



# KENYA

CAPITAL: Nairobi

POPULATION: 39.1 million

GNI PER CAPITA (PPP): \$1,580

<b>SCORES</b>	<b>2006</b>	<b>2010</b>
ACCOUNTABILITY AND PUBLIC VOICE:	5.09	4.45
CIVIL LIBERTIES:	4.49	4.29
RULE OF LAW:	3.97	3.40
ANTICORRUPTION AND TRANSPARENCY:	3.29	3.06

(scores are based on a scale of 0 to 7, with 0 representing weakest and 7 representing strongest performance)

**Thomas R. Lansner**

## INTRODUCTION

Absent genuine efforts to transcend ethnic politics and instill accountability for the political—and potentially criminal—acts of senior political leaders before scheduled 2012 elections, Kenya's prospects are bleak. The country is experiencing a simmering crisis that threatens to again erupt into bloody conflict that could tear it apart along ethnic lines, as nearly happened after profoundly flawed elections in December 2007. The country's ethnic divisions have been reinforced by successive generations of politicians who have used patronage to build personal and party loyalties based on ethno-regionalism. The bitterly divided, and effectively unelected, coalition government formed in April 2008 has thus far proved unable to address the many grave problems facing the nation.

After achieving independence from Britain in 1963, Kenya acquired a reputation for relative stability and prosperity within the troubled East Africa region. Founding president Jomo Kenyatta and his successor, Daniel Arap Moi, presided over the increasingly corrupt one-party rule of the Kenya African National Union (KANU), which respected few political and civil rights and on occasion violently suppressed opposition. During the 1990s, Kenya gradually transitioned from authoritarian rule toward functional multiparty democracy. The 2002 election as president of Mwai Kibaki, a longtime top KANU leader and former vice president and finance minister who broke with the party in 1992, raised hopes for a peaceful evolution to more equitable and responsive governance. The Kibaki administration pledged zero tolerance of corruption, and in

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its first years helped revive Kenya's economy through reforms that promoted investment, improved governmental operations, and made far greater efforts to provide primary education and stimulate rural development.

However, many of the problems and worst practices of a one-party, patronage-based state were carried over into the new democratic structures. Corruption endured and remains rife, impairing governmental effectiveness and damaging people's faith in elected leaders. Compounding the problem is Kenya's origin as a British colonial creation that grouped disparate ethnicities into an externally-imposed polity within artificially drawn frontiers. Rapid population growth, from about 9 million people at independence to nearly 40 million in 2009, has helped intensify competition for land and resources among ethnic groups. The Kikuyu, who inhabit central Kenya, comprise about 22 percent of Kenya's people and are the largest single group. Ethnic groups from western Kenya include the Luhya and Luo people, each about 14 percent, and Kalenjin and Kamba, each about 12 percent.<sup>1</sup> Group violence is deployed as a political tool through various armed militia groups that often operate with impunity. Attacks on individual citizens, activists, journalists, and politicians, many of them deadly, continue and are mostly left unresolved. Police brutality is widespread and rarely punished. And perhaps most damaging, the failure to reverse the broad perception that government power continues to disproportionately reward one ethnic group—under current circumstances, President Kibaki's Kikuyu—has pushed politics perilously further from ideological argument towards identity-based conflict.

Kenya's democratic space has undoubtedly expanded since Kibaki replaced Moi in 2002. Independent media have grown stronger and fight to expose wrongdoing by official and nonstate actors, although some media outlets have promoted sectarian violence. Civil society is diverse and active across sectors including basic rights, the environment, gender equity, and rural development, and today it is this arena that appears to be the country's best hope for transcending ethnic divisions.

Yet the trauma caused by the December 2007 elections is difficult to overstate. An authoritative official investigation described the fiercely contested voting process as "irredeemably polluted,"<sup>2</sup> echoing a conclusion that many Kenyans and other observers reached immediately. Proclamation of President Kibaki's reelection was met with incredulity that exploded into anger as the apparently stolen vote plunged Kenya into violent turmoil. Riots broke out in major cities. In rural areas, neighbors attacked people from other ethnic groups and drove many from their land. Conservative estimates calculate over 1,100 people killed and more than 300,000 displaced during three months of sporadic ethnic violence, much of which appears to have been orchestrated by senior political figures, and was marked by widespread sexual assault and looting.

Under intense international pressure, the rival candidates worked to stem the bloodshed, and the "Grand Coalition Government" was formed in February 2008 with Kibaki remaining as president, opposition Orange Democratic

Movement (ODM) leader Raila Odinga occupying the newly created post of prime minister, and other cabinet posts split between the two main parties. This arrangement, mediated by former United Nations Secretary-General Kofi Annan, pulled Kenya back from the precipice of a catastrophic civil war. But the power-sharing government has shown little unity or capacity to address key issues facing the country. The International Criminal Court (ICC) will investigate the most senior figures accused of fomenting post-election violence after no agreement on a special tribunal within Kenya could be reached. Constitutional and electoral reform remains stalled. Finally, on the complex core question of land reform, the country faces the formidable challenge of redressing the historical injustices asserted by various groups.

