

# *We're Tired of Taking You to the Court*

**HUMAN RIGHTS ABUSES BY KENYA'S  
ANTI-TERRORISM POLICE UNIT**





“We’re Tired of Taking You to the Court”

Human Rights Abuses by Kenya’s  
Anti-Terrorism Police Unit

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For more information contact:  
Jonathan Horowitz  
Legal Officer  
National Security and Counterterrorism  
[Jonathan.Horowitz@opensocietyfoundations.org](mailto:Jonathan.Horowitz@opensocietyfoundations.org)

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# Table of Contents

Acknowledgments	5
Methodology	7
Executive Summary and Recommendations	9
Chapter 1: Introduction	17
Chapter 2: Anti-Terrorism Police Unit Human Rights Abuses	23
ATPU Detention of Swaleh Abdullah Said, October 9, 2013	24
ATPU Detention Operation, November 13–14, 2012	26
Other ATPU Raids and Detainee Abuse	30
Allegations of Unlawful Killings and Disappearances	34
Renditions and Transfers to Torture: Uganda, Somalia, and United States	42
Chapter 3: Impact of ATPU Abuses on the Community	47
Chapter 4: Police Reform and the Legal Framework for Counterterrorism Policing	51
International, Regional, and Domestic Human Rights Protections	52
Gaps in Law and Implementation	56

Chapter 5: Prevention of Terrorism Act, 2012—A Human Rights Analysis	61
Vaguely and Broadly Defined	62
Mens Rea	63
Criminalization of Membership	63
Due Process Guarantees	64
Severity of Punishment	66
Chapter 6: Conclusion	67
Notes	69

# Acknowledgments

This report was written by Jonathan Horowitz, legal officer for the Open Society Justice Initiative's National Security and Counterterrorism program, and staff members from the Kenyan NGO Muslims for Human Rights (MUHURI). The report was edited by David Berry and Kate Epstein, with additional input from Hussein Khalid and Francis Auma from MUHURI, and Robert Varenik and Amrit Singh from the Justice Initiative. Additional assistance was provided by Stacey Cammarano and Kamilah Lester.

The Open Society Justice Initiative bears sole responsibility for any errors.



# Methodology

This report is based on over 40 in-person interviews jointly conducted by the Open Society Justice Initiative and Muslims for Human Rights (MUHURI) in 2012 and 2013 with victims, witnesses, and other individuals with knowledge of Anti-Terrorism Police Unit-related human rights abuses. The report also relies on information from court documents, other documentary evidence, reputable human rights organization reports, and news outlets. Many of the individuals interviewed requested that their identities not be disclosed out of fear of government reprisals. For this reason, this report identifies some witnesses by name, but uses pseudonyms for others.



# Executive Summary and Recommendations

In September, 2013, over sixty people were killed at the Westgate shopping center in Nairobi,<sup>1</sup> in a terror attack carried out by members of the militant group *Harakat al-Shabaab al-Mujaahidiin* (Al Shabaab). The attack was not an isolated incident. Since late 2011, when Kenya sent military forces into Somalia to fight Al Shabaab, there have been over 30 attacks involving grenades or explosive devices in Kenya, according to figures from the U.S. embassy in Nairobi. Those attacks left at least 76 people dead and 220 people injured.<sup>2</sup> In 1998, the bombing of the U.S. embassy in Nairobi was attributed to members of al-Qaeda; in 2002 there were separate attacks against a passenger airplane and a hotel.

Amid this violence, the Kenyan government has credited the country's Anti-Terrorism Police Unit (ATPU) with thwarting dozens of other terrorist plots, and arresting or killing dozens of terrorist suspects, in an ostensibly robust counterterrorism response. But, in carrying out its work, the ATPU has committed a wide array of human rights abuses that violate international, regional, and domestic law. At a time when Kenya is undertaking sweeping police reforms aimed at ensuring the police do not have unlimited powers, the ATPU, which sits within the Kenya Police, must receive greater scrutiny and oversight. ATPU officials must be held accountable for their human rights abuses, and victims must receive reparations. In addition, the new police reforms that have been signed into law must be urgently implemented.

This report traces ATPU abuses from 2007 to the present. These abuses include the use of excessive force during house raids; torture and ill-treatment of detainees; arbitrary detentions, including disappearances; and rendering terrorist suspects to countries where they faced a real risk of torture.

One of the clearest examples of ATPU human rights abuses documented in this report stemmed from a November 13–14, 2012 operation in Mombasa, during which the unit captured several suspects and beat them prior to bringing them to various police stations. Eventually, all the charges filed against these individuals were dropped due to a lack of evidence. This report also documents detailed and credible allegations that the ATPU physically abused Swaleh Abdullah Said, a man captured in Mombasa on suspicion of terrorist-related activities, including the Westgate Shopping Mall attack. Also, in 2012 and 2013, several terrorist suspects went missing or were killed. The Kenyan government has denied any wrongdoing, saying that either it was not involved in the disappearances and killings or that it killed terrorist suspects lawfully. This report, however, documents the disappearance of Badru Mramba in November 2012, and lays out evidence implicating the Kenyan government, and the ATPU specifically. This report also presents credible allegations of the ATPU using unlawful lethal force on Omar Faraj and credible allegations of extrajudicial executions by the ATPU of Kassim Omollo and Salim Mohammed Nero. All of these allegations of beatings, disappearance, and killings require, at a minimum, a robust and effective investigation by Kenyan authorities. In the cases documented in this report where the government denies any involvement in the murder or disappearance of terrorist suspects, the government nonetheless has an obligation to conduct an effective investigation into who was responsible.

The abuses documented here are part of the ATPU's history of operating outside the law. Although this report focuses primarily on abuses committed in Mombasa in 2012 and 2013, the ATPU's broader pattern of rights violations extends back years earlier. In 2010, for example, the ATPU arbitrarily detained and rendered to Uganda at least nine suspects in the July 11, 2010, World Cup bombing in Kampala, Uganda. Two separate court rulings deemed those renditions unconstitutional.<sup>3</sup> Several of the World Cup bombing suspects alleged they were physically and psychologically abused by ATPU officers prior to their rendition and, upon their arrival in Uganda, were subjected to further abuses.<sup>4</sup>

Prior to the World Cup bombing renditions, in 2007, Kenya rendered at least 85 individuals to Somalia, who were then rendered to Ethiopia.<sup>5</sup> In a legal proceeding that found the detentions and renditions unlawful and amounting to torture, the (now former) head of the ATPU, Nicholas Kamwende, said he was involved in the operation that led to the apprehension and rendition of those eleven individuals.<sup>6</sup> Muslim Human Rights Forum also reported that suspects were booked by ATPU officers and Human Rights Watch found that, "Several detainees reported being interrogated by plainclothes

Kenyan police officers who worked for the Anti-Terrorism Police Unit (ATPU).<sup>7</sup> One of the petitioners in the legal proceedings claimed he was beaten up and subjected to a mock execution while in Kenyan custody.<sup>8</sup> Several of the people rendered who Muslim Human Rights Forum and Human Rights Watch spoke with described being brutally tortured after being transferred out of Kenya.<sup>9</sup> Also in 2007, Kenyan police arrested Mohammed Abdulmalik, a Kenyan national, in Mombasa.<sup>10</sup> The ATPU detained him for two weeks, during which time officials reportedly beat him and interrogated him about a plan to attack a well-known running race.<sup>11</sup> Kenyan authorities then drove him to the Nairobi airport and handed him to U.S. personnel who rendered him to Djibouti.<sup>12</sup> There, he was detained in a shipping container on a U.S. military base, and subsequently rendered to Afghanistan where he was held in various facilities, before being moved to Guantánamo Bay, where he remains imprisoned to date.<sup>13</sup>

This report also provides a legal analysis of Kenya's Prevention of Terrorism Act of 2012. Enacted in October 2012, the law attempts to strengthen counterterrorism powers in the country. Unfortunately, like many other counterterrorism laws passed since September 11, 2001, it contains vague definitions of terrorism, creates terrorist blacklists with inadequate due process guarantees, and expands police powers, all of which can be used both against terrorist suspects and as a tool against political opponents, civil society, religious and ethnic groups, minorities, and common criminals.<sup>14</sup> The Prevention of Terrorism Act of 2012 can be found online at: <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xml?actid=No.%2030%20of%202012>.

The abuses documented in this report are not only unlawful but also counterproductive. Violent extremists use such abuses to justify violence and to recruit others.<sup>15</sup> In addition, counterterrorism-related human rights abuses erode community trust in government. This extinguishes opportunities for authorities to enter into dialogues with the same communities that can be instrumental in reducing extremist violence. It is particularly disturbing that many of the abuses in this report occurred after 2010, after Kenya adopted its new constitution and began an effort to develop stronger human rights protections. These protections include the new constitution's bill of rights;<sup>16</sup> the National Police Service Act (2011);<sup>17</sup> the Independent Policing Oversight Act (2011),<sup>18</sup> and the creation of the National Police Service Commission.<sup>19</sup> Combined, these reforms increased the potential for internal police accountability, independent oversight, and police vetting. They placed limits on the use of force and firearms and on the powers of arrests and detention. Importantly, in an attempt to end rampant impunity, the new legislation established an Internal Affairs Unit<sup>20</sup> and, separately, an Independent Policing Oversight Authority that investigates police crimes and misconduct.<sup>21</sup> Unfortunately, however, at the time of writing there have been attempts to erode many of these important advancements through legislative amendments that would, for example, significantly expand the scope of firearms use by police and reduce police accountability.

## Recommendations to Kenya:

*To the Inspector General of Police (IGP), Independent Police Oversight Authority (IPOA), National Police Services Commission (NPSC), and Anti-Terrorism Police Unit (ATPU):*

- Ensure that the ATPU complies with domestic, regional, and international human rights standards, in particular the prohibitions on extrajudicial killings; torture and other ill-treatment; excessive use of force; disappearances; and other forms of arbitrary detention, renditions, and transfers to torture and other serious human rights violations.
- Publicly state that Kenyan police will not carry out extrajudicial killings; torture and other ill-treatment; excessive use of force; disappearances; or other forms of arbitrary detention, renditions, and transfers to torture and other serious human rights violations.
- Ensure rigorous scrutiny of the ATPU by the IGP, IPOA, and NPSC's oversight, investigation, vetting, and accountability powers. This includes ensuring independent, impartial, and transparent investigations into allegations of extrajudicial killings, torture and other ill-treatment, excessive use of force, disappearances and other forms of arbitrary detention, renditions, and transfers to torture and other serious human rights violations allegedly carried out by the ATPU.
- Ensure that the ATPU is notifying IPOA of any ATPU-caused death or serious injury and provide IPOA with all relevant evidence and facts related to the incident as required by the Independent Policing Oversight Act, 2011.
- Conduct effective criminal investigations into the disappearances and killings of individuals suspected of terrorism-related activities. This includes, but is not limited to, Issa Abdalla (killed), Salim Abubakar (disappeared), Omar Faraj (killed), Mohammad Kassim (disappeared), Samir Khan (killed), Gadaffi Mohammed (killed), Badru Mramba (disappeared), Jeremiah Onyango Okumu (disappeared), Sylvester Opiyo (disappeared), Stephen Mwanzia Osaka (disappeared), Kassim Omollo Otieno (killed), Jacob Musyoka (disappeared), Titus Nabiswa (killed), Salim Mohammed Nero (killed), Aboud Rogo (killed), Ibrahim Ismael, also known as Ibrahim Omar Rogo (killed), Ibrahim Ramadhan Hamisi, also known as Ruta and Musyoki Kyondi (killed), Omar Abu Rumeisa (killed), and Omar Shwaib (disappeared).
  - Provide regular and public updates on the status of these investigations.
  - Safeguard complainants, witnesses, those conducting the investigation, and their families from violence, threats of violence, or any other form of intimidation, including detention and monitoring.

