. 4790 of 2009, President Kibaki appointed a National Task Force on Police Reforms with a mandate to examine existing policy, institutional, legislative, administrative and operational structures and recommend comprehensive reforms within a span of 60 days. On 26 August, 2009 the Task Force handed in an interim report and sought for extension of their period to finalize the report. On 3 November 2009, the Police Reform Task Force handed over the final report to the President with over two hundred recommendations aimed at strengthening the effectiveness of the Police Service. On 8 September, 2009, President Kibaki appointed a new Police Commissioner, Mathews Iteere, formerly General Service Unit Commandant, and Major General Ali Hussein, who was later named an ICC suspect, was deployed as the Postmaster General. Though the Police Reforms Taskforce Report put forward far-reaching recommendations, no immediate action was taken by the government to implement these reforms.

Since then, however, important reform legislation has been enacted. In August 2011, Parliament enacted the National Police Service Act, whereby the Kenya Police and the Administration Police are merged into one hierarchy and the IGP is granted authority over both policing branches. However, the publication of the Act was delayed for almost a year. The National Police Service Act regulates the administration, functions and powers of the IGP and the Deputy Inspectors (DIGs), the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations. As such, it gives the Police a robust mandate, strengthens internal accountability, and attempts to curtail political interference in police operations. The Act clearly outlines the functions of the Kenya Police Service and the Administration Police Service, and establishes the Directorate of Criminal Investigations with independent funding, which could enhance the management and quality of criminal investigations. Also the Act sets out to describe the powers of police officers in order to reduce arbitrary police actions and limiting the use of force. Specifically, the Act stipulates that an officer may use “force and firearms, if and to such extent only as is necessary (article 41).” The Act requires that all serving police officers be vetted for integrity and competence to determine their suitability to continue in the service. The Act further establishes clear command structures and responsibilities; an Internal
Affairs Unit is established to receive and investigate complaints about police misconduct, independent of the two services and directly reporting to the IGP; and civilian oversight is created at county level through the County Policing Authorities.

Additionally, the Policing Oversight Authority Act has been passed, which establishes an oversight authority mandated to deal with complaints against the Police. The Authority has the power to conduct disciplinary and criminal investigations and make recommendations for disciplinary action or criminal sanctions. The members of the Authority were approved by Parliament and sworn into office in June 2012.

Moreover, the National Police Service Commission Act has been enacted, whereby a civilian board is established to oversee recruitment and appointments of police officers, review standards and qualifications, and receive complaints from the public and refer them to the Independent Policing Oversight Authority (IPOA) and other government entities for remedy. After a significant delay, in October 2012, the Commissioners were appointed. By establishing the NPSC as an independent commission, it is hoped that political interference with the police personnel management can be curtailed. The Act stipulates that all current members of the National Police Service must be vetted by the Commission.

Although the Police reform legislation was thus enacted well in advance of the deadlines stipulated in the 5th Schedule of the Constitution, as follows from the sub-sections below, there are serious challenges ahead implementing these laws.

**Fact Box 8: The Mandate of the National Police Service Commission**

- Recruitment and appointment of National Police Service officers
- Confirmation of appointments
- Promotions and transfers within the National Police Service
- Disciplinary control over and removal of persons holding offices within the National Police Service
- Setting standards and qualifications of the members of the National Police Service
- Remunerations and benefits for the National Police Service
Fact Box 9: Background to Police Reforms

Over the past many years, several initiatives have been launched aimed at reforming Kenya’s Police Service, including the Police Strategic Plan (2004–2008), the Police Reforms Task Force, the Kenya Police Reforms Framework and the GJLOS Reform Programme. Furthermore, the government established yet another task force, namely the Police Reforms Task Force (also known as the Ransley Task Force after its chairman). In its report, the Task Force noted that “[e]xisting weakness in accountability and responsibility in police services can be traced to the entrenched culture of impunity and patronage, whereby officers involved in misconduct, crime and violation of human rights, feel confident that they will not be disciplined or held accountable”, and recommended that the recruitment processes as well as the conditions of service be reformed and that a civilian oversight board be established. However, these recommendations were largely ignored.