<b>ACCOUNTABILITY AND PUBLIC VOICE</b>	<b>4.45</b>
FREE AND FAIR ELECTORAL LAWS AND ELECTIONS	3.50
EFFECTIVE AND ACCOUNTABLE GOVERNMENT	4.00
CIVIC ENGAGEMENT AND CIVIC MONITORING	6.00
MEDIA INDEPENDENCE AND FREEDOM OF EXPRESSION	4.29

Kenya's December 2007 presidential election was a profound blow to the consolidation of electoral democracy that had gradually emerged over polls in 1992, 1997, and 2002 during the country's transition from three decades of post-independence one-party rule. Polling indicates that most Kenyans strongly support electoral democracy as the best form of governance. President Kibaki's 2002 election as head of the National Rainbow Coalition (NARC), with support across ethnic groups and in balloting generally viewed as reasonably free and fair, helped promote this conviction. However, the fragile coalition split over various matters, especially a draft constitution that was subject to a November 2005 referendum. The core dividing issue was executive power, as President Kibaki's backers, mostly from his Kikuyu ethnic group, strongly supported the proposed retention of a dominant presidency that they expected would preserve their privileged access to state patronage. Kenyans from other ethnic groups just as adamantly rejected this notion, supporting "majimboism"—a more federal power structure—and the draft constitution was soundly defeated.

Following this development, regio-ethnic parties dominated the recast political spectrum. President Kibaki ran as leader of an alliance, the Party of National Unity (PNU), with its base among Kikuyus. The opposition ODM, strongly supported by Luo and Kalenjin groups, offered Raila Odinga as its presidential candidate.

Leading up to the 2007 elections, political parties worked tirelessly to mobilize support throughout the country, usually with few official constraints. Legislative and local elections conducted concurrently were generally accepted as free and fair, despite localized problems that eventually proved far graver than observers had first suspected. Elections were monitored by the Kenya Election Domestic

Observer Forum, which fielded about 1,700 observers, and other regional and international missions. While the December 27 polling day was mostly peaceful, occasional bursts of serious violence and other problems had marked the campaign period. The official but autonomous Kenya National Commission on Human Rights (KNCHR) issued a pre-election report, titled “Still Behaving Badly,” that observed “violations of the electoral code of conduct among other electoral malpractices,” including misuse and misappropriation of public resources by both sides; participation of public officers (provincial administrators, civil servants, heads of parastatals, etc.) in the campaigns; incitement to violence; and use of hate speech, particularly on ethnic and gender lines, by politicians and the media.<sup>3</sup>

Voter turnout was strong, polling was mostly orderly, and local parliamentary voting and results in most constituencies did not at first appear contentious. Reports later identified the recurrence of serious flaws that had been highlighted during the 2002 campaign. The Electoral Commission of Kenya (ECK), whose composition and competence was questioned even before the election,<sup>4</sup> was in later analysis found to be grossly negligent in fulfilling its duties. Large areas of election conduct, from voter registration to tallying ballots, fell far short of international standards and Kenyan law. The most detailed analysis of these widespread shortcomings was provided in an official report by the Independent Review Commission (IREC), led by retired South African jurist Johann Kriegler, in September 2008.<sup>5</sup> According to IREC, “vote-buying and ballot-stuffing appear to be such extensive and universally condoned practices in Kenyan elections that the question can rightly be asked whether genuinely free and fair elections are at all possible,” adding, “the conduct of the 2007 elections was so materially defective that it is impossible—for IREC or anyone else—to establish true or reliable results for the presidential and parliamentary elections.”

Several observer groups, including those from the European Union and the Commonwealth, also found that the election process was seriously flawed.<sup>6</sup> Reports from both groups noted a clear bias in state media toward President Kibaki and the PNU. Media coverage analysis by the Coalition for Accountable Political Financing (CAPF) concluded that the government-owned Kenya Broadcasting Corporation (KBC) “failed to fulfill the minimal legal obligations required of it as a public service broadcaster as set out in the Kenya Broadcasting Corporation Act.” The study found that 76 percent of election news reporting on KBC radio and 71 percent on KBC television was given to the PNU. The KBC also failed to provide candidates with free airtime, as required by law.<sup>7</sup> Lack of transparency and acts of alleged corruption related to campaign finance were also highlighted in the CAPF report, including heavy use of official resources to promote President Kibaki and the PNU. New financial accountability structures and public financing for political parties were included in the 2008 Political Parties Act, but it is unclear whether loopholes will be closed and transparency mechanisms enforced.<sup>8</sup>

In the legislative portion of the elections, the ODM and its allies took 103 seats, while the PNU and its affiliates took 77. While the IREC report makes clear that the entire electoral process was severely compromised, early returns matched anticipated results and gave the opposition ODM a clear lead in parliamentary contests, with numerous incumbents and sitting ministers defeated. This raised public expectations that ODM leader Odinga would also win the presidential contest, and unofficial counts reinforced that prospect. A potentially influential exit poll withheld by the Washington, D.C.-based International Republican Institute pointed to a substantial Odinga victory.<sup>9</sup>

With no adequate explanation, however, the ECK delayed reporting the presidential vote tallies for 72 hours. With tensions high across the country, President Kibaki was abruptly declared the victor and hurriedly sworn in for a second five-year term. The International Foundation for Electoral Systems reported that “startlingly, the ECK chairman confessed shortly afterward that he had been pressured to announce results without having all of the information at hand and admitted that he could not say with certainty who actually won the presidential election.”<sup>10</sup>

Rallies and demonstrations against what was seen as a stolen election began immediately. Many were peaceful protests organized by the ODM. Others expressed spontaneous anger, but in some areas, violence against presumed political opponents, usually identified solely by ethnicity, appeared well prepared and orchestrated. Severe rioting took place in Nairobi among its diverse ethnic groups. In western Kenya, demonstrations were mounted mostly by Luo supporters of the ODM. The worst clashes occurred in the central Rift Valley, where electoral tensions revived longstanding land grievances between Kikuyu and Kalenjin ethnic groups and sparked open combat. A subsequent KNCHR report named many people it believes were behind appalling acts of murder, rape, forced circumcision, and other assaults by existing gangs and hastily organized local militia groups, noting: “The magnitude of the attacks, looting and destruction of property and lives, the resources used, the swiftness with which the attackers moved and the deployment of reinforcements . . . point to a good level of planning, coordination and organisation, monitoring, communication networking, financing, provision of transport services and facilities, medical treatment/services.”<sup>11</sup> The principal constraint on the severity of the violence was the level of weaponry available. Alarming reports indicate that combatants who in early 2008 often used machetes and bows and arrows were subsequently acquiring automatic weapons.