- To help build community relations and fulfill the police’s mandate of accountability and transparency, make public the command and control structures of Kenya’s police forces and ensure that the ATPU operates more transparently.
- Ensure, through training, oversight, and accountability, that ATPU officials clearly identify themselves prior to any use of force, including arrest, search and seizure operations, and use of a firearm. In cases where firearms are used, ensure that ATPU officials provide ample warning prior to the use of a firearm unless doing so places the officer or another person at risk of death or serious harm.
- Ensure ATPU officers are trained and evaluated with regard to proper evidence gathering techniques and methods; and ensure that evidence is submitted in accordance with due process and fair trial standards.

*To the Director of Public Prosecutions:*

- Bring criminal charges against ATPU officers where there are grounds to suspect that an officer committed a human rights abuse, including extrajudicial killings; torture and other ill-treatment; excessive use of force; disappearances; and other forms of arbitrary detention, unlawful renditions, and transfers to torture or other serious human rights violations.

*To the Parliament:*

- As a matter of priority, pass a prevention of torture bill into law that meets international human rights standards.
- Repeal or amend the Prevention of Terrorism Act of 2012 such that it no longer contravenes international human rights standards.
- Do not pass amendments to the National Police Service Act or National Police Service Commission Act that erode current human rights standards, in particular with respect to rules on the use of firearms.
- Ratify the International Convention for the Protection of All Persons from Enforced Disappearance and make the act of an “enforced disappearance” an offense under Kenyan criminal law.
- Ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, which requires States’ parties to set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mecha-

nism). Under the protocol, States' parties must allow visits by the monitoring mechanisms where persons are or may be deprived of their liberty.

- Declare under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment that Kenya recognizes the competence of the Committee Against Torture to receive and consider communications from, or on behalf of, individuals who claim to be victims of a violation of the Convention.
- Ratify the Optional Protocol of the International Covenant on Civil and Political Rights, allowing the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

*To the Office of the President:*

- Seek the lawful return of Kenyan nationals who were unlawfully rendered to Uganda.
- Do not sign into law amendments to the National Police Service Act or National Police Service Commission Act that erode current human rights standards, in particular with respect to rules on the use of firearms.

### **Recommendations to states providing security assistance to the ATPU, in particular the United States and United Kingdom:**

- Cease assistance and training to any ATPU unit where there is credible information that that unit committed gross violations of human rights where the alleged perpetrators are not being held accountable.
- Disclose which security force units have been determined ineligible for assistance and training in Kenya due to their human rights abuses.
- Make publicly available, in a regularized and easily accessible format, information about foreign military and counterterrorism support to Kenya. This information should include, at a minimum, the amount and type of military and counterterrorism support being provided and the identities of the units receiving the support.
- Ensure diplomatic engagements go beyond the Kenyan government to include civil society, local religious and community leaders, and affected citizens and populations.

- Encourage Kenya to pursue its police reform agenda and support the efforts of the Independent Police Oversight Authority. Place heightened emphasis on ensuring the ATPU is subject to these reforms and oversight. Encourage Kenya to pass the Anti-Torture Bill.
- Maintain a dialogue with Kenya to encourage it not to erode important human rights policing standards, especially on the use of force and firearms. Clearly stake out a position not to provide assistance to Kenyan security forces if this erosion occurs.



## CHAPTER 1

# Introduction

The ATPU, part of Kenya's National Police Service, was established in February 2003 to combat terrorism. Since then, the ATPU has responded to numerous attacks. The ATPU has a mandate to "Prevent, detect, disrupt and interdict imminent terrorist activities within the country; exhaustively investigate all terrorism and terrorism related cases; take control, secure, and cordon all scenes of terrorist incidents; create profiles for suspected terrorists and establish a databank; share intelligence with other security related agencies operating within the country; and review and monitor security of foreign missions accredited to Kenya." The same year it was established, the United States provided the ATPU with \$10 million in funding and has provided funding ever since.<sup>22</sup>

Attacks by suspected terrorists have increased since late 2011 when Kenya sent military forces into Somalia to fight the militant group *Harakat al-Shabaab al-Mujaa-hidiin* (Al Shabaab). In September 2013, Al Shabaab took responsibility for an attack against a Nairobi shopping mall that left over 60 people dead.<sup>23</sup> This was the worst terrorist attack Kenya faced since the 1998 embassy bombing. The U.S. Embassy reported that in 2012 there had been over 30 attacks involving grenades or explosive devices in Kenya. The embassy reported that at least 76 people died in these attacks, and around 220 people were injured.<sup>24</sup> A high-level Kenyan counterterrorism official listed to the Justice Initiative other concerns he had relating to terrorism in Kenya, including radicalization of Kenyans, refugee flows into Kenya, the presence of nearby terrorist groups such as Al-Qaeda in the Islamic Maghreb and Boko Haram, and the effect the Arab Spring has had on transnational arms movements.<sup>25</sup>

The ATPU has its headquarters in Nairobi. It has two major sub-units: the Mombasa sub-unit and the Nairobi sub-unit. Each sub-unit is further divided into ten smaller divisions called “Detachments.”<sup>26</sup> The ATPU operates in Nairobi, Coast, Nyanza, and North Eastern Provinces. Given its clandestine nature, it is also difficult to estimate the total number of ATPU officers. The ATPU has had two leaders since its inception: Nicholas Kamwende ran the unit until 2011 when his post passed to his deputy Boniface Mwaniki, the current head. The current head of the ATPU in Mombasa is Elijah Rop.

The ATPU appears to operate with a strong central command structure. In its 2004 report to the UN Counter Terrorism Committee, Kenya described the ATPU as being “located in the Office of the President.”<sup>27</sup> One officer informed the Justice Initiative and Muslims for Human Rights, “We have an interagency task force on counterterrorism—out of Nairobi—and it sends back to us information for action.”<sup>28</sup> The dispatch of ATPU officers from Nairobi to Mombasa and elsewhere in Kenya to conduct counterterrorism operations also suggests a strong central command. For example, police informed Muslims for Human Rights on October 2, 2013, that a team from Nairobi was to arrive in Mombasa to carry out an operation the following day.<sup>29</sup> In another instance, an individual detained by the ATPU during the November 13–14, 2013, operation (as described in this report below) overheard a conversation that identified some of the officers as being from Nairobi.<sup>30</sup>

The ATPU has been particularly active in the coastal region of Kenya, including the city of Mombasa. The region has a history of marginalization: its predominantly Muslim population remains largely landless and has other long-standing grievances against the government. Many Mombasa residents were hopeful that, with the arrival of Kenya’s new constitution, the government would provide greater economic and political opportunities. However, by the time the 2013 elections arrived, many in the coastal region were not satisfied with the changes. In some cases, the dissatisfaction was articulated through support for the Mombasa Republican Council (MRC), with its slogans of “*Pwani si Kenya*” (the Coast is not part of Kenya), and “*Tumechoka na Ahadi*” (we are tired of promises).<sup>31</sup> The MRC has made secession demands throughout its history and at times called for a boycott in the run-up to Kenya’s 2013 elections. It has also been labeled by some as a political party that resorts to violence.

The tension between the coastal region and the central government is also fueled by a history of terrorist attacks and the region’s reputation as a haven for suspected terrorists and a source of disenfranchised youth who feed the ranks of Al Shabaab. In 2002, a suicide bomber killed 15 people when he attacked the Paradise Hotel in Mombasa. The same day, two missiles were fired at an Israeli airplane carrying over 250 passengers that had just taken off from the city’s airport.<sup>32</sup> More recently, Mombasa has been the location of attacks against police stations and public venues, including bars. These attacks, the tense relationship between the government and the coast’s predom-

inantly Muslim community, the region's reputation as a source for Al Shabaab recruitment, and its status as a port city and a hub of tourism worthy of strong government protection, are among the likely reasons for the ATPU's focus on Mombasa.

An ATPU officer described the ATPU as the most disciplined policing force in Kenya, noting that its officers have received training from the United States, United Kingdom, Russia, and elsewhere.<sup>33</sup> However, the Justice Initiative also met with a Kenyan counterterrorism official who explained, "In this work you can't go by the book."<sup>34</sup> He compared this extralegal approach to that of other countries, explaining, "This is why there is Guantanamo Bay and why the British are detaining people in Afghanistan."<sup>35</sup> The official explained that he cannot rely on the Kenyan courts to prosecute terrorist crimes because of the difficulty of gathering evidence and getting informants to appear in court. "What do you do if no one gives you evidence?" he asked. "We're pushing for CCTV [closed-circuit television] everywhere to cut out human evidence and instead we can use CCTV evidence."<sup>36</sup> Another Kenyan intelligence officer explained, "Technology-based intelligence will help with evidence for prosecution. It's hard to get witnesses before a court—for reasons relating to ethnic closeness as well as security threats to witnesses."<sup>37</sup> In September 2013, the *Standard* reported, "ATPU has dispatched teams of killer cops known as High Risk Officers, whose work is to erase terror suspects, according to officials directly involved in the programme. ATPU is also increasingly employing informers to monitor sermons in mosques, even when there is no evidence of wrongdoing."<sup>38</sup>

The challenges that arise in counterterrorism policing are real, but do not in any way excuse the ATPU's regular perpetration of human rights abuses, including use of excessive force during house raids; torture and ill-treatment of detainees; arbitrary detentions, including disappearances; and rendering terrorist suspects to countries where they face a real risk of torture.<sup>39</sup> Human rights violations by police and other security forces are both unlawful and counterproductive. Violent extremists can employ human rights violations as a recruitment tool and can use them to claim justification for terrorist violence. In addition, counterterrorism-related abuses often indiscriminately target entire communities and, as a result, erode community trust in government. As an editorial in the weekly newspaper *Friday Bulletin*, which criticized Kenyan security forces for human rights abuses against ethnic Somalis, observed: "Violence against locals will only alienate the community further thereby making them hostile to security machinery. The war on insecurity and the threat posed by the Al Shabaab cannot be won without winning the hearts and minds of the local people. Violating their rights is absolutely not the way to go."<sup>40</sup> Indeed, when Kenya's security forces disregard the rule of law and violate human rights, they forfeit the opportunity to cultivate ties with communities and civil society groups that have criticized terrorist violence and Al Shabaab recruitment.