More recently, the GJLOS Reform Programme established objectives of improving police responses to corruption, improving crime reporting procedures, increasing training in investigation techniques, and providing better equipment and technical assistance. The GJLOS Reform Programme has facilitated research initiatives and training programmes for police officers, including human rights training in cooperation with NGOs.

In the context of the KNDR, CIPEV made a number of recommendations for police reforms, including ensuring that the Police Service is guided by principles of fair representation of all ethnic groups, impartiality and cultural sensitivity, human rights, accountability and that the Police Service be decentralized. Moreover, CIPEV recommended that the Kenya Police Service and the Administration Police be integrated; that the Police Act be amended with a view to strengthening “police governance, accountability and organisational arrangements in a way which is suitable for a contemporary age” and improving the effectiveness of the police; that “a new and modern code of conduct” be created; and, not least that the criminal investigations process should be strengthened to enable that perpetrators of crimes are brought to justice. CIPEV also noted that the Police Service has “a fundamental problem with its investigative capability”, and that “there was inability or reluctance to effectively investigate serious crimes and their perpetrators even when strong evidence existed” and that “police appeared unwilling or incapable of investigating and arresting politically powerful individuals implicated in the post-election violence instead concentrating on the lower level perpetrators”. Moreover, CIPEV stated that the Police Service has inadequate systems for investigating incidents where police officers may have been involved in crimes. In this light, CIPEV recommended that the independence of the Directorate of Criminal Investigations should be strengthened and that a Police Service Commission and Civilian Oversight of Policing be established. CIPEV recommended that the process of realising these recommendations should be guided by a “specialised and independent Police Reform Group” consisting of both national and international policing experts. In May 2009, the government established a National Task Force on Police Reform to “examine the existing policy, institutional, legislative,
administrative, and operational structures, systems and strategies and recommend comprehensive reforms taking cognisance of the recommendations contained in Agenda 4, Kriegler, Waki and other Police related reports so as to enhance police efficiency, effectiveness and institutionalise professionalism and accountability.” In its final report, the Task Force recommended that an independent policing oversight authority composed of civilians should be established to enhance police accountability; that a code of ethics should be established to address conflicts of interest and corruption involving police officers; and that a statutory police reforms implementation commission should be established to coordinate, monitor and supervise the implementation of the recommendations of the Task Force. After receiving the report of this Task Force, the government established the Police Reforms Implementation Committee, which has been in charge of preparing bills on Police reforms for consideration by Parliament.

4.3.2. Implementation and Structural Changes

Having established the offices of the IPOA, NPSC and the IGP implies a fundamental structural change in the Police Service, whereby various responsibilities relating to law enforcement and investigation have been spread across several independent bodies. However, as Amnesty International notes in a recent in-depth report on police reforms in Kenya, numerous delays in establishing these institutions point to “limited political commitment to police reform which may hamper their effectiveness in the long-run.” Notwithstanding that Parliament passed all three Acts within the one year deadline established by the government, the executive failed to publish them swiftly as well as to ensure their implementation by the dates given in the respective Acts.

For example, the National Police Service Commission Act, which was due to come into effect on 30 August 2011, did not commence until July 2012, with the executive offering no explanations for these delays. Moreover, the IGP was not recruited until after the NPSC was established, though the National Police Service Commission Act would have that under a transitional arrangement. According to Amnesty International, part of the explanation for the delays is that instead of urging the prior Police Commissioner and Police Commandant to implement the new legislation, the police oversight bodies and many civil society groups were inclined to wait until the appointment of an IGP in late December 2012. As a result, many aspects of the new legal framework, including new restrictions which limit the use of force and firearms, regulate arrest and detention, and enhance internal accountability and reporting obligations to IPOA, are yet to be applied in practice.