After a month of rising violence, an array of multilateral and bilateral diplomatic efforts and intensifying pressure from Kenya’s civil society—as well as the recognition that the country was on the brink of civil war—convinced Kibaki and Odinga to accept a power-sharing National Accord brokered by an African Union Panel of Eminent African Personalities, led by Kofi Annan. The so-called National Dialogue and Reconciliation process identified its goal as the “achievement of sustainable peace, stability, and justice in Kenya through the rule of

law and respect for human rights.” The accord’s four-fold agenda was based on immediate action to stop violence and restore fundamental rights and liberties; urgent measures to address the humanitarian crisis and promote healing and reconciliation; devising a strategy to overcome the political crisis; and addressing long-term issues, including constitutional and institutional reforms, land reforms, poverty and inequality, youth unemployment, national cohesion, and transparency and accountability.

In May 2009, a report by the Kenya National Dialogue and Reconciliation Monitoring Project noted that implementation of these agenda points has been slow, uneven, or obstructed, warning that “without undertaking fundamental reforms, another violent civil conflict may occur. . . . The country, and the political leaders in particular, seem to quickly forget the principles that shaped these recommendations. . . . to fight impunity and erode the basis of ethnicity as drivers of politics.”<sup>12</sup> The political infighting thwarting implementation of the 2008 National Cohesion and Integration Bill, meant to lead ethnic reconciliation, is emblematic of the situation.<sup>13</sup>

The sharp decline in violence across the country immediately after the power-sharing agreement was an indication that much of it was organized “as part of the national bargaining process over power.”<sup>14</sup> Evidence for this view was offered by the official Commission of Inquiry into Post-Election Violence (CIPEV), known as the Waki Commission after its chairman, Kenyan High Court Judge Philip Waki. Presenters of the 529-page Waki Report indicated that they had identified a number of senior figures as important instigators of post-election violence, though the names were not publicly revealed. The commission urged creation of a special tribunal in Kenya to pursue criminal cases;<sup>15</sup> however, by mid-2009, the divided Kenyan government had not launched such a tribunal, and the ICC assumed jurisdiction over the investigations.

The coalition government can point to some accomplishments. The Kenyan constitution was amended in 2008 to disband the utterly discredited ECK. An Interim Independent Electoral Commission was empowered to pursue its prime mandate to “reform the electoral process and the management of elections in order to institutionalize free and fair elections.” Most analysts agree, however, that technical fixes aside, impunity and corruption must be addressed before meaningful reform can take root. As the IREC report warned, Kenyans must “distinguish those [problems] that can be attributed to anomalies, failures and malpractices traceable to gaps or provisions in the Constitution and laws of Kenya from those that can be attributed to a bad culture encompassing impunity, disrespect for the rule of law and institutional incompetence.”<sup>16</sup>

The 2007 election and ensuing violence highlight disparate problems of Kenyan governance. The heavy concentration of power in the executive has long been nearly unassailable by the legislature or the judiciary and has been a sharp point of conflict in recent years, particularly during the debate over the rejected draft constitution. Despite a retreat from personalized one-party rule and a shift toward more assertive rhetoric, members of Parliament (MPs)

have been ineffective in exercising control over the state budget or resources. Throughout the post-independence period, most legislation has originated with the executive, although in the years following Kibaki's election Parliament played a larger role in both drafting new bills and revising or rejecting executive-based proposals. Attempts by small groups of politicians, often aligned with leading business interests, to commandeer state power and resources are common. Governmental agencies and the civil service, even when staffed by competent and dedicated individuals hired in accordance with the technical provisions established by the Public Service Commission, see their efforts diminished by patronage and corruption.

The critical role played by civic groups has become more apparent in recent years. Kenya's civil society groups generally operate freely, often with international aid. The vibrant civil society sector has opened debate and offered myriad highly credible reports and proposed solutions related to problems in governance and development. Its robust character also offers hope that issues of human rights and equitable opportunity can be addressed across ethnic lines. Networks like Bunge la Mwananchi, or "People's Parliament," are building grassroots support for systemic change.<sup>17</sup> These civil society groups have garnered significant media attention and raised public pressure on issues such as parliamentary allowances and land rights. Although problems with legal registration have not been as contentious an issue as in many developing countries, a current focus of nongovernmental organizations (NGOs) is revision of the 1990 NGO Coordinating Act, which is viewed as codifying arbitrary and potentially unconstitutional provisions while also failing to provide regulation adequate to enforce transparency and accountability among NGOs and other civil society groups.<sup>18</sup>

Media are generally free and the private press is vibrant, but pressure from the government occasionally encourages self-censorship. According to the Africa Media Barometer, the government is "often discriminatory" in awarding advertising contracts.<sup>19</sup> The most overt act of intimidation in recent years occurred in March 2006, when masked security agents raided the *Standard* newspaper and its sister television station in Nairobi. The *Standard* had recently been reporting on corruption and political maneuverings, prompting a senior minister to warn that "if you rattle a snake, you must be prepared to be bitten by it." According to the Committee to Protect Journalists, one reporter was seriously assaulted before the December 2007 polls, and two journalists were shot and wounded, with many more reporting threats, during the communal violence in January-February 2008. Gangs and others have also threatened individual journalists for everyday reporting. The January 2009 murder of Francis Kainda Nyaruri, who was reporting on corruption, remains unsolved, and key witnesses in the case have reportedly received death threats.<sup>20</sup>

Kenya's media played a mixed role in the election and post-election violence, reflecting its growing diversity and uneven levels of maturity. Some outlets provided useful voter education before the polls, urged restraint in the



post-election period, and mobilized assistance for victims of clashes. Other outlets, especially vernacular local radio stations, were accused of inciting people to violence. Shortly after the presidential election results were announced, all live news broadcasting was temporarily banned, at least partially because some vernacular radio stations were goading their communities to bloodshed.