This report focuses on a November 13-14, 2012 counterterrorism operation in Mombasa during which the ATPU captured several terrorist suspects, disappeared one of them, and beat the others prior to bringing them to various police stations. This report also documents detailed credible allegations that the ATPU physically abused Swaleh Abdullah Said, a man captured in Mombasa on suspicion of terrorist-related activities, including the Westgate Shopping Mall attack. In addition, the report presents credible allegations that the ATPU used unlawful lethal force on Omar Faraj and extrajudicially executed Kassim Omollo and Salim Mohammed Nero. All these allegations of beatings, disappearances, and unlawful killings require, at a minimum, a robust and effective investigation by Kenyan authorities. In the cases documented in this report where the government denies any involvement in the murder or disappearance of terrorist suspects, the government nonetheless has an obligation to conduct an effective investigation into who was responsible.

The ATPU has exhibited similar human rights violations in the past. In September 2012, Human Rights Watch documented an instance in which an ATPU officer led security forces that beat people in Mandera, located in northern Kenya near the border with Ethiopia.<sup>41</sup> In 2010, the ATPU also arbitrarily detained and rendered to Uganda suspects in the 2010 World Cup bombing in Kampala, Uganda. Several of the suspects alleged they were physically and psychologically abused and threatened by ATPU officers prior to their rendition. They also made allegations of physical and psychologically abuse upon their arrival in Uganda, raising the concern that Kenyan authorities knowingly sent the suspects to a country where they faced a real risk of torture.<sup>42</sup> Prior to the World Cup bombing renditions, in 2007, Kenya rendered at least 85 people to Somalia, who were then rendered to Ethiopia.<sup>43</sup> In a legal proceeding that found the detentions and renditions unlawful and amounting to torture, the (now former) head of the ATPU, Nicholas Kamwende, said he was involved in the operation that led to the apprehension and rendition several of the individuals rendered to Somalia in 2007.<sup>44</sup> Muslim Human Rights Forum reported that ATPU officers booked the suspects and Human Rights Watch found that, “Several detainees reported being interrogated by plainclothes Kenyan police officers who worked for the Anti-Terrorism Police Unit (ATPU).”<sup>45</sup> One of the petitioners in the legal proceedings claimed he was beaten up and subjected to a mock execution while in Kenyan custody.<sup>46</sup> Several of the rendition victims who Muslim Human Rights Forum and Human Rights Watch spoke with described being brutally tortured after being transferred out of Kenya.<sup>47</sup>

The 2012 and 2013 abuses occurred after Kenya put in place a new constitution and enacted police reform legislation with strong human rights protections. These included the new constitution’s bill of rights;<sup>48</sup> the National Police Service Act (2011);<sup>49</sup> the Independent Policing Oversight Act (2011),<sup>50</sup> and the creation of the National Police Service Commission.<sup>51</sup> Combined, these reforms increased the potential for internal

police accountability, independent oversight, and police vetting. They placed limits on the use of force and firearms and on the powers of arrests and detention. Importantly, in an attempt to end rampant impunity, the new legislation established an Internal Affairs Unit<sup>52</sup> and, separately, an Independent Policing Oversight Authority (IPOA) that investigates police crimes and misconduct.<sup>53</sup> If Kenya's new constitutional and legislative reforms are to be meaningful, the ATPU must receive increased scrutiny under these new oversight mechanisms, ATPU officials must be held accountable for their human rights abuses, and victims must receive reparations. Unfortunately, however, at the time of writing there have been attempts to erode many of these important advances through legislative amendments that would, for example, significantly expand the scope of firearms use by police and reduce police accountability.



## CHAPTER 2

# Anti-Terrorism Police Unit Human Rights Abuses

This section looks at specific abuses committed by the ATPU, with a focus on the beating of a Westgate terrorist suspect; the unit's operation in Mombasa on November 13 and 14, 2012—which included excessive use of force, detainee mistreatment, arbitrary detention, denial of medical assistance, death threats, the disappearance of Badru Mramba (discussed further in the section on Allegations of Unlawful Killings and Disappearances); and credible allegations of unlawful killings of Omar Faraj, Salim Mohammed Nero, and Omar Faraj. This section also documents the murder and disappearances of other terrorist suspects for whom the government denies involvement, but for who the government appears to have failed in its responsibility to sufficiently investigate. This section goes on to demonstrate that the ATPU's human rights abuses date back at least to 2007, when it played a role in illegally detaining, abusing, and rendering people from Kenya to Somalia.

The ATPU's pattern and practice of engaging in human rights abuses is well-established. As a lawyer experienced in litigating ATPU-related cases observed,

From the time of arrest the APTU were very brutal, including being brutal in front of the suspect's family, and they continue their abuse at a police station. Their treatment [of suspects] gets better only once they are brought to court. The brutality includes punching, kicking, beatings—including in the private parts—and slapping. This type of abuse had occurred in all the cases I've dealt with except for a 2013 case.<sup>54</sup>

He added, "The ATPU is treated as being immune to any accountability and they know this. They've been given the green light to do what they what. They aren't held

accountable by the executive of course, or the judiciary. They have never ever been held accountable.”<sup>55</sup> In contrast, a foreign government official notified the Justice Initiative that, in some cases, a magistrate has placed ATPU actions under review. At the time of writing, Muslims for Human Rights and the Justice Initiative did not have additional information about the procedures and effectiveness of this process. It is, however, imperative that any investigation into human rights abuses must meet international standards, including effectively investigating and publicly disclosing information about human rights abuses, and bringing to justice, including through prosecution, perpetrators of human rights abuses.

## ATPU Detention of Swaleh Abdullah Said, October 9, 2013

On September 21, 2013, a group of armed men attacked the Westgate Shopping Mall in Nairobi. A standoff between the gunmen and Kenyan security forces lasted until September 24. At the end of the siege, news reports claimed that 60 shoppers and several Kenyan security officials were killed.<sup>56</sup> In addition to the deaths, the attack left over 100 injured.<sup>57</sup> Al Shabaab claimed responsibility for the attack. In al Jazeera’s lengthy interview of Sheikh Abulaziz Abu Muscab, an Al Shabaab spokesperson, he said,

The place we attacked is Westgate shopping mall. It is a place where tourists from across the world come to shop, where diplomats gather. It is a place where Kenya’s decision-makers go to relax and enjoy themselves. Westgate is a place where there are Jewish and American shops. So we have to attack them.

On civilian deaths, Kenya should first be asked why they bombed innocent Somali civilians in refugee camps, why they bombed innocent people in Gedo and Jubba regions. They should be asked that first before us.<sup>58</sup>

Community leaders and human rights activist strongly condemned the attack, but they also warned that the government must respond to the attack within the rule of law. This was advice that the government did not follow.<sup>59</sup> At the time of reporting, the media reported that authorities had arrested or questioned over 40 individuals in relation to the Westgate attack.<sup>60</sup> While arrests and questioning are required to prevent terrorism and bring justice to the victims and the families of the Westgate attack, this report documented one case of detainee abuse in Mombasa, where several arrests took place. There was also suspicion that the ATPU had been responsible for shooting dead Sheikh Ibrahim Omar Rogo and three other men who were driving in the same vehicle

on October 3, 2013. This led to riots the next day, which saw four men shot dead by police and others injured, and a church burned.

One of the men arrested by the ATPU for suspected involvement in the Westgate attack was Swaleh Abdullah Said, a Kenyan who lived in the Mombasa area with his wife and her young child. According to Swaleh, he was arrested in Mombasa on October 9, 2013, by civilian-clothed ATPU officers who covered his face with a jacket, wrestled him to the floor, and threw him into a waiting car. Swaleh also said that during his arrest the officers beat him and took him for questioning at the ATPU's offices in Mombasa.<sup>61</sup>

The next day, the ATPU brought Swaleh to his house in Likoni.<sup>62</sup> One witness saw Swaleh brought to his house handcuffed and heard him being beaten. The witness recalled that officers arrived with Swaleh at the house very early in the morning on October 10:

It was dawn. There were more than 20 of them. Three were in uniforms with guns and wearing boots. Their uniforms were greenish, like soldiers. They wore greenish vests and helmets. The others were in plain clothes, in casual clothes. They surrounded the house and searched everything in the house.<sup>63</sup>

None of the officials identified themselves as they pointed their guns at Swaleh's wife, who was at the house at the time. The officers brought Swaleh into the house, who was handcuffed behind his back, and brought him to a room where the witness heard him being beaten, shouting, and crying, "Don't beat me...You're beating me for nothing." At the same time, they were searching the house and confiscating various items, including identification documents, money, and cellphones. Outside the house the officers were telling Swaleh's wife that they would kill her if she did not tell them what was in the house. As she cried, one of the officers raised his hand to slap her, but did not. She asked, "Why are you beating innocent people. You're government agents. Are you allowed to beat me?" They asked her age and took photos of her. They asked how long she was with her husband and said, "if you don't answer us we will beat you."

By around 7:30 or 8:00 am, the officers left the house, taking Swaleh with them and leaving behind his wife and her child.<sup>64</sup> Swaleh was then taken to Makupa Police Station, held there overnight, and then taken to a Mombasa court the next day, on October 11. In the courtroom, Swaleh complained of being beaten and was not represented by a lawyer.<sup>65</sup> The government asked for additional days to keep him in custody for further investigations, which the judge approved while setting October 17 as the next hearing date.<sup>66</sup>

On October 17, Swaleh was brought to Mombasa Lower Court No. 3 and charged with attempting to commit a felony, possession of a weapon (a grenade), and being a member of Al Shabaab. Separately, security officials told the media that Swaleh was

involved in the killing of dissident Al Shabaab members.<sup>67</sup> During his October 17 court appearance, he was once again without a lawyer and pleaded not guilty. Once again, he complained to the court that he had been beaten and continued to complain about his health. The magistrate gave a date of January 16, 2014, for the next trial. The judge denied Swaleh bail after the investigating officer said that Swaleh was a national security threat and that terrorist suspects in the past had fled after being granted bail.<sup>68</sup>

## ATPU Detention Operation, November 13–14, 2012

From November 13 to 14, 2012, the ATPU conducted a detention operation in Mombasa that rounded up at least nine individuals suspected of terrorist activities or having associations with terrorist suspects. The head of the ATPU confirmed the operation was carried out by his unit when he told the media, “[o]ur officers are operating on highly-placed intelligence reports of impending terror attacks in Mombasa and Nairobi and we have arrested several suspects who are assisting us with investigation.”<sup>69</sup>

The ATPU beat most of those detained at the point of capture and during questioning; threatened them with violence; took them to various police stations; and denied medical treatment to those who needed it. In many instances the beatings, which were at times administered to extract information, amounted to torture or cruel, inhuman or degrading treatment. As part of this operation, the ATPU conducted a night-time raid on the house of the late Sheikh About Rogo, who was on the U.S. and UN terrorist sanctions list and had been shot dead in August 2012 by unidentified assailants. During the raid, ATPU personnel detained one individual and beat him and other occupants of the house, several of whom were children.