While all three institutions are now operational, they lack proper secretariats which means that they have a limited capacity to carry out their respective mandates. Moreover, issues such as housing, staff, budget and regulations for the various bodies are yet to be solved.
Fact Box 10: Delays in Implementing Police Laws

<table>
<thead>
<tr>
<th></th>
<th>NPS Act</th>
<th>NPSC Act</th>
<th>IPOA Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commencement date</td>
<td>30 August 2011</td>
<td>4 October 2011</td>
<td>18 November 2011</td>
</tr>
<tr>
<td>IGP</td>
<td>24 December 2012</td>
<td>9 October 2012</td>
<td>4 June 2012</td>
</tr>
<tr>
<td>NPSC</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IPOA</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

4.3.3. Awareness
Amnesty International notes that the slow implementation of the Police reforms are in part the result of a lack of knowledge within the police, and noted that far from all Police officers are aware of the new laws and their modalities for implementation.

4.3.4. New Appointments
The long delayed recruitment of an IGP and DIGs started soon after the NPSC became operational. The interviews, conducted in November 2012, for the IGP, DIGs as well as IPOA Board members and NPSC Commissioners were held in public, with the IGP interview being broadcasted live on national television. In accordance with the Constitutional requirement for public participation, the public were invited to provide feedback on the integrity and capabilities of the applicants and their input was widely debated in the media. The NPSC had allowed itself three days to scrutinize and incorporate public feedback into their appointment decisions. In late December 2012, David Kimaiyo was appointed Kenya’s first Inspector-General of Police. In addition to the recruitment of the IGP and DIGs, the NPSC re-opened police recruitment, which had been on hold pending the establishment of the NPSC and was further limiting the capacity of an already overstrained police force. The NPSC has stated it wishes to recruit an additional 7,000 Police officers.
4.3.5. Vetting

The NPSC, which was supposed to vet all police officers ahead of the March 2013, has not yet finalized this process. The process was put on a hold pending the March 2013 elections. In early February, Chairman Johnstone Kavuludi of the NPSC, who had been approached by the police command, explained the decision as follows: “We consulted widely and realised they had genuine concerns. We would not want to divert attention of officers and make them worry about such issues when they should be devoting all their energies on our safety, especially when we are entering the campaign period.”

Moreover, the statement said that: “In the execution of its mandate of recruitment, appointment, transfers and disciplinary control within the police, the commission has developed policies, regulations, standards and procedures which are under consideration for implementation. These include the ranking system, new designations as well as uniforms and insignia.” While senior police officers are thus yet to be vetted, they are said to have been overlooked when appointments to key directorates of the police have recently been made.

Aside from the vetting process, it is worth noting that the new Police structure abolishes six ranks, including that of the Commissioner, SDCP1, SDCP2, Deputy Commissioner of Police, Senior Assistant Commissioner of Police. These posts had been held by about 1,200 officers across all police units.

4.3.6. Police Performance in Pre-Election Period

As such, the performance of the Police in the post-election as well as the election period seems to be an appropriate indicator of the impact of the reforms. Overall, the performance shows a mixed record, with some situations being handled relatively well and professionally whereas others could be seen to indicate that the Police still needs to undergo substantial reforms.

Already in March 2012, then Police Commissioner Mathew Iteere took steps towards minimizing the risk of renewed political violence in the context of the March 2013 elections, warning politicians who might engage in hate speech or incite violence in their campaigns that the Police would not accept such violations of the law. In this context, Iteere directed his officers deployed at public rallies to be on the lookout for “hate speeches, incitement and political hooliganism”, while issuing a warning to the politicians, noting that “this time, we shall not allow you to go scot free. We shall deal with you firmly and decisively”. However, at the same time, Iteere stated that the Police needed more resources to ensure that officers can deliver with efficiency, noting
that the force is still weighed down because it lacks sufficient vehicles to respond to emergencies and that there are no houses to accommodate all the officers.