The state retains control over the largest broadcast media network, the Kenyan Broadcasting Corporation, which has continued its long tradition of strongly supporting the incumbent administration. Kenya's constitution does not expressly guarantee press freedom, and media operations are subject to various laws and jurisdictions.<sup>21</sup> The 2007 Press Act, which created the Media Council of Kenya, and a new communications law passed at the end of 2008 that includes curbs on "hate speech," have increased the government's ability to regulate the media to a degree that free expression advocates consider excessive. The Kenya Communications (Amendment) Law 2008, enacted in January 2009, also empowers the government to destroy or confiscate broadcasting equipment to maintain "public safety." A concerted campaign by journalists and freedom of expression advocates—during which authorities arrested a number of protesters in December 2008—won a government promise in May 2009 to revise or repeal more draconian sections of the law.<sup>22</sup> Criminal libel and defamation laws are sometimes used against journalists in courts that possess a mixed reputation for fairness. The National Cohesion and Integration Act 2008 made it an offence to use threatening, abusive, or insulting words to seek to promote ethnic hatred. Internet and other electronic communication are not obstructed, although there are reports that some government ministries have sought to block their staff's computer access to the government's own anticorruption commission.

## CIVIL LIBERTIES

4.29

PROTECTION FROM STATE TERROR, UNJUSTIFIED IMPRISONMENT, AND TORTURE	2.88
GENDER EQUITY	3.67
RIGHTS OF ETHNIC, RELIGIOUS, AND OTHER DISTINCT GROUPS	3.50
FREEDOM OF CONSCIENCE AND BELIEF	6.67
FREEDOM OF ASSOCIATION AND ASSEMBLY	4.75

Kenyans enjoy little protection against abuse by police and security forces, and in some areas of the country also fall prey to organized criminals who appear linked to local political leaders. Numerous credible allegations have emerged in recent years of extrajudicial killings and other assaults on suspected criminals or ordinary citizens by police, who operate with virtual impunity. After a visit to Kenya in February 2009, the United Nations Special Rapporteur on Extrajudicial Executions, Philip Alston, stated that "the police are free to kill at will," adding, "systematic, widespread, and carefully planned extrajudicial executions



are undertaken on a regular basis by the Kenyan police,” and “the proper response to criminality is not to shoot a suspect in the back of the head . . . but to investigate, arrest, and try the suspect in accordance with law.”

According to the KNCHR, approximately 500 people were killed or disappeared in a five-month span in 2007. At least some, Professor Alston reported, were suspected criminals who were “taken to a forest and tortured to death.”<sup>23</sup> But as the Alston report and other investigations have made plain, ordinary citizens too are targets for assault, extortion, and murder by security forces that are utterly unaccountable to any other authority. The report also warned of systematic violence to silence police critics. A policeman who gave detailed accounts of official death squads was murdered in October 2008. On March 5, 2009, two prominent human rights activists, Oscar Kamau Kingara and John Paul Oulo, were shot dead in broad daylight near President Kibaki’s official residence in the center of Nairobi. In 2007, Kingara’s Oscar Foundation Free Legal Aid Clinic had alleged that since 2002 over 8,000 Kenyans were tortured to death or executed by police in an ongoing crackdown on a criminal gang known as the Mungiki.<sup>24</sup> There have been no arrests in these assassinations; the police claim that they are defending themselves against well-armed criminals, who have indeed murdered dozens of police in recent years.

Although dissidents are less likely to suffer the systematic repression that characterized the KANU regime, political activists are routinely detained and harassed, and they allege abuse by police and other security forces. In February 2009, PEN Kenya president Philo Ikonya and PEN member Fwamba N. C. Fwamba, along with activist Patrick Kamotho, were arrested, allegedly assaulted by police, and hospitalized following a protest against the rising food prices in Nairobi. All three activists have been arrested in the past for “taking part in illegal demonstrations.”<sup>25</sup>

UN Rapporteur Alston and several human rights groups also reported widespread abuses by security forces during operations against a local militia/criminal group, the Sabaot Land Defence Force, in the Mount Elgon area in northwestern Kenya in 2008. Human Rights Watch said that both security forces and rebels are “responsible for horrific abuses, including killings, torture and rape of civilians.”<sup>26</sup> Like many other violent confrontations in Kenya, the Mount Elgon conflict arose over land disputes that evolved into violent resource competition between ethnic groups—and, as elsewhere, was apparently abetted by local political leaders. Amnesty International also reported that in November 2008, dozens of residents of Mandera district in northern Kenya charged that soldiers and police committed rape, torture, and beatings during an operation to curb weapons smuggling from the Horn of Africa. The government dismissed the allegations.<sup>27</sup>

The Mungiki and other criminal bands are a serious threat to many average Kenyans’ daily lives. Extortion of businesses is commonplace, especially in large cities and towns. Kidnappings for ransom have increased. Occasional police campaigns against gangs have reportedly included abuses against many

citizens. While there have not been terrorist attacks on Kenyan soil since 2002, counter-terrorism efforts have included what some rights groups describe as illegal detention and improper rendition of non-Kenyans, as well as discrimination against Kenyans of Somali origin (see below).