The arrests had begun on November 13, 2012. Witnesses stated that Rogo’s daughter, Rumeisa, and her husband, Swaleh Abdu Majid, were driving to dinner after getting married earlier in the day when several ATPU vehicles pulled them over at about 7:30 pm. The men, who were dressed in ordinary clothes with bullet proof vests and helmets, came out of their cars with guns, cuffed Swaleh, covered his and Rumeisa’s faces, moved the couple into a different car, and drove them away, along with the rest of the ATPU convoy. When Swaleh tried to look at the officers, a handful of officers beat him with gun butts. When the officers asked him questions and he hesitated in providing an answer, he was beaten all over his body and punched in his mouth, causing him to bleed.

Eventually, the authorities placed Rumeisa and Swaleh in separate vehicles. Rumeisa was driven to various unknown locations with her face covered, while various men in the vehicle interrogated her. “If you cheat us we will take you someplace you

regret,” one threatened. The ATPU placed Swaleh in a vehicle that joined a convoy headed for Aboud Rogo’s house, in Kanamai, Mombasa, where they arrived at approximately 10:00 pm.<sup>70</sup>

At the same time that Swaleh and Rumeisa were being interrogated, ATPU personnel raided Rogo’s house—an operation that the head of the ATPU took public credit for.<sup>71</sup> The ATPU was seeking Sheikh Aboud Rogo’s 17-year-old son, Khubaib Aboud. The ATPU parked its vehicles about 30 yards from Rogo’s house, which sits at the end of a long, winding dirt road. Approximately a dozen heavily armed officers dressed in bullet proof vests and helmets proceeded quietly on foot to the house. The armed men raided the house without warning or identifying themselves, barging into a room occupied by eight males, including a 14-year-old boy, a 16-year-old boy, the 17-year-old Khubaib, and five adult men.<sup>72</sup> The armed men told the group to lie down, took their cellphones, photographed each detainee, and asked for Khubaib.<sup>73</sup> During the operation, the officers kicked and beat the men and boys with guns and rubber hosing.

One witness, Abubakar, explained:

When the armed men entered they said “hands up, lie down.” Then we raised our heads one by one and they photographed us. They were asking for Khubaib. They were stepping on us and beating us very hard. I was beaten with the back of a gun and kicked. I still feel the pain now...They beat me with a hose doubled over, hitting me many times.<sup>74</sup>

Abubakar said that a young man named Ahmed “was lying down and they kicked his head three times... When they kicked him it knocked his face into the ground causing him to bleed on his shirt.”<sup>75</sup> A boy at the compound, Hussein, who was watching television when the officers barged in, gave a similar account:

We didn’t hear them arrive. The first time I saw them was when they had a gun in my face. They said, “Hands up. Remove phones.” And then they photographed us.

One armed man stood at the door to the room and called the other armed men one by one as they entered the room. They asked us questions. They were asking us questions, then leaving to discuss things, and then entered to ask more questions. “Take one step and we’ll shoot you,” one of them said.

[While the officers questioned us] they stepped on our heads, legs, and backs. It was hard... They beat Khubaib with a hose and the back of their guns many times when asking him questions...Khubaib was asleep at first when the armed men came in. They beat him on his head and back—all over his body.

I saw that the men who came wore green pants, bullet proof vests, black and blue helmets, and they had round bombs on their vests. They were like the hand grenades we see in films. They also had magazines tucked into their vests.... They never ID’ed themselves. Everyone followed their instructions.

They didn’t take our money. They took nothing but Khubaib.<sup>76</sup>

The ATPU raid ended approximately 30 minutes after it began. Witnesses to Khubaib's arrest said that ATPU personnel handcuffed Khubaib, covered his face, marched him out of the house, and put him into one of their vehicles. In the car, the ATPU interrogated Khubaib with a gun to his head, beat him, told him to confess that he was a member of Al Shabaab, and drove him around for hours before finally arriving at the Central Police Station in the early evening on November 14, 2012.

Khubaib's sister Rumeisa, meanwhile, did not see her new husband again until approximately 2:00 am or 3:00 am on November 14. Once together, the ATPU drove Rumeisa and Swaleh to various unknown locations with their faces covered until they finally reached Central Police Station. There they separated the couple again and brought them, separately, to the ATPU's offices, which are located in the police station. In the afternoon of November 14, 2012, the ATPU released Rumeisa, who had been crying, exhausted and shocked from the event. Swaleh, along with Khubaib, remained detained.

During the time that the ATPU was interrogating, abusing, and detaining Khubaib, Swaleh, and Rumeisa, the ATPU also detained six other individuals—Badru Mramba, Ahmed, Issa, Yahya, Khalid, and Mohammad—from at least four separate locations.<sup>77</sup> Most of the individuals detained, witnesses said, were hooded, handcuffed behind their backs, and put into vehicles by heavily armed ATPU officers who wore bullet proof vests and helmets. The officers demanded Ahmed confess to being a member of Al Shabaab and, when he refused, beat him with punches to the side of his torso. The ATPU found Issa outside his house. He was reportedly beaten with a gun butt, kicked, and then handcuffed. The ATPU beat him so badly that they had to carry him to the ATPU car. ATPU officers asked Issa, “will you bring out the guns or not? We’ll break your head if not.” Officers also reportedly told him, “Don’t look at our faces,” and hit his head with a stick. During Issa’s arrest, one security officer squeezed his genitals, another hit him on both sides of his head, and another hit his joints with sticks. The ATPU detained Yahya on the street and brought him to his home, where his wife and her six young children were inside. The ATPU threw tear gas inside the house and forcibly entered without warning. An ATPU officer told Yahya, “bring out the guns or we’ll kill you. Today is your last day on earth.” The ATPU also told Yahya’s wife they would kill her.

During the operation, ATPU officials implicitly and explicitly threatened suspects with death, according to witnesses. A second-hand source reported to the Justice Initiative that one detainee was told, “We killed Rogo and we killed Samir and we’ll kill you.” This was a reference to Sheikh Aboud Rogo and Samir Khan, both terrorist suspects who were killed by unidentified men earlier in 2012. Another officer, whose affiliation with the ATPU was unclear, told one detainee at a police station, “We’re tired of taking you to the court. Next time we’ll finish you off in the field.” According to a media report, Khubaib stated that Elijah Rop, the head of the ATPU in Mombasa, “told me that my

father was mouthy. He said that is why they killed him. He added that he had on several occasions warned my father to keep quiet but he refused.”<sup>78</sup>

On November 15, 2012, seven detainees—Swaleh Abdu Majid, Khubaib Aboud, Ahmed, Issa, Yahya, Khalid, and Mohammad—were brought to a holding cell in the Mombasa Court House. Representatives from the Justice Initiative and Muslims for Human Rights saw several of the detainees briefly at this time. One of the detainees displayed visible signs of injury. The left side of his face, around the eye, was visibly swollen and his left foot had a fresh wound on the right side. He said, “[I was] beaten on my face. I was also beaten in the private parts. They also used a sharp object to beat my foot.” At least two of the suspects asked for medical assistance due to the injuries they suffered from the beatings, but authorities refused. An individual who saw some of the suspects in detention told the Justice Initiative and Muslims for Human Rights, “The youngest was in pain and was with a swollen face. They told me they were really tortured and beaten.” The witness also said that one of the detainees told him that officers beat him on the back with a plastic pipe and used pliers on his genitals.

While all seven were locked in the basement cell of the Mombasa court house, upstairs, a magistrate met in closed chambers with the government and defense counsel. The government representative asked that the suspects be held without charge for seven more days, to allow police time for further investigation. The magistrate granted this request—despite the constitutional requirement that an arrested individual be physically brought before a court not later than twenty-four hours after being arrested.<sup>79</sup>

After those seven days, the suspects were presented before the court and formally charged with planning to attack police stations.<sup>80</sup> The media reported that their lawyer said at the hearing, “My clients have complained to me that investigators used a pair of pliers to squeeze their private parts and I therefore request the court to order for them to be taken to hospital for a doctor to ascertain if their private parts were squeezed.”<sup>81</sup> At this point the suspects saw a medical professional for the first time since they had been beaten, but they did not receive the medicine the doctor prescribed for their pain, and no investigation of the abuse they suffered ensued.<sup>82</sup>

The judge allowed the seven suspects to post bail on December 4, 2012, and ordered them to report to a police station once a week, according to witnesses. Then, on April 23, 2013, the senior assistant director of public prosecutions informed the ATPU in Mombasa that he was dropping the charges. The prosecutor wrote a letter to the ATPU which was presented in court, stating there was an “absence of cogent evidence” due to the fact that there were no recorded statements of the people who implicated the suspects, no other implicating exhibits, and supposed key witnesses who volunteered information to the police declined to record statements.<sup>83</sup> It is unclear whether the prosecutor regularly drops charges against suspects detained by the ATPU, although this case clearly demonstrates that the ATPU promised the prosecution evidence against the suspects that it could not deliver.

A lawyer for the suspects summarized the detention as arbitrary and unconstitutional. Speaking about the seven-day extension that the magistrate granted the state, the lawyer noted, “Those men should have been presented before the magistrate. Their injuries were an important observation for the court to have been able to make.”<sup>84</sup> A relative of one of the detained suspects noted that the authorities wanted seven days “to ensure the detainees can heal or else you can’t bring them to the court in that condition.”<sup>85</sup> Their lawyer noted further, “It’s a bloody unconstitutional step—to give an extension of pretrial detention without charge. The prosecution must come up with a charge, even if only with a holding charge as required for further investigation.”<sup>86</sup> The lawyer spoke of preparing a constitutional petition challenging the seven day extension, and suing for compensation and accountability, which would take advantage of a right explicitly granted in the Kenyan constitution.