In another incident, the Police seem to have been less prepared, or perhaps even complicit in crimes. Human Rights Watch reports that when in August 2012, unknown gunmen shot dead Islamic preacher Sheikh Aboud Rogo, the Police might have been involved in the crime: At the time of his killing, Rogo, who had complained of police threats and requested protection, was facing charges of illegal possession of weapons and recruiting for al-Shabaab. On July 24, he had reported to the Police, the Kenyan National Commission on Human Rights, and the court in which he was being tried that unknown assailants had attempted to abduct him and his co-accused, Abubakar Shari Ahmed, when they arrived in Nairobi for the court hearing. Rogo’s killing followed the abductions and deaths earlier in 2012 of several other people charged with recruitment and other offenses related to al-Shabaab. In March, Samir Khan, who was also charged with possessing illegal firearms and recruiting for al-Shabaab, and his friend Mohammed Kassim, were pulled from a public bus in Mombasa by men who stopped the vehicle and identified themselves as Police officers. Khan’s mutilated body was found a few days later in Tsavo National Park. Kassim’s whereabouts remain unknown. Four other suspected al-Shabaab members facing charges in court disappeared in 2012 after being arrested by people who identified themselves as police, according to local human rights groups. In response to allegations of police involvement, the DPP, the Police, and the Kenya National Commission on Human Rights instituted a joint probe on to investigate Rogo’s killing.

On 15 October 2012, 38 people were arrested during a raid on a home in Kwale, including the President of the Mombasa Republican Council (MRC), his wife, and children. Two bodyguards were killed during the operation. The Police claimed there was a firefight which led to the deaths of the two bodyguards, alleging that the bodyguards had barricaded the road which led to the President’s home and had attempted to detonate a petrol bomb, though this has been disputed by human rights organisations and eye-witnesses who reported to Amnesty International that the police arrived around 5am and surrounded the place, and that those was ordered to lie down were beaten. The President of the MRC, Omar Mwamnuadzi, told Amnesty International that he was taken into a car where he was beaten, allegations that were supported by media coverage of the raid. Those arrested were later charged with various offences, including possession of firearms, incitement, witchcraft and belonging to an illegal gang. However, most of the MRC leadership, including Omar Mwamnuadzi, are out on bond.

Further, the Tana Delta crisis and the Baragoi massacre can be hardly be seen as indicating the emergence of a more professional and efficient Police service. Amnesty International views these incidents as “a missed opportunity for IPOA, as the public expected them to investigate these incidents and hold those responsible to account”. However, although IPOA did announce that investigations were being opened, they stopped them
because of parallel investigations by other government bodies. In the case of Tana, the Judicial Commission of Inquiry necessitated their withdrawal from investigating the matter. In the case of Baragoi, no one has been held to account despite the announcement of various inquiries and Investigations, including one by IPOA and one by the NPSC (the IPOA later withdrew from investigating the matter due to a multiplicity of investigations by other bodies).

Following the Baragoi incident, A Joint Parliamentary Committee, made up of members of the Administration and National Security, Defense and Foreign Relations and Justice and Legal Affairs, recommended that the government undertake a number of police reforms urgently. These include:

- Fast track police reforms, including the appointments of the Inspector General in addition to senior officials of other security organs
- Fund the National Police Service Commission and the Independent Police Oversight Authority to ensure they optimally perform their mandate
- Establish a specialized hospital for the police, similar to that of KDF
- Introduce risk allowance and establish a compensation fund for all police officers in the National Police Service who are injured or die in the line of duty
- Improve the terms and conditions of service for police officers, to the same level as other security organs
- Establish a commission of inquiry to investigate the killing of security officers in Baragoi and arrest and charge those responsible