Kenya ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997, and after a long delay submitted its first state report in June 2007. In January 2009, the UN Committee against Torture responded by welcoming the introduction in Kenya of several formal mechanisms that, if properly empowered, could reduce the prevalence of torture, including the KNCHR, the launch of the Governance, Justice, Law and Order Sector Reform Programme, and the establishment of the independent Police Oversight Board. Despite such official commitments, torture remains commonplace. The Kenyan NGO Independent Medico-Legal Unit, which works to rehabilitate torture victims, has issued numerous reports with their testimonies and detailed forensic evidence of torture in Kenya. The group states that “the need for clear, comprehensive and consolidated legislation on torture cannot be overemphasized.”<sup>28</sup>

The remainder of the UN response, meanwhile, is a scathing indictment of widespread abuses committed with impunity by the security forces. “[I]mpediments faced by individuals who may have been subject to torture and ill-treatment to complain and have their cases promptly and impartially examined by the competent authorities” are noted with concern. The Committee against Torture also made special note of “dire” conditions in Kenya’s prisons, “in particular the high number of persons in pre-trial detention,” remarking on “the overcrowding, lack of appropriate health services and high levels of violence inside the prisons, including inter-prisoner violence.”<sup>29</sup> Based on official capacity, Kenya’s occupancy level is 223.3 percent, and 43.3 percent of detainees are in remand.<sup>30</sup> The government responded to these problems by allowing increased public access to prisons and ordering a review of the Prisons Act. Like other Kenyans, detainees and prisoners may file complaints with the Public Complaints Standing Committee. However, Kenya’s prisons remain severely underfunded. Most detainees and prisoners lack the information and access necessary to pursue complaints, and the overburdened and at times incompetent or corrupt justice system responds sluggishly at best to complaints.<sup>31</sup>

The autonomous KNCHR has the authority to review prison conditions and receive complaints regarding prison conditions, and serves as the primary rights watchdog and provider of redress for all Kenyan abuse victims. It is widely perceived as independent and has called attention to numerous rights issues while also attempting to formulate programs to improve rights awareness and protections throughout the government and society. It has the authority to order detainees released as well as compensation for rights abuse victims, but lacks prosecutorial powers.

While Kenyan law prohibits gender-based discrimination, traditional practices and law continue to restrict gender equality. A provision of Kenya's criminal code carried over from British colonial rule provides up to 14 years' imprisonment for consensual homosexual acts. Multiple accounts describe how women and girls are particular and common targets for sexual violence by the military, police, ethnic militia, and criminal gangs, and there are increasing reports of rape of men and boys as well.<sup>32</sup> Many women and girls were sexually assaulted during the post-2007 election violence, reportedly including by police.

The police have acted on a Waki Report suggestion to launch a special unit to investigate and address gender-based violence, although its effectiveness remains to be proven. Despite laws against trafficking of children and trafficking for sexual exploitation, UNICEF reported in 2009 that "there is evidence that Kenya is a fast growing source country, as well as a transit and destination country, for human trafficking."<sup>33</sup> While female genital mutilation was outlawed in 2001, it is still widely practiced within many communities.

Kenya is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women. Yet women's property rights remain limited under customary and formal laws of inheritance and succession. A draft National Land Policy pushed by civil society and approved by the cabinet in July 2009 proposes expanding women's rights to inherit land and would modernize discriminatory laws.<sup>34</sup> Even if it passes, enforcing change in a strongly patriarchal society will be difficult; traditional courts, especially in rural areas, are particularly biased against women. Of the 222 members of Parliament, only 15 elected and 6 nominated MPs are female. A wide array of proposed legislation aimed at protecting women, including the Anti-trafficking in Persons Bill, the Domestic Violence (Family Protection) Bill, the Equal Opportunities Bill, and the Matrimonial Property Bill, remains at the discussion stage in Parliament.

Civil society groups continue to lead efforts to advance disabled rights, which receive only limited protection under current law. An estimated 10 percent of Kenyans have some form of disability. The 2004 Persons with Disabilities Act, which established the National Council for Persons with Disabilities, has been broadly welcomed, but the law "is apparently plagued with inherent operational and legal impediments to its utilization," observed one advocacy group. "[A] factor that renders the Act unenforceable is the fact that the Act is too apt in giving discretionary powers where mandatory powers seemed the only viable alternative."<sup>35</sup>

Kenya's legal structures prescribe equality for its many ethnic groups—discrimination on the basis of a person's "race, tribe, place of origin or residence or other local connection, political opinions, color, or creed" is constitutionally forbidden—but political patronage has entrenched an informal system of favoritism that has especially disfavored smaller ethnic communities. Ethnic Somali Kenyans have suffered particular neglect and abuse. Somali Kenyans are the only ethnic group required to produce two identification cards to prove

their citizenship. Furthermore, they face unequal economic opportunities due to lack of government development efforts in the North Eastern Province and discrimination in hiring for jobs within the police, military, and civil service.<sup>36</sup>

Kenya has not ratified International Labor Organization Convention 169 on Indigenous and Tribal Peoples nor approved the United Nations Declaration on the Rights of Indigenous Peoples. UN Special Rapporteur on Indigenous Issues Rodolfo Stavenhagen wrote in 2007 that the “livelihoods and cultures” of Kenya’s pastoralist, hunter-gatherer and forest tribes “have been traditionally discriminated against and their lack of legal recognition and empowerment reflects their social, political and economic marginalization,” adding, “most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control over land and natural resources.” Some civil society organizations promoting indigenous rights and their donors have reportedly come under governmental pressure.<sup>37</sup>

Kenyans are free in religious practice, although the role of traditional Islamic courts vis-à-vis civil law is contentious, and is set to evoke a divisive communal debate during the constitutional reform process. Christians comprise about 80 percent of the population, and Muslims make up approximately 10 percent, mostly in the coastal area. Tensions have occasionally erupted, with Muslims alleging discrimination at the hands of the government, including the arrest and illegal deportation, on national security grounds, of foreign Muslim scholars and others.<sup>38</sup>