## Other ATPU Raids and Detainee Abuse

The ATPU has a history of using excessive force and abusing people in the course of conducting raids. The *modus operandi* of the November 13 to 14 raid and detention operation follows a pattern seen in other ATPU operations: Heavily armed ATPU officers break down doors; give no warning, reason, or display a warrant for the raid; provide no or minimal identification; and beat and threaten bystanders and terrorist suspects. If the ATPU decides to detain someone, they will drive the suspect around for hours while interrogating, threatening, and beating him; then they bring him to several different locations while depriving him of access to a lawyer, medical care, or family contact before dropping the suspect off at a final location.

### House Raid, Mombasa West, 2012

The Justice Initiative and Muslims for Human Rights interviewed victims of a November 9, 2012, raid that took place in Mombasa West, in the Magongo Wayani neighborhood. The target of the raid appeared to have been madrassa students.<sup>87</sup> According to witnesses, a security force comprised of dozens of personnel from the ATPU and the Kenya’s General Service Unit (GSU) broke down people’s doors and slapped and threatened residents.<sup>88</sup> A 64-year-old woman, Fatima, who was in one of the houses raided, concluded that the ATPU was involved because of what the forces were wearing and because they said they were looking for “Al Shabaab.”<sup>89</sup>

Fatima recalled:

There were about 60 of them. The GSU were outside surrounding the area and the ATPU were inside with guns. Some were in uniforms, with helmets and others with red barrettes

[commonly worn by GSU] and some with bulletproof vests. They went into a total of three houses in the neighborhood but they surrounded the whole area. They said “We’re officers. We’re looking for Al Shabaab.” We said, “We don’t know Al Shabaab.” They said, “Don’t fear us,” but they were breaking [into] our houses.<sup>90</sup>

A 29-year old woman, Hania, recounted, “Some of the men didn’t have uniforms who came inside—just bullet proof vests. There were about 20 inside; and outside there were many with uniforms.” She said she saw an officer who was inside a house point his gun at a man’s head and demanded he get the key to a door. The gun, she said, had a knife and torch at the end of the muzzle. Some residents shouted at the security forces and someone threw a shoe at the armed men. One of the officers slapped and threatened Hania if she wouldn’t say who had thrown the shoe. As she recounted, he said, “I’ll take you away and torture you.” “I thought he was going to rape me.”<sup>91</sup>

## **House Raid, Mandera, 2012**

In another incident involving the ATPU, Human Rights Watch reported that on September 15, 2012, in Mandera district in northern Kenya, witnesses saw:

A group of police officers from various police units led by a well-known officer attached to the Anti-Terrorism Police Unit beat residents of the village of Bulla Power, near the town of Mandera. The beatings immediately followed the 10 a.m. explosion of a remote-controlled improvised explosive device (IED) targeting a vehicle used by police officers. Two officers in the back of a pickup truck had minor injuries. After the explosion the four police officers who were in the vehicle called for reinforcements and then descended on the nearby village beating everyone in sight.<sup>92</sup>

The victims included a mother in her 30s who was preparing food for her one-year-old child. Human Rights Watch reported that “the police kicked open the door of her home, violently kicked the food off the fire, and started beating her with wooden sticks.”<sup>93</sup> Human Rights Watch also reported that at the house of another woman, who was six months pregnant, a group of five police officers:

Kicked open the door of her house and then attacked her. One officer kicked her to the ground and kicked and whipped her until she lost consciousness, she said. She told Human Rights Watch that she felt sharp pain in her hip and abdomen, but was not able to afford a medical checkup.<sup>94</sup>

According to the statements it gathered, Human Rights Watch reported that when the victims of these attacks went to report the abuse at a police station:

The officers, who included those identified by victims, refused to allow them into the station.... [They accused] the villagers of responsibility for the attacks on police...and threatened them with “severe consequences” if they persisted.<sup>95</sup>

### **Individual Detention, Shabaan Mwenda, 2013**

Shabaan Mwenda, a 27-year-old man, told Muslims for Human Rights that ATPU officers beat, threatened, and forced him into assisting them in tracking down other suspects in June 2013. In the statement that he gave to Muslims for Human Rights he said that at 1:00 pm:

I was arrested by police. They blindfolded me and started asking me about terrorism. They were torturing me in the car using sharp objects. They took me to the bush and told me to show them where I had kept weapons and explosives. They took me to my place and broke the door and started searching my house but they did not [find] anything.... Then they took me to the beach and then they instructed me to show them some people who I know from my area. They have a list of 50 people [who] they wanted me to show [to] them. They told me if I want to be released I [have to] show them all these people and if I don't they will kill me or they will hide me, and I told them I would cooperate.<sup>96</sup>

Mwenda said that the officers then released him. After his release, Mwenda said he did not provide the police with the information they sought. Days later, he said, “ATPU officers came to my house around 6:00 am. They asked why I had not reported to them...and I told them I was sick.” Mwenda said that if he does not report back to the ATPU he fears that they will “either kill me or they will take me to Uganda.”<sup>97</sup> The ATPU has rendered other Kenyan terrorist suspects to Uganda.<sup>98</sup>

### **Individual Detention, Ibrahim, 2011**

In another case of alleged detainee abuse, Ibrahim described to the Justice Initiative and Muslims for Human Rights the abuse he suffered at the hands of the ATPU in the second half of 2011. The Justice Initiative and Muslims for Human Rights were unable to corroborate Ibrahim's allegations due to a lack of other independent sources, but his account was consistent with other ATPU abuse allegations.

Ibrahim recalled:

There were about six of them, some dressed in civilian clothes. They had guns.... They kicked me, and used their fists, and as a result I was urinating blood. I still feel the pains under my ribs. They were just calling me “Al Shabaab.” Then they put me in the trunk of a car.<sup>99</sup>

From there, Ibrahim said he was taken to five different police stations, including the ATPU headquarters in Nairobi, over the course of approximately a week before

being brought to court. Officers denied him a lawyer and medical attention, and told a relative who came looking for him at a station where he was held that he was not there. At the first police station, the men who arrested him said they were from the ATPU. At the second police station, Ibrahim fainted because it was Ramadan and he had not eaten for four days. At the third, the ATPU headquarters in Nairobi, Ibrahim was interrogated, hit on the head, and threatened by an officer who said, “I have a license to kill you whenever I want.”<sup>100</sup>

Eventually, Ibrahim was released. He has been called back to court several times, “but nothing happens,” he said. Ibrahim said he filed a complaint against the officers who beat and threatened him in Nairobi. He also said unknown men who have his picture came looking for him at home and that he relocated to avoid further abuse by security forces.<sup>101</sup>

### **Detentions of Suspects in the World Cup Bombings, 2010**

Suspects in the 2010 World Cup bombings in Kampala, Uganda, have also alleged that the ATPU abused them. Habib Suleiman Njoroge, whose case is discussed in the last section of this chapter, stated in a court affidavit that before being transferred to Uganda in 2010, the now-former head of the ATPU, Nicholas Kamwende, took a gun, placed it against Njoroge’s neck as if he was going to shoot him, and accused Njoroge of being an Islamic fundamentalist.<sup>102</sup> Njoroge also alleged that Kamwende slapped him hard on the face.<sup>103</sup> Mohammed Hamid Suleiman, another rendition victim, claimed in a court affidavit that in 2010, at the ATPU headquarters, he was “severely beaten in full view of senior police officers,” and told he would be handed over to Uganda to be tortured, shot, and killed.<sup>104</sup>

The ATPU also detained and rendered two Ugandan nationals, Isa Ahmed Luyima and Batematyo Abubakari, to Uganda in 2010.<sup>105</sup> Luyima wrote in a sworn affidavit that in Mombasa, “at the time my illegal arrest was being effected, I was beaten and tortured by the A.T.P.U Officers who constantly verbally abused me, the officers hooded [and] handcuffed me.”<sup>106</sup> He also alleged that ATPU officers jabbed guns into his ribs and neck and kept him in painfully tight handcuffs.<sup>107</sup> After this, Luyima was taken to a police station where conditions in the cell were “filthy, inhuman and degrading... The toilet in the cell was blocked and emitting [an] extremely [strong] stench, the corridor was flooded with stagnant water and the officers forced me to walk barefoot, and the other people I saw on the cell were relieving themselves in the same corridor.”<sup>108</sup> He said it was “infested with mosquitos and I became ill of malaria due to the filthy unhygienic condition[s].”<sup>109</sup>

# Allegations of Unlawful Killings and Disappearances

Members of Kenya's Muslim community allege that the ATPU is involved in a series of unlawful killings and enforced disappearances that began around April 2012. This report documents credible allegations of two extrajudicial executions, one instance of the unlawful use of lethal force, and one disappearance, all carried out by the ATPU. International law categorically prohibits unlawful killings and enforced disappearance. The reasons why the ATPU would resort to these tactics are not clear. However, it may be rooted in the ATPU's failure to gather evidence that results in convictions. As one lawyer explained, "I've worked on a dozen or so cases that involved the ATPU. Only one of them has proceeded beyond initial proceedings. In the others, the case is dropped or falls apart. If the ATPU brings someone to court they know they've lost, so they kill you instead."<sup>110</sup> The failure to prosecute was similarly recognized by a Kenyan intelligence official who told the Justice Initiative, "in this work you can't go by the book," and then explained that he cannot rely on the Kenyan courts to prosecute terrorist crimes because of the difficulty of gathering evidence and getting informants to appear in court. "What do you do if no one gives you evidence?" he asked.<sup>111</sup>

While in some cases the ATPU has taken credit for the killings, saying they occurred in shootouts and were therefore lawful, in other cases the ATPU has denied involvement, claiming that terrorist suspects were murdered or disappeared as a result of Al Shabaab in-fighting or personal disputes.<sup>112</sup> They have also claimed that people who have disappeared have fled Kenya to avoid prosecution for terrorism.<sup>113</sup> The government nonetheless has a legal obligation to effectively investigate the murders and disappearances, work to stop them, and bring the perpetrators to justice.<sup>114</sup> Lawyers who represent several of the missing persons said that the government has failed in this obligation.<sup>115</sup> When the Justice Initiative asked one of the lawyers if authorities responsible for conducting an investigation have been in contact with relatives of the deceased and missing persons, he said he was unaware of such contact, adding:

I am also not aware if any family members of the victims have sought any explanation from the police except for the initial report after a killing or disappearance. From the look of things, some could have lost hope in the system, if they would ever know what happened to their loved ones. One thing I am sure, in the event that no family is making follow ups it's because fear has inhibited everybody's conscious. People have been left to just see and hear; but don't ask or talk.<sup>116</sup>

Another lawyer representing the families of individuals who had been killed or were missing said:

The government has not conducted sufficient investigations into the missing and extra-judicially executed “terror suspects.” For me I think the reasons are two. One, according to the families and witnesses, state agents particularly the police are implicated in the disappearances and murders. Two, impunity appears to be acceptable when dealing with “terror suspects.”<sup>117</sup>

## **ATPU Acknowledged Killings**

### ***Killing of Kassim Omollo***

On June 12, 2013, police killed Kassim Omollo in his house in Kisauni Mlaleo. The *Star* reported that Kassim Omollo was “gunned down by officers from the Anti-Terror Police Unit” and that Kisauni Deputy Officer Commanding Police Division (OCPD) Joseph Sanguti “confirmed the incident adding that the ATPU officers trailed Omollo to his home before engaging him in a shootout after he failed to surrender.”<sup>118</sup> But other individuals familiar with the incident described to the Justice Initiative and Muslims for Human Rights what would amount to an extrajudicial killing.