**Fact Box 11: Amnesty International on the Police’s Performance in Tana River**

Violence in the Tana Delta has led to the deaths of over 200 people and displacement of 112,000 others since August 2012. Despite the subsequent deployment of over 2,000 police officers in the Tana Delta and the creation of a Judicial Commission of Inquiry, the security forces have been unable to stem or prevent repeated attacks and counterattacks, as recently as January 2013, raising serious concerns about the security forces’ response to the situation and their ability to protect the human rights of people in Tana. Violence beginning in August and September 2012 was the culmination of smaller scale violence between the Pokomo and Orma communities, which had resulting in deaths, casualties and lost livestock on the part of both communities. Initial attacks in August and September left over 100 people dead, including nine police officers. Attacks have continued to take place since the initial outbreak, as recently as January 2013. Residents in the Tana Delta claimed that they repeatedly attempted to raise their concerns about the escalating situation with the police and security forces before August 2012, but they were not taken seriously. Many local residents do not believe enough was done to deal with reports of smaller scale violence. They believe that the police either entirely
failed to respond to the attacks or, where they did arrest individuals, simply went on to release them without any investigations. In other instances, residents of Tana River have accused the police of simply watching violence unfold. During one incident in December 2012, police are reported to have watched as ten suspected raiders were burned alive in Kipao village. There have been reports of political involvement in the organization of the violence in the Tana Delta ahead of elections in March 2013, with allegations that the violence is connected to local power struggles ahead of the election.

4.3.7. Police Performance in the Election Period

The Police early on stated that it “is prepared to provide the necessary security coverage during the campaign period, the polling day, post-election period until a new government is in office to discharge its mandate as clearly defined in the Constitution and enabling legalisation. However, on the night prior to the conclusion of the general elections, one got a different impression as several incidents occurred in and around Mombasa. A group allegedly consisting of 200 MRC secessionists armed with guns, machetes and bows and arrows set a trap for police before dawn, killing five officers, the Kenyan police inspector general, David Kimaiyo, said. A second attack by secessionists in nearby Kilifi killed one police officer and five attackers. Moreover, seven other people died in that assault, including an election official. Notwithstanding these episodes, the general impression in the election period was that the Police (in combination with the army) played a positive role in ensuring a relatively peaceful election.

Table 3: GJLOS Statement of Achievements concerning Programme 1, the National Police Services, as of January 2012

Programme Outcome: Improved Security in the country and Reduction of incidences of crime
<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Planned Output</th>
<th>Achieved Output</th>
<th>Variations/Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kenya Police</td>
<td>7,176 Housing units acquired through construction/lease/purchase</td>
<td>914 housing units constructed, 292 Units purchased, 1,536 houses and 9 offices leased and rehabilitation of all existing police houses in all Provinces and 1 Divisional headquarters.</td>
<td>Resources allocated did not match planned output and lengthy procurement procedures</td>
</tr>
<tr>
<td></td>
<td>700 Motor vehicles purchased.</td>
<td>400 vehicles purchased.</td>
<td>Resources allocated did not match planned output and lengthy procurement procedures</td>
</tr>
<tr>
<td></td>
<td>Plant, equipment and machinery purchased</td>
<td>Assorted plants, equipment and machinery purchased</td>
<td>Resources allocated did not match planned output</td>
</tr>
<tr>
<td></td>
<td>Installation of the CCTV cameras in the 4 major cities</td>
<td>36 CCTV cameras installed by KDN and networked at traffic headquarters to ease in traffic control.</td>
<td>Inadequate funds for installation of CCTV cameras in major cities</td>
</tr>
<tr>
<td></td>
<td>Establishment of a national security data centre</td>
<td>National security data centre 50% complete</td>
<td>More funds required to Complete</td>
</tr>
<tr>
<td>Administration Police Services</td>
<td>Community policing strategies Rolled out to 284 districts</td>
<td>154 districts covered</td>
<td>Resources allocated did not match planned output</td>
</tr>
<tr>
<td></td>
<td>Enhanced Border security by establishing 10 patrol bases and acquiring surveillance equipment</td>
<td>Safer borders with reduced inflow of illicit small arms &amp; light weapons and 4 patrol bases established</td>
<td>Inadequate personnel and Funding</td>
</tr>
</tbody>
</table>
5. Conclusions: Challenges and Opportunities for Advancing the Rule of Law in Kenya through Legal Sector Reforms