In most areas, Kenya’s transition from one-party rule has allowed a blossoming of civic associations with little overt governmental interference. All Kenyan workers except members of the military or police may join a union of their choice; about 500,000 are union members. Workers can negotiate collective bargaining agreements, although official grievance procedures can be cumbersome, and workers sometimes strike outside the approved process. Most of the roughly 40 registered unions in Kenya belong to the single approved national labor federation, the Central Organization of Trade Unions (COTU), which is the official workers’ representative in administering the Industrial Relations Charter in conjunction with the government and the Federation of Kenya Employers. However, the government appoints COTU’s secretary general from a list of union nominees, and many of the COTU-affiliated unions are viewed as ineffective or corrupt. Professional unions outside COTU are regarded as much more capable advocates for their members’ interests.<sup>39</sup>

While protests are common, the constitutional right to public assembly is not always respected, and security forces sometimes resort to force to suppress even peaceful and lawful protests. Some people arrested at protests have alleged beatings and sexual abuse while in police custody. Despite constitutional guarantees, authorities banned all public gatherings after the December 2007 elections. Police are described as repeatedly using deadly force against peaceful protestors, especially supporters of the opposition ODM. Almost no members of the security forces have been held accountable for such actions.

**RULE OF LAW****3.40**

INDEPENDENT JUDICIARY	3.60
PRIMACY OF RULE OF LAW IN CIVIL AND CRIMINAL MATTERS	3.00
ACCOUNTABILITY OF SECURITY FORCES AND MILITARY TO CIVILIAN AUTHORITIES	3.00
PROTECTION OF PROPERTY RIGHTS	4.00

Kenya's judicial system retains many facets of the British system it inherited at independence in 1963, but in practice is heavily dominated by the executive branch and permeated with corruption at all levels. The lack of judicial independence and integrity is a core factor permitting impunity for abuses by the country's most powerful groups and individuals. Reports by the Commonwealth (2002) and the International Commission of Jurists (2005) detailed dire deficiencies and offered clear suggestions for improvement. While the first Kibaki administration took up the mantle of reform and the government sacked some judges and magistrates,<sup>40</sup> the structure of the judiciary, its lack of resources, and its susceptibility to external influences gravely subvert the rule of law in Kenya today.

The president appoints the attorney general, chief justice, and Supreme Court, Court of Appeals, and High Court judges. The Judicial Service Commission advises on such appointments but is itself comprised of the chief justice, attorney general, chair of the Public Service Commission, and two High Court or Court of Appeals judges, all of whom are executive appointees. This process has created a judiciary that is largely beholden to the incumbent regime, although some individual jurists have demonstrated independence in seeking to enforce the law even at the highest levels despite demonstrated executive disdain for court decisions.

Lack of compliance with judicial rulings creates consequences noted in 2006 by the African Peer Review Mechanism Kenya Country Report: "[P]rominent government officials either disobeyed courts orders or expressed an intention to disobey them . . . fostering an emerging culture of impunity [that] strikes at the heart of the mandate and rule of law." The report also described the consequences of this distrust, including "individuals' resort to self-help initiatives, where communities employ their own private militias to protect or enforce rights, or prefer to use traditional mechanisms to resolve disputes rather than . . . formal courts."<sup>41</sup>

A Gallup poll conducted in April 2009 found this to be an accelerating trend: Kenyans' confidence in their country's judicial system had dropped to 27 percent, less than half the level of only two years earlier.<sup>42</sup> The World Bank Institute's governance indicator for the rule of law in Kenya also dropped sharply from 2006 to 2008.<sup>43</sup> The corrosion of Kenya's justice system is so severe that UN Special Rapporteur Philip Alston explicitly called for the removal from office of both the attorney general and the head of the Kenya Police in his 2009 report on extrajudicial killings. "The Government of Kenya can choose to deny the existence of

problems or insist that they are under control, while the killings and impunity continue," he warned. "[S]uch a path will lead inexorably to chaos and large-scale violence within a relatively short time."<sup>44</sup>

The constitution sets out the minimum qualifications for members of the High Court, and the Judicature Act lists essential magistrate qualifications, but credentials and training are insufficient, and incompetent candidates sometimes serve as prosecutors and judges. In 2008, Kenya began efforts to address the problem by establishing a World Bank-funded Judicial Training Institute and meeting with international experts in judicial education to revise Kenya's draft Judicial Education Policy.<sup>45</sup>

Overall, however, reform has stalled since the proposed new constitution was rejected in November 2005, and many initiatives are sharply contested along political lines, with a view toward the 2012 elections. Judicial, electoral, and civil service reform and land rights are among crucial issues that a new constitution must address. A Committee of Experts has been appointed under legislation to renew the constitutional review, but the process is likely to continue to be mired in political controversy. The question of accountability for the post-2007 election violence, discussed earlier, remains an open issue. The government has reneged on its agreement to form a special tribunal, as recommended by the Waki Commission, and instead plans to use existing courts and expand the mandate of the Truth, Justice and Reconciliation Commission. This decision has been strongly criticized by local and global human rights groups,<sup>46</sup> and led directly to the ICC's decision to assert its jurisdiction.