According to one of those interviewed, it was around 3:00 or 4:00 am when police shot at the door to Omollo’s house. He was there with his wife, Fatma Muhammed, and their four young children. Six armed men in soldiers’ uniform with masks told Kassim and Fatma to raise their hands. They then said, “We were sent to kill you,” adding that if the family provided money they might spare Kassim’s life. After Kassim said he had nothing to give but 67,000.00 Kenyan shillings [approximately \$U.S. 800.00] in the cupboard, one of the officers handcuffed Kassim and another officer handcuffed Fatma. After taking the money in the cupboard and Fatma’s jewelry from the room, the officers said they retrieved what they needed and now had no choice but to kill Kassim. They then told Kassim they would rape his wife in front of his eyes before killing him. Kassim objected, but the men proceeded to sexually harass Fatma until they again said to Kassim that they have no choice but to kill him. Kassim then kissed his son and, after he did, the officers pulled the son and his three daughters away from their father. Then, according to an interviewee, they shot a first bullet through Kassim’s chest, and as he was falling down, shot him three times in the head.

Once Kassim was dead, they took his wife, Fatma, to the sitting room and showed her an arrangement of guns, bullets, and other items that they said belonged to her husband. One of the officers took Fatma’s finger and applied ink to her thumb and forced her to press it on a sheet of paper which was, presumably, a forged witness statement attesting to the fact that the guns, bullets, and other items in the house belonged to Kassim. As Kassim’s wife objected to her treatment, the police beat, slapped, and kicked her. Then they brought her downstairs, put her in a vehicle, and drove her to a police

station. From there she was sent to Shimo La Tewa Prison where she was subjected to hard labor, consisting of carrying stones, digging, and mopping. Eventually, she was brought to court, charged, and released on bail.

A relative of Kassim's informed the Justice Initiative and Muslims for Human Rights that as of October 2013 he was unaware of any official investigation into Kassim's death.

### ***Killing of Salim Mohammed Nero***

On the same day that the ATPU gunned down Kassim Omollo the unit also shot dead Salim Mohammed Nero (also known as Suleiman Shauri) in his Mombasa home.<sup>119</sup> The Xinhua News Agency reported that the regional police commander, Aggrey Adoli, said Nero was "gunned down during a shoot-out with Anti-Terrorism Police Unit (ATPU) officers."<sup>120</sup>

Acting Police Spokesman Masoud Mwinyi told the *Star* newspaper of Nero's death, "Our officers are not on a shooting spree. They abide by ethics and law of natural justice.... Suspects are apprehended and subjected to the due process. It's unfortunate that some ended up being gunned down during the operations."<sup>121</sup> But a witness who saw Nero just before he died told Muslims for Human Rights that he saw Nero handcuffed by the police: "I heard some noise from outside our house and I opened the gate and saw [Salim Mohammad Nero] was under arrest and handcuffed."<sup>122</sup> The police brought Nero into the house, then searched the house and brought his family outside while keeping Nero inside. Then, suddenly, the witness heard a gunshot and, upon entering the house, saw Nero lying on the bed.<sup>123</sup> The family members were then taken to Kiembeni Police Station. When they returned home, the family reported, two officers were standing guard and "we saw blood all over the house."<sup>124</sup> A post-mortem evaluation showed that Nero's death was caused by five bullet wounds to his head. Four bullets were fired to the left side of his face and one bullet was fired into his skull.<sup>125</sup> The Justice Initiative and Muslims for Human Rights are unaware of any official investigation into this death.

### ***Killing of Omar Faraj and Titus Nabiswa***

The ATPU shot dead Omar Faraj and another man, Titus Nabiswa, in Mombasa, very early one October morning in 2012.<sup>126</sup> The police said they picked up Nabiswa and he led the ATPU to Faraj.<sup>127</sup> According to the *Times* (U.K.), which conducted interviews with several of Faraj's neighbors and with his wife, Rahma Ali, Faraj, a local butcher, had been shot in the shoulder when the ATPU first entered the house, but he was then "shot in the head as he peered over a neighbor's wall, seeking an escape route."<sup>128</sup> Faraj's relative also told Muslims for Human Rights that Faraj had contacted him on the phone

during the incident and indicated he did not know who was pursuing him, mistaking the ATPU for thugs or armed robbers.

Evidence reported in the *Times* cast doubt on the ATPU's characterization that they used lethal force as a necessary last resort. Neighbors did not recall hearing the security forces making demands during the operation. Faraj and Nabiswa had gunshot wounds to the head. The *Times* reported that the police "described the four-hour night raid as a 'shootout'." However, while the walls of Omar's apartment were scarred by bullet holes, the *Times* said it found "no marks on surrounding houses to suggest that anyone had fired back."<sup>129</sup>

When the ATPU shot Faraj in the head his body fell on top of his wife, and Rahma feigned death. The officers, who thought she was fatally injured, left her for dead. One neighbor, the *Times* reported, overheard the police say, "We don't have to shoot the lady.... She won't take long to die."<sup>130</sup> In making this statement, it is clear that the police failed in their legal duty to provide medical attention to Rahma.

There is no detailed public account of how Nabiswa died. One media story reported that Kenyan authorities said he was killed in a crossfire.<sup>131</sup> Another reported that police "admitted that a key suspect with information on a terrorist cell in Mombasa perished in the gun battle as security forces tried to use him to draw out other militants from a house."<sup>132</sup> According to individuals who saw Nabiswa's dead body, he had a deep head wound on his left temple that resembled a bullet wound. He had another deeply penetrating wound on his lower left neck and other on the top of the left shoulder.<sup>133</sup>

The *Star* reported that a member of parliament demanded a full disclosure of the reasons behind the two killings and accused the government of incitement, saying, "We are tired of this. The government wants to cause havoc in Mombasa."<sup>134</sup> The Justice Initiative and Muslims for Human Rights are unaware of any further investigation into the two men's deaths.

## Unacknowledged Disappearances and Killings

### ***Badru Mramba***

Badru Mramba, an acquaintance of Sheikh Aboud Rogo, was seized at around 7:30 am on November 14, 2012, from his samosa kiosk in Majengo Musa, opposite the Musa Mosque in Mombasa. According to one witness, the men who detained him identified themselves as police. The witness recalled:

Three people came. They removed him and said they were police. They arrested him. They handcuffed him behind the back and put him in a car. They had on casual clothes. They didn't have guns. Badru said "leave me alone." They only said they were the police.<sup>135</sup>

Mramba's capture by the ATPU was confirmed to the Justice Initiative and Muslims for Human Rights by another witness who said he saw Mramba detained and being beaten by the same ATPU officers who conducted the raid on the late Rogo's house.<sup>136</sup> "I knew Badru. I know what he looks like. Badru was taken out of a vehicle near the Provincial Police Station. I saw them beating him physically...There were like eight guys...and it was daylight. Then Badru was taken away."<sup>137</sup>

Mramba's wife, Rehema Lugogo, made numerous inquiries at courts and with the police, including the ATPU, in the Mombasa area, but officials denied ever arresting Mramba:

My husband went missing on Wednesday, November 14, 2012. I looked for him at the Makupa Police Station [near to where he was arrested] and Nyali Police Station [near to where they live]. They said they don't have him.... On Wednesday and Thursday I went to the High Court looking for him but I didn't see him.<sup>138</sup>

Rehema continued her search the following week by going to court and checking the registration board, which should have the names and information of people being held and appearing in court. She said his name was not there. Later that day, she went to the ATPU asking for Mramba. She said that Elijah Rop, the head of the ATPU in Mombasa, denied that Mramba was in his custody. She recalled Rop saying, "I don't know that guy and we didn't arrest anyone in Majengo."<sup>139</sup>

In December, 2012, the United Nations Working Group on Enforced and Involuntary Disappearances issued an urgent appeal communication to the Government of Kenya concerning Mramba's case.<sup>140</sup>

In early April 2013, Rehema spoke to an official at the Criminal Investigation Division (CID) in Mombasa who told her that the CID was under outside pressure to investigate Badru's disappearance, but he did not say where the pressure came from. The CID official assigned Rehema an investigating officer and told her to bring any witnesses that knew about Mramba's disappearance.<sup>141</sup> For Rehema, this was an insufficient response. The police, having denied ever detaining Mramba, had an affirmative duty to investigate his disappearance immediately after the incident came to their attention, not four and half months later. Rehema also complained that the CID officer had told her to bring witnesses. "But that's impossible," Rehema said. She explained, "It's too intimidating for them. They take ID info and the witnesses think it's a trap."<sup>142</sup> Again, a few months later she said, an officer from the Makupa Police Station "called me and asked that I write another statement about my husband's disappearance."<sup>143</sup> At the time of writing, Mramba remains missing and Rehema complained of being harassed by the presence of police vehicles with the markings of Mombasa County Police outside her parents' house, which she has had to move into since she can no longer afford to pay for the house she was living in prior to Badru's disappearance.<sup>144</sup>

### ***Other Allegations of Disappearances***

In addition to Badru Mramba and Mohammad Bekhit Kassim (see below), at least six other men have gone missing from Mombasa under mysterious circumstances. Sylvester Owino Opiyo (also known as Musa Osodo) was taken from his car in May 2012,<sup>145</sup> along with another man, Jacob Musyoka.<sup>146</sup> Neither has been seen or heard from since. Opiyo was previously arrested in March 2012 after a Nairobi bus stop was attacked with grenades, killing nine people.<sup>147</sup> Several factors suggest that he was disappeared by the ATPU, including his previous arrest by the ATPU, the method of his disappearance, and the testimony of a female acquaintance who was with Opiyo just before he disappeared, and who said that Opiyo had recognized an ATPU official—who was apparently following Opiyo—earlier on the day of his disappearance.<sup>148</sup> Police spokesman Eric Kiraithe told reporters that police had no involvement in Opiyo’s disappearance.<sup>149</sup> Opiyo’s lawyer, skeptical of these claims, told reporters, “When the police begin to say we are not holding that person, that is a very dangerous sign. People are never seen again when police say they don’t know where the suspects are.”<sup>150</sup>