This Report has analyzed the status of the rule of law in Kenya, emphasizing an examination of passed and ongoing reforms relating to the core legal sector institutions, specifically the Judiciary, the Prosecution and the Police. While the Report has provided for an analysis of what has been called a formal understanding of the rule of law, more substantive issues, including the actual performance of the core legal sector institutions, have been discussed as well.

The overall picture that emerges from this analysis is that the core legal sector institutions have undergone significant change through the enactment of a series of reform laws, which change the structure of these bodies in ways that typically, but not consistently, comply with principles of separation of powers and accountability. Still, from a formal perspective there are significant differences between the success with which the various legal sector bodies have been reformed, with the Judiciary being the institution that was first and arguably most comprehensively restructured. Only more recently has legislation been drafted and enacted enabling a restructuring of the other main legal sector bodies – that is the Prosecution and the Police – and in some cases the legislation is not yet in place. Partly, these delays seem the result of lacking political will to fundamentally change the nature of law enforcement, investigation and prosecution in Kenya.

While there appears to be no singular explanation for these differences, one relevant factor for understanding the priority given to reforming the Judiciary relates to the Government’s admissibility challenge with respect to the ICC cases, the potential success of which the Government seemed to understand depended on the putting in place of judicial reforms. Although the admissibility challenge turned out to be unsuccessful, somewhat ironically the political leadership’s resistance to criminal accountability for the post-election might thus have promoted reforms of the court system. Another relevant factor relates to the publicity surrounding the various reform agendas, with a high level of public attention to the reforms of the courts and a somewhat lower emphasis to the other core legal sector bodies.

Whereas from a formal perspective there has thus been significant progress in promoting the rule of law through legal sector reforms, from a substantive perspective Kenya still faces significant challenges ensuring that the legal sector promotes fairness and justice for all. While the challenges are indeed many, for the purposes of laying the ground for ICPC’s development of a comprehensive mechanism to monitor and evaluate legal sector reforms and the performance of the core legal sector bodies, it is useful to take the starting point in what the ordinary Kenyan deems to be the most needed forms of change. The survey carried out by ICJ-Kenya, as cited above in this Report, offers some useful insights in this respect. According to this
survey, the most desired forms of change involve 1) increased efficiency and timeliness of court proceedings (26 percent); 2) ensuring that justice is felt across all social divides (17 percent); 3) declare corruption a common enemy strengthening efforts to eradicate it all together (16 percent); 4) employing more professional and competent judicial officers (14 percent); enhancing civic education to the general public on legal matters (14 percent); 5) automate and digitalize all court processes (14 percent); 6) ensuring that advocates are affordable and accessible to all (9 percent); 7) promote ethical standards on the bench and in the bar (9 percent); 8) adherence to performance contracts (8 percent); 9) avoid the use of police prosecutors (7 percent); 9) ensure the reforms in the judiciary are adhered to (4 percent); and 10) pay the judicial staff well to reduce temptations of bribery (3 percent).