Kenyan law presumes people charged with a crime to be innocent until proven guilty, guarantees a public hearing, and allows consultation with an attorney. The government provides attorneys only in capital cases, however, and most defendants cannot afford legal counsel. The government and courts sometimes withhold evidence from defendants by using secrecy laws, and the scale of free legal aid services does not match the enormous need. Courts are chronically underfunded and understaffed, and a daunting backlog of cases prevails. Legal requirements that people arrested must be charged within 24 hours or 14 days in non-capital and capital cases, respectively, are often not honored. Many suspects are held for months or years of pretrial detention under dreadful conditions despite provisions for their release on bail or bond. High court fees, poor knowledge of legal rights, language barriers, and, in many rural areas, lack of legal infrastructure also present grave obstacles to access to justice for most Kenyans.<sup>47</sup>

Kenya's military numbers about 22,000 personnel. It was closely aligned with the authoritarian KANU regime, and individuals from President Moi's Kalenjin group were awarded many senior posts during his rule. The only overt effort to take power was an aborted coup in 1982, and the army has continued to accept civilian oversight during the country's fitful democratic transition. There are fears that the military could fracture along ethnic lines if it is asked to suppress large-scale ethnic conflict. Most domestic security operations

are carried out by various police units, including highly trained paramilitary groups. Allegations of corruption in military procurement have not resulted in serious investigations, largely due to the fact that security and defense contracting is exempt from procurement regulations. Numerous scandals have arisen in recent years, the most notable being the Anglo Leasing Scandal, which involved numerous overcharged government contracts, including for the construction of forensic laboratories and security vehicles for the national police and the delivery of an oceanographic survey vessel to the Kenya Navy.<sup>48</sup> The Kenya Anti-Corruption Commission (KACC) investigated 18 security-related contracts in relation to the Anglo Leasing case and forwarded seven to the attorney general for prosecution, but a combination of appeals and petitions filed by the defendants have resulted in repeated delay of the only two prosecutions undertaken.<sup>49</sup>

Property rights in Kenya's modern commercial sector are generally respected, despite complaints about slow and sometimes corrupt commercial court proceedings. The Heritage Foundation reported in 2009 that "lax property rights and extensive corruption hold down overall economic freedom," and noted a lack of protection of intellectual rights.

The question of land rights is far more vexing. The distribution of land is a source of deep grievance across Kenya and a root cause of group conflict. Land seizures even for public purposes are sometime arbitrary; Amnesty International reported that in mid-2009 3,000 people were forcibly evicted from a Nairobi community.<sup>50</sup> There is a long record of alienation of traditional lands of smaller ethnic groups and favoritism in land allocation toward the Kikuyu that began in colonial times. An official government report issued in December 2004 estimated that over 200,000 illegal allocations had been made since independence in 1963: "'Land grabbing' became part and parcel of official grand corruption through which land meant for public purposes . . . has been acquired by individuals and corporations."<sup>51</sup> Land-motivated displacement was a key underlying cause of much post-election violence, particularly in the Rift Valley.

The draft National Land Policy could address many pressing land issues, including by empowering authorities to recover improperly allocated property. But the law awaits parliamentary approval, and stronger protections for disadvantaged communities are urged by NGOs such as the Kenya Land Alliance. The new policy will be politically contentious, and likely elicit resistance from large landowners and groups that have benefited under previous regimes.<sup>52</sup> In northern Kenya and other arid areas, desertification and growing population pressures are intensifying land-related resource competition, including cattle raiding and conflict between herders and farmers. A Ministry for Northern Kenya and Other Arid Lands formed in 2008 is meant to better address this situation. Hunger is growing acute in these regions: the World Food Program estimates that about 5.6 million people in Kenya are "food insecure." Drought and rising global commodity prices are partly to blame, exacerbated by economic dislocation caused by violence, governmental ineffectiveness, and corruption.



**ANTICORRUPTION AND TRANSPARENCY 3.06**

ENVIRONMENT TO PROTECT AGAINST CORRUPTION	2.75
PROCEDURES AND SYSTEMS TO ENFORCE ANTICORRUPTION LAWS	2.50
EXISTENCE OF ANTICORRUPTION NORMS, STANDARDS, AND PROTECTIONS	3.50
GOVERNMENTAL TRANSPARENCY	3.50

Kenya's pervasive corruption damages both governmental efficiency and people's faith in democratic rule. Details of massive corruption under the regime of former president Daniel Arap Moi were reported extensively by the private security group Kroll in a report commissioned by the Kenyan government, but apparently never pursued.<sup>53</sup> In 2008 Kenya ranked 147th out of 180 countries in Transparency International's annual Corruption Perceptions Index.<sup>54</sup> Graft is reportedly rife at all levels, from military procurement to market inspectors in Nairobi's sprawling slums to rural land distribution. A survey by Transparency International's Kenya chapter in April-May 2009 found that over half of Kenyans reported paying bribes to obtain goods or services, and that "the Kenya Police is the most corrupt institution in East Africa."<sup>55</sup> In 2005, the Africa Peer Review Mechanism Report warned that corruption occurred on a scale sufficient to affect both Kenya's economic health and its attractiveness as a destination for foreign investors.<sup>56</sup>

The experience of John Githongo, a journalist and anticorruption campaigner appointed head of Kenya's Office of Governance and Ethics after President Kibaki's 2002 election, illustrates the frustrations of attempting to fight graft in Kenya. His story, and corruption's impact on Kenya's political dynamics and development, was the subject of a 2009 book by journalist Michaela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower*. After initially tackling his job with vigor, by early 2005 Githongo had resigned after senior officials obstructed his investigations, and he fled Kenya after receiving multiple threats. A year later, he issued a report alleging then Vice President Moody Awori and senior ministers had misappropriated over US\$600 million in government funds in the Anglo Leasing scandal.<sup>57</sup> The Anglo Leasing case is just one of many where graft in government procurement and budgeting processes has been exposed, and it revealed the inability of the public or even Parliament to gain reliable information about government operations.