In June 2012, Jeremiah Onyango Okumu (also known as Duda Black) and Stephen Mwanzia Osaka (also known as Duda Brown) also went missing in Kisauni, Mombasa. The two men had been accused, along with Opiyo, of participating in the March 2012 grenade attack. Muslim Human Rights Forum reported that at the same time and location, two other men, Omar Shwaib and Salim Abubakar, also “disappeared without trace.”<sup>151</sup> Muslim Human Rights Forum reported that these four disappearances, “were reported to the police but no news about outcomes of any investigations has been given to their kin.”<sup>152</sup> More recently, the defense counsel in the criminal proceedings against Opiyo, Okumu, and Osaka, asked the state to hand over the findings of the abduction investigations. Witnesses had reported two of the abductions, but the government ignored this and responded in court proceedings in May 2013 that all three men had fled justice. At the time of writing, government counsel provided no substantive information about the investigation, saying only that the director of public prosecution recommended that the file on the disappearances remain open pending final investigation.<sup>153</sup>

### ***Killing of Sheikh Ibrahim Omar Rogo***

Sheikh Ibrahim Omar Rogo, also known as Ibrahim Ismael, was killed on October 3, 2013, in Mombasa by unidentified gunmen as he drove in a car with four other men, three of whom also died from gunshot wounds. The names of the other victims were Issa Abdalla, Gadaffi Mohammed, and Omar Abu Rumeisa.<sup>154</sup> Sheikh Ibrahim was viewed by many as the predecessor of Sheikh Aboud Rogo, who also preached at Masjid Musa Mosque and who was shot dead in August 2012 in the same vicinity as Sheikh Ibrahim (see below). Many in the Muslim community and beyond have accused

the government of killing Sheikh Ibrahim, saying it was a way to show the police were responding to the Westgate attack by Al Shabaab that had taken place two weeks earlier. The government has denied any involvement,<sup>155</sup> though it nonetheless has a responsibility to conduct an effective investigation with the purpose of bringing the perpetrator to justice. When Muslims for Human Rights representatives and another human rights activist went to file an official report to the police of Sheikh Ibrahim's death and the other three deaths, a police officer on duty refused to take the complaint. At the time of writing, it was unclear if authorities were carrying out an effective investigation into the four deaths.

### ***Killing of Sheikh Aboud Rogo***

One of the most publicized killings of a terrorist suspect was that of Sheikh Aboud Rogo, who was killed in his car in late August 2012 by unidentified gunmen. Rogo's wife, Hania Said Saggar, who was in the car at the time of her husband's shooting and death, told the Justice Initiative and Muslims for Human Rights that the murder happened at around 11:30 am on August 27, 2012:

My husband was driving and two of my daughters and other relatives were in the van. There were six of us all together. It happened so fast. It sounded like a machine gun. Like a rat-tat-tat. At that time I was looking at my husband. I couldn't understand what was going on. I was shocked. There was a loud bang. Then I realized the loud sound was gunfire. My 16-year old daughter was shot in her left knee. My grandfather was injured in the head and hand from the gunshots. I was sitting behind the driver on the window side.

The gunshots were fired just as we passed the [Bamburi Police Station] gate. My husband looked back at me but kept driving. Then the car pulled over off to the side of the road and my husband slowly fell sideways. And it was over.

Rogo—whose house was the subject of the November 13, 2012, raid documented above—was on U.S. and UN terrorist sanction lists and facing criminal charges for terrorism-related activities at the time of his murder. He had also been charged and acquitted of crimes relating to a 2002 hotel bombing in Kenya.<sup>156</sup> These circumstances, along with Rogo's escape from an attempted abduction in Nairobi in July 2011—carried out by individuals that Rogo and a friend, Abubakar Shariff Ahmed, identified as police—raised strong suspicion that the Kenyan government had a hand in his murder, something authorities deny.<sup>157</sup>

Rogo's murder occurred in broad daylight when his van—which he was driving filled with family members—was riddled with bullets as he passed by the Bamburi Police Station in Mombasa. No culprits were identified and government officials have denied involvement, but many suspected the government killed Rogo. Human Rights Watch reported in a press release:

Rogo had complained of police threats before his death and requested protection. On July 24, Rogo had reported to the police, the Kenyan National Commission on Human Rights, and the court in which he was being tried for recruiting for al-Shabaab, that unknown assailants had attempted to abduct him and his co-accused Abubakar [Shariff] Ahmed when they arrived in Nairobi for the court hearing. He swore an affidavit that men in civilian clothes who claimed to be police officers tried to force the two men into an unmarked car. He said that he and Ahmed had challenged the men to produce identification and that passers-by helped the two men resist being forced into the car.<sup>158</sup>

Human Rights Watch also reported that Mbugua Mureithi, Rogo's lawyer, said Rogo frequently expressed concern about being followed by police and spoke of threats from known police agents who he said told him that, "The state will find a way of dealing with you."<sup>159</sup> Other suspects' reports (discussed above) of being threatened with the same fate as Rogo and Khan support the allegations of ATPU involvement.

Rogo's murder proved a tipping point in the rising tensions between Kenyan anti-terrorism security forces and members of the Muslim community in the coastal region. Protests and riots erupted in Mombasa, with rioters killing a man near a mosque; two hand grenades were thrown at police, killing at least five officers and injuring several others.<sup>160</sup> People also set fire to three churches and there was heavy looting. Protestors threw stones at riot police and security forces fired back with tear gas. According to media reports and civil society groups, some of the protestors were Rogo supporters; some were poor, unemployed youths angry at their government; others simply took advantage of the chaos to loot stores for personal gain.<sup>161</sup>

The public outcry over Rogo's death, as well as the riots, produced a reaction from the Kenyan government that contrasts with the government's usual unresponsiveness to the murders of suspected terrorists. The public prosecutor's office established a task force to augment a police investigation team sent from Nairobi.<sup>162</sup> This task force included representatives from the Office of the Director of Public Prosecutions, the police, the Law Society of Kenya, the Commission on Administrative Justice, Kenya National Commission on Human Rights, and the Independent Policing Oversight Authority.<sup>163</sup> The task force began its work on September 4, 2012,<sup>164</sup> reported to the director of public prosecutions, had oversight of the criminal investigation into Rogo's murder, and had the authority to gather additional information.<sup>165</sup> It also had jurisdiction over the other riot-related violence.<sup>166</sup> But the media reported in November that the task force's work had stalled after "representatives from the law society resigned citing frustration," explaining that they resigned in "what they termed as lack of will from the government to resolve the murder."<sup>167</sup>

Rogo's wife could not identify the shooters but she holds the government responsible either because it killed Rogo or it failed to identify the shooter or shooters. In mid-November 2012, she told the Justice Initiative and Muslims for Human Rights:

Investigators came to ask me questions. The investigation is zero work...Two females arrived to my home to interview me. I've received no feedback on the investigation....I expect nothing from this investigation. My husband wasn't the first person this kind of thing happened to.<sup>168</sup>

Finally, in August 2013, the task force submitted its report to the director of public prosecution. The task force conducted several interviews but was ultimately unable to determine the identity of Rogo's killer. The task force also chastised the police for conducting an incomplete investigation. It was critical of the police for sending investigators from Nairobi rather than deploying officers on the ground and for not giving clear command over the investigation.<sup>169</sup> The task force also said the investigating team sent from Nairobi was "inadequately constituted to handle the sensitive investigation" and "no statements of any civilian witnesses had been recorded more than a week after the incident."<sup>170</sup> In its recommendations, the task force instructed the Office of the Director of Public Prosecutions to lead a public inquest and to provide proper security assurances to potential witnesses.<sup>171</sup> It was unclear at the time of writing whether such an inquest would provide for a robust and effective investigation.

### ***Killing of Samir Hashim Khan***

Muslim preacher Samir Hashim Khan and his colleague Mohammad Bekhit Kassim, who is blind, were pulled from a public bus in Mombasa in April 2012 by men who, according to Khan's lawyer Mbugua Mureithi, stopped the bus and identified themselves as police officers.<sup>172</sup> According to Human Rights Watch, "Khan's body was found, badly mutilated, a few days later in Tsavo National Park. Kassim's whereabouts remain unknown."<sup>173</sup> The police have denied involvement, but Kassim had previously been abducted in 2011 outside Nairobi's Jamia Mosque. He was questioned and later dropped in the suburbs of Nairobi. His abductors warned that they would come back for Kassim.<sup>174</sup> Human Rights Watch reported, "Police briefed journalists at the time, saying he had been arrested by the Anti-Terror Police Unit, but they later denied arresting him."<sup>175</sup> The ATPU had also arrested Khan in 2010 on weapons charges and again in 2011 for being a member of Al Shabaab.<sup>176</sup> The cases against him were pending at the time of his second abduction and murder.

## **Renditions and Transfers to Torture: Uganda, Somalia, and United States**

The ATPU's record of abuse includes unlawful renditions and transferring terrorist suspects to other governments where they faced a real risk of torture. These violations were on clear display in the aftermath of the July 10, 2010, bombing in Kampala, Uganda,

which killed over 70 people and injured at least 70 others who were watching the final game of the soccer World Cup on television. In the months following that attack, the ATPU seized suspects of the bombing, arbitrarily detained them, and unlawfully rendered them to Uganda, despite the risk they would be tortured there. Two of the rendered suspects spent a year in jail in Uganda before being released—without charge.<sup>177</sup>

## **World Cup Bombing Renditions, 2010**

According to an ATPU officer's sworn affidavits, on the evening of July 23, 2010, the ATPU detained three Kenyan men—Idris Magondu, Mohammed Ahmed Abdow, and Hussein Hassan Agade—as suspects in the World Cup bombing and rendered them to Uganda on July 27, 2010, "to assist the Uganda authorities with their investigations."<sup>178</sup> The ATPU did the same to Mohammed Hamid Suleiman on August 14, 2010, and Yahya Suleiman Mbutia on August 26, 2010, for the same purpose.<sup>179</sup> Two other men, Habib Suleiman Njoroge and Omar Awadh Omar, also claim that the ATPU rendered them to Uganda in August and September 2010 respectively, although authorities denied this.<sup>180</sup> The ATPU also rendered two Ugandan nationals—Isa Ahmed Luyima and Batematyo Abubakar—from Kenya to Uganda.<sup>181</sup>

The suspects' affidavits provide strong indications that both the head of the ATPU at the time, Nicholas Kamwende, and his deputy Boniface Mwaniki (who is now head of the ATPU) were aware that the renditions were taking place. Idris Magondu was, according to his affidavit, working as a driver in Nairobi when, on July 23, 2010, unidentified men broke into his house in Nairobi's Kawangware neighborhood and took him to Uganda, where he remains today, facing criminal charges in relation to the July 11, 2010, World Cup bombing.<sup>182</sup> Magondu provided an account of his arrest and rendition in a court affidavit that was similar to those of other defendants. He said that at around midnight, when he was with his wife and four month old baby, police burst into the house without showing an arrest warrant and forced him and his wife to lie on the floor as the men searched the house.<sup>183</sup>