The results of this survey suggest that to meet the demands of Kenyans, legal sector bodies need to be allocated significantly more resources. Moreover, despite the vetting processes and the putting in place of other initiatives aimed at limiting corruption and strengthening internal accountability, the performance and integrity of legal sector personnel often continue to pose a problem for advancing the rule of law. Beyond ensuring that all legal sector personnel are vetted according to accepted standards, to remedy these types of challenges the findings of this Report point to a need for expanding and improving the training offered to legal sector personnel. In this regard it must be emphasized that it is necessary to promote a deeper transformation whereby the prevailing norms in the legal sector institutions counter, rather than encourage, malpractices such as corruption, arbitrariness, and disrespect for the dignity and rights of those Kenyans who encounter and use legal sector bodies. In essence, this transformation must be one from a perception whereby the legal bodies perceive themselves as rulers over subjects to one where they are look at themselves as service providers, committed to principles of equality, transparency, efficiency and rights. Such change in norm sets can obviously not be achieved overnight, but requires commitment among those situated at the top of these institutions as well as political will to promoting fundamental change in the manner the legal sector bodies operate. For this to happen, one must enable public scrutiny and pressure, including critical engagement by civil society.

It is on these premises the Report will now put forward a series of recommendations focusing on how civil society, including the ICPC, can best advance the rule of law in Kenya by encouraging the reform agenda pertaining to the core legal sector bodies discussed in the Report. Accordingly, civil society should focus on:

**The Government**

Encouraging the government to provide sufficient funds and other needed resources to the various legal sector bodies, notably the DPP, the National Police Service Commission, the Independent Policing
Oversight Authority and the Police Service itself, especially with respect to allocation of funds to ensure that these bodies can hire qualified staff members; offer continuous training to their staff; pay staff members an appropriate salary and in other ways improve the conditions of service; and buy necessary equipment and meet other costs related to the effective day-to-day operations of the legal sector bodies

Monitoring the executive’s respect for the separation of powers and the independence of the various legal sector bodies mentioned in this report

Whenever the executive fails to comply with the above, take various measures aimed at remedying this, including litigation, campaigns aimed at informing the public of the breaches and other measures

**The Judiciary**

Supporting the Judiciary’s independence by publically condemning situations where other branches of the government or powerful individuals attempt to interfere in its work and in other ways express support for judicial independence

Monitoring developments and taking necessary measures to promote that the Judiciary puts in place effective strategies to further reduce the case backlog, and that these strategies are effectively implemented and respected

Monitoring the Judiciary’s compliance with the standards set forward in the Judiciary Transformation Framework, and taking measures to promote that the Framework is further developed and consolidated

Monitoring that the Judiciary complies with requirements in the newly enacted laws, including the 2011 amendment to the Judicature Act, according to which there must be at least 120 High Court judges and no less than 30 Court of Appeal judges

Monitoring and providing input to the training carried out by the Judicial Training Institute as well as advocating for a policy whereby all magistrates and judges undergo sufficient training on issues relevant to their work

Monitoring that the Code of Ethics and Conduct released by the Judicial Service Commission is adhered to and providing input for possibly needed improvements

Promoting public awareness of the Ombudsman of the Judiciary and help facilitating that the institution becomes an effective tool for ensuring internal accountability in the Judiciary

Monitoring and promoting that the Judiciary fulfils its promise of providing resources to automate all courts
Encouraging the Judiciary to fulfil the promise of establishing courts in all districts of Kenya, if need be in the form of mobile courts in remote areas

Encouraging the Judiciary to fulfil its promise to create a comprehensive ICT strategy and monitoring its implementation and effectiveness once in place

Monitoring the case law of Kenyan courts and use such assessments as an indicator of the quality of justice

**The Director of Public Prosecutions**

Monitoring the implementation of the National Prosecution Service Bill, including the full operationalization of the National Prosecution Service Board

Providing input to and encouraging the swift adoption of needed policies, including the National Prosecution Policy, the Training Manual, and a Code of Conduct

Monitoring ODPP compliance with the principles and values set forward in the 2011 – 2015 Strategic Plan, including the expressed commitment to having an independent, professional, efficient and effective prosecution service that draws public confidence and meets best international standards, principles and practices, and which serves the public by providing quality, impartial and timely prosecution services anchored on the values and principles enshrined in the Constitution