State activity in the economy is substantial despite the fact that several state-owned enterprises have been fully or partially privatized in recent years. In 2008, the 2005 Privatization Act, which aimed to boost transparency during the privatization process through the creation of an Independent Privatization Commission and an accompanying regulatory framework, came into effect, but implementation has been modest thus far.<sup>58</sup> Opportunities for direct political interference, patronage, and corruption are numerous as state-owned enterprises report directly to politically appointed ministers.<sup>59</sup>

There is no lack of awareness of the scale of both grand and petty corruption, or its corrosive effect on the country. The interagency GJLOS introduces itself on its website by asking: “Has your file ever ‘disappeared’ at the courts but reappeared at the production of ‘kitu kidogo’ [a petty bribe—literally “something small” in Kiswahili]? Have you ever reported a crime and you became the criminal instead? . . . Did you ever lose a case in court because you could not give a kickback? The list is endless. . . .”<sup>60</sup>

Several other anticorruption agencies exist. The Office of the Ombudsman houses the Public Complaints Committee. International donor-backed efforts to improve government procurement practices, including strengthening the Public Procurement Oversight Authority, have reported some success,<sup>61</sup> but serious problems continue to pervade this area, and it appears that impunity remains the norm at the highest levels of government. Kenya’s National Audit Office is responsible for regulating state expenditures, but its independence is limited, and resource constraints, audit backlogs, and a failure to release audit reports in a timely manner decrease its effectiveness. Recent reforms have enabled the auditing agency to upgrade its investigative capacity.<sup>62</sup> However, as with reports from other agencies and commissions, there is little evidence of political will to act on its findings.

The KACC is also active, but apparently unable to seriously tackle major high-level scandals, and without independent prosecutorial powers. The highly politicized attorney general’s office has failed to pursue any senior officials or business people accused of malfeasance. While the KACC encourages Kenyans to report corruption, it cannot itself provide whistleblower protection or pursue those who seek to intimidate people reporting illicit acts. KACC officials acknowledge potential whistleblowers’ fear but believe an anonymous web-based reporting system launched in 2007 will help.<sup>63</sup> In March 2009, a Witness Protection Unit was formally launched under a new Witness Protection Act that came into effect in September 2008, but it is so far untested and underfunded. Repeated and enterprising media exposés that failed to induce proper investigations led a senior editor in Nairobi to despair that reporting on corruption is “like talking to yourself.”<sup>64</sup>

MPs have undertaken parliamentary corruption probes and demanded action, but senior officials still appear able to ignore parliamentary demands and sometimes even judicial decisions. The 2003 Kenya Public Officer Ethics Act prohibits public officials from holding shares or an interest in a corporation or body that would interfere with their official duties, and requires that public officers declare their assets. However, the law does not require the declarations be made public, fails to specify which assets must be declared, and does not establish a procedure for the review of the declarations.<sup>65</sup> Many public officials see little separation between their private interests and official duties. This became institutionalized during the 2003–2007 Parliament, when MPs voted to sharply increase their pay, mileage, housing, constituency, and severance allowances.<sup>66</sup>

New scandals continue to emerge, and there is little indication that these will be addressed any more seriously than those unpunished in the past. In 2008, the Grand Regency Hotel in Nairobi was sold to Libyan buyers at a price allegedly far below its real value. A litany of other official high-level corruption allegations are discussed in the Kenya National Dialogue and Reconciliation Monitoring Project's May 2009 report, which bluntly states that "the Coalition Government continued to be riddled with corruption scandals."<sup>67</sup> Despite myriad accusations and previous investigations, no senior officials have been prosecuted.

Transparency International Kenya urges that Kenya's Official Secrets Act be repealed, and that pending legislation, including the Freedom of Information Bill under consideration since 2007 and Anti-Money Laundering Act, be enacted promptly "to ensure that the robbers of the public resources are identified, stopped and effectively prosecuted."<sup>68</sup> Section 79 of the Kenyan Constitution guarantees freedom of expression, but no laws explicitly regulate citizens' right to information. The opacity of executive decision making makes legislative oversight of budgetary processes largely ineffective. Some reforms have been enacted: the 2008 Fiscal Management Act, which was enacted in June 2009, mandates that Parliament participate in and oversee the budget-making process, sets out specific requirements and deadlines for report submission, and requires the publication of a "Budget Outlook Paper" every January. Legal advances have not thus far resolved serious issues related to the inflation of the budget and the misuse of funds. In May 2009, Finance Minister Uhuru Kenyatta was criticized after substantial inconsistencies were found in his supplementary budget estimates.<sup>69</sup> Nonetheless, Kenya receives a score of 57 percent in the 2008 Open Budget Index, an improvement of 10 points from two years ago.<sup>70</sup> The propriety of administration and distribution of international aid—desperately needed as Kenya faces its worst drought in a generation along with numerous other social challenges—has occasionally come under question. Several countries and donors have at times suspended assistance to Kenya amid allegations of corruption in food procurement, distribution of medicines, and education projects, among others.<sup>71</sup>

## RECOMMENDATIONS

- Utilizing the diagnosis and prescriptions of the IREC report as a base for electoral reform, request immediate substantive international mediation and expertise to propel nonpartisan constitutional and electoral changes in advance of the scheduled 2012 elections.
- Move swiftly to act on the Waki Commission's recommendations to prosecute those responsible for instigating past violence, or cooperate fully with the International Criminal Court's efforts to ensure such accountability.
- Pass and implement the draft freedom of information bill to raise transparency at all levels of government and public service.

- Establish a permanent mechanism of dialogue to identify and, if possible, peacefully disarm militia and other groups that have been engaged in ethnic and/or political violence.
- Sign and ratify UN relevant treaties and conventions to which Kenya is not yet party, including ILO 169, and codify their provisions with meaningful enforcement mechanisms into domestic law.
- Fully implement the National Land Policy [*Ed.: adopted by Parliament in December 2009*] through appropriate enabling legislation and empowerment of a genuinely autonomous National Land Commission.

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