The men took Magondu to the Inland Container Depot Police Station in Nairobi, and then to the headquarters of the ATPU.<sup>184</sup> His affidavit states that he was denied water, access to his next of kin, and access to a lawyer, despite asking for one.<sup>185</sup> He was then taken from one police station to another, frequently returning to the ATPU headquarters.<sup>186</sup> Other rendition victims were also held incommunicado in Kenya, sometimes in undisclosed locations, without being allowed contact with their family or a lawyer—an allegation that Kenyan authorities disputed.<sup>187</sup> Several rendition victims said that, during their interrogations, Kenyan officials threatened them with death and physically abused them. (Discussed further in the section on Other ATPU Raids and Detainee Abuse.) Magondu said that, following his detention in Kenya, ATPU officers drove him

to the town of Malaba, on the Kenya-Uganda border.<sup>188</sup> There, the officers handed him over to Ugandan authorities without his ever having appeared before a court.<sup>189</sup>

Rendition victims' affidavits state that Kenyan authorities sent them to Uganda knowing they would likely face torture. Mohammed Hamid Suleiman, who was severely beaten at the ATPU headquarters, said that Kenyan authorities told him he would be handed over to Uganda to be tortured, shot, and killed.<sup>190</sup> Idris Magondu similarly stated under oath that, "The ATPU officers threatened to hand me over to the Ugandan Army who would subsequently torture, shoot and kill me and they also told me that I would never see my family again and that they would kill members of my family."<sup>191</sup>

In September 2010, two Kenyan justices separately ruled that two World Cup bombing-related renditions were unconstitutional, reaffirming that the rule of law should not bend to national security and terrorist threats. One of the petitioners was Mohammed Hamid Suleiman who, through his wife, asked a court on August 16, 2010, to order the commissioner of police and the commandant of the ATPU to explain why Suleiman was arrested and why he should not be released. After hearing the facts of the case on August 18, 2010—four days after Kenyan authorities rendered Suleiman to Uganda without ever bringing him to court in accordance with Kenya's extradition procedures—High Court Justice Aggrey Muchelule condemned the rendition, stating:

Whether one is a terror suspect or an ordinary suspect, he is not exempted from the ordinary protection of the law...Police must have the capacity to battle terrorism and enforce human rights at the same time as the two are not, and should not, be incompatible.<sup>192</sup>

High Court Justice Mohammed Warsame, who heard the second petitioner, a World Cup bombing suspect named Mohammed Aktar Kana, prior to his rendition to Uganda made similar statements in his September 28, 2010, ruling. The court blocked the attempted rendition until a hearing could take place. In his ruling, which he handed down soon after Kenya's new constitution ushered in a new bill of rights, Justice Warsame stated:

The significant issue which we must not lose sight of is that the new constitution has enshrined the bill of rights of all citizens and to say one group cannot enjoy the right[s] enshrined under [the] bill of rights is to perpetuate a fundamental breach of the constitution and to legalize impunity at [a] very young age of our constitution. That kind of behavior, act or omission is likely to have far and serious ramification[s] on the citizens of this country and the rulers.<sup>193</sup>

Both rulings demonstrated the critical role that an independent judiciary can play in ensuring that Kenya's security forces do not violate human rights and undermine the rule of law. But these court decisions did not solve all the problems. Ismail Abubakr

was reportedly rendered twice from Kenya to Uganda, the first time as a suspect in the World Cup bombing.<sup>194</sup> Ugandan authorities released him on November 30, 2010.<sup>195</sup> But in February 2011—after the judges had condemned the renditions—the ATPU rendered him from Kenya to Uganda again.<sup>196</sup> He was released from Ugandan custody in mid-July 2011.<sup>197</sup>

## **Renditions to Somalia and United States Custody, 2007**

In 2007, Kenya rendered to Somalia at least 85 people, who were then rendered to Ethiopia.<sup>198</sup> Applicants who sought damages from a Kenya High Court claimed that Kenyan authorities arbitrarily detained them without bringing them before a court within 24 hours of their detention and denied them a hearing or access to extradition and/or deportation procedures, all of which are required by Kenyan domestic law. They also claimed to have been subjected to torture and other ill-treatment in Kenya, Somalia, and Ethiopia.<sup>199</sup> In those legal proceedings the (now former) head of the ATPU, Nicholas Kamwende, said he was involved in the operation and that it was conducted on national security grounds, but he did not admit to committing abuse.<sup>200</sup> However, in response to the government's contention that it was constitutionally entitled to "arrest, hold the petitioners and issue the declaration and deportation orders for reasons of national security," the court held that "as this court has found in several cases, reasons of national security cannot be a basis for violating the constitutional rights of any person..."<sup>201</sup>

According to Human Rights Watch:

Over the course of three weeks—on January 20, January 27, and February 10, 2007—Kenyan officials secretly—without notifying relatives or lawyers—flew at least 85 people, including 19 women and 15 children, from Kenya to Somalia.

When the planes arrived in Mogadishu and Baidoa [Somalia], Kenyan authorities handed the detainees over to Ethiopian military forces. As one detainee described the scene in Mogadishu: "The plane was surrounded by Ethiopian military when we got off. We were brought to an open area near the plane and blindfolded. Two soldiers grabbed me and yelled at me: 'You are a terrorist. We will kill you. We will sell you.' Then they took me to a so dusty room in the airport with the others where we spent two nights."

Some were flown to Addis Ababa within days, where they were held in various detention facilities. Other detainees reported being driven from Mogadishu to Baidoa, where they were held for months without charge, and interrogated and tortured by men in Ethiopian military uniforms. From there, Ethiopian authorities transported them to a military detention facility in Awassa, Ethiopia, and finally on to another military detention facility in Ambo, Ethiopia, where the torture reportedly continued.<sup>202</sup>

Also in February 2007, Kenyan police arrested Mohammed Abdulmalik, a Kenyan national, in Mombasa.<sup>203</sup> The ATPU detained him for two weeks, during which

time officials allegedly beat and interrogated him about a plan to attack a well-known running race.<sup>204</sup> Kenyan authorities then drove him to the Nairobi airport and handed him to U.S. personnel who rendered him to Djibouti.<sup>205</sup> There, he was detained in a shipping container on a U.S. military base, then rendered to Afghanistan where he was held in various facilities, before being moved to Guantánamo Bay, where he remains imprisoned.<sup>206</sup>

Speaking on the issue of renditions in October 2010, and in doing so implicitly admitting that the department had illegally rendered suspects, Kenya's police spokesman commented to a regional newspaper: "Nobody complains when it is about a car thief, but when it comes to Al Qaeda, some people would like us to believe that they are more equal than other criminals and therefore we must follow the extradition procedure."<sup>207</sup>

## CHAPTER 3

# Impact of ATPU Abuses on the Community

The ATPU abuses documented in this report are unlawful and an affront to the commitment to greater respect for human rights and police reform articulated in Kenya's new constitution. In addition, these abuses undermine the aims of an effective counterterrorism policy. Violent extremists can use human rights violations as a recruitment tool and can use them to claim a justification for the violence of terrorism. Moreover, counterterrorism-related abuses erode community trust in government. A relative of Kassim Omollo, the man killed by the ATPU in June 2013, explained, "[The government] becomes unpopular killing people. Even boys who want to surrender don't feel safe to come out and do so. We need rehabilitation, but instead they are killing them. This thing [terrorism] must end to bring the country to peace...the community has to be part of the solution."<sup>208</sup>

The impact of ATPU abuses in Kenya demonstrates that the unit's counterterrorism strategy is deeply flawed and is hampering, not helping, the fight against terrorism. The tension between many in the Muslim community and Kenyan law enforcement has been on the rise. In May 2012, after Samir Khan's murder and Mohammad Kassim's disappearance people in Mombasa staged protests against the police. The *Star* reported:

The youth demanded answers to the many questions surrounding the death of Khan whose body was found in a forest in Voi last month. They carried placards demanding the disbandment of the Anti-Terror Police Unit."<sup>209</sup>

Then, in August 2012, Mombasa erupted in riots after Sheikh Aboud Rogo's murder. Five police officers and at least one civilian were killed in the violence, three

churches were burned, and widespread looting terrorized residents and business owners. As tensions mounted further, rioters threw stones at riot police who returned fire with tear gas. Al-Amin Kimathi, a human rights activist who strongly condemned the rioting, put the riots in context, saying:

Rogo's death was the immediate event that sparked the riots. But there were also demonstrations—though not bloody—when Samir Khan's body was found. So there has been a build-up leading to the riots. The rioters were saying "enough is enough." The disappearances and killings, taken together, led to the riots.<sup>210</sup>

When the ATPU killed Omar Faraj in October 2012, tensions mounted again, with community and political leaders criticizing the government. The *Star* reported that "Muslim leaders and relatives who spoke to the press condemned the incident" and reported that "the Forum for Muslim Unity interim chairman Salim Jaffer Salim said that the Muslim community will not take lightly the manner in which police were dealing with the suspects."<sup>211</sup> The *Star* also reported that a member of parliament demanded a full disclosure of the reasons behind the killing and accused the government of incitement, quoting "We are tired of this. The government wants to cause havoc in Mombasa."<sup>212</sup> Riots did not ensue, but Omar Faraj's killing was yet another incident that intensified the distrust that many in the Muslim community in Mombasa already had of the ATPU.

Rioting broke out once more in the city in early October 2013, after the shooting of Sheikh Ibrahim Omar Rogo. Ibrahim was killed by unidentified gunmen as he drove in a car with four other men, three of whom also died from gunshot wounds. Four additional men died from gunshots during the riots and there were reports that several others suffered non-fatal gunshot wounds, in what appeared to have been an excessive use of force by the police. During the riot, people set fire to a Salvation Army Church in Majengo and blocked a main road.<sup>213</sup>

Several individuals released after being detained by the ATPU reflected on their time in detention and said they were being tracked or monitored after their release, and that officers had their pictures. Most feared for their lives and some had been unable to return to their jobs or get a new job. One man's brother had been visited by officers. Another man said, "I have no rights. It's like I'm not a human." Another stated:

What type of life do they want us to live? They keep coming for us. They portray us as dangerous. No one wants to sit in our home. We are alone here.... The perception of the community is that this is a no go zone.

A relative of a man who had been released said the extended family feared their phones might be tapped. A woman who witnessed the November 9, 2012, joint ATPU-GSU raid said she'd begun sleeping elsewhere because she was afraid of another raid on the house.<sup>