Monitoring the ODPP’s modalities of implementation with respect to the key policy priorities identified in the Strategic Plan, such as professionalization of prosecution services; strengthened witness and victim care and support; decentralization of prosecution service to promote access to justice; automation and modernization of processes and procedures; the putting in place of monitoring and evaluation tools

Providing input to the modalities of training to be facilitated by the Training Committee, and monitor the quality of training as carried out

Promoting that the task team mandated to review and make recommendations concerning the terms and conditions of service for ODPP staff finalizes its work, scrutinize the recommendation, and, to the extent desirable, advocate for the implementation of the recommendations

Monitoring and promoting a transparent and credible process with respect to the work of the task team mandated to audit and determine the transfer of police prosecutors to the ODPP, and advocating that police prosecutors who lack integrity or are otherwise unsuitable are disqualified for working with the ODPP and that comprehensive training is offered to former police prosecutors

Scrutinizing the process of recruiting three Deputy Directors of Public Prosecution in order to ensure that these will be individuals of integrity with appropriate qualifications who are able to work independently of other branches of the government
Scrutinizing the process of recruiting an additional 63 prosecuting counsel of various ranks in order to ensure that these will be individuals of integrity with appropriate qualifications who are able to work independently of other branches of the government

Monitoring the establishment of ODPP County Offices, and encouraging that the process of decentralization takes place in accordance with constitutional principles and best practices

Advocating for the development of a comprehensive and practicable strategy to prosecute international and other serious crimes, including crimes committed in the context of the post-election violence as well as more recent crimes in Mombasa, Tana River, Baragoi and elsewhere

The Police

Monitoring the implementation of the recently enacted reform legislation, including the National Police Service Act, the Policing Oversight Authority Act and the National Police Service Commission Act

Supporting that the bodies created with the reform legislation, including the National Police Service Commission and the Independent Police Oversight Authority, receive sufficient funding and are fully operationalized

Encouraging that the stalled vetting process is swiftly continued and carried out in a transparent and credible manner

Advocating that the terms and conditions of service for police officers is improved

Encouraging that copies of new laws are made available at all police stations

Advocating for adequate training of all police officers on the new laws, human rights standards and other good practices relating to policing and scrutinizing the development of police training curriculums

Providing input to the development of a comprehensive code of conduct, which complies with international best standards while taking into account the Kenyan context, and monitoring that the Code is published and made available to all police officers

Promoting that the National Police Service Commission develops a transparent process of fair and speedy disciplinary measures to be used in situations where the Police violate the Code of Conduct

Advocating for the establishment of policies which set clear and fair standards for the recruitment, promotions and transfers within the Police, and monitor compliance with these standards once established

With respect to the Independent Policing Oversight Authority, monitoring that the authority is enabled and empowered to independently investigate any occurrence of death or serious injury to individuals
who are in police custody, under the control of the police or in other ways harmed in the course of Police activities, and monitor that such investigations are in fact carried out in such a manner

Promoting that policies are developed to ensure that officers who are suspected of being criminally responsible for the abuses mentioned above are suspended pending the investigation and proceedings

Monitoring the use of force by police officers and advocating that clear policies are established to ensure that force is only used when authorized by the law (the Sixth Schedule of the NPS Act and taking into account international human rights standards)

Advocating for the development of the necessary expertise and procure of equipment to facilitate professional, efficient and timely investigations into unnecessary or otherwise unlawful use of firearms, including for securing and examining potential crime scenes, ballistics and other forensic tests, and autopsies and medical examinations

Having made these specific recommendations with respect to how civil society, including the ICPC, could move ahead promoting the rule of law in Kenya by means of documentation, advocacy work and engagement with the core legal sector bodies, the Report will conclude by noting that it could prove useful to follow up on the survey conducted by ICJ and continuously monitor public trust in the key judicial institutions; identify the public’s perceptions of key progress and challenges ahead for the rule of law reforms; and measure other factors relevant for having a comprehensive tool for monitoring and evaluating the performance of legal sector bodies in Kenya.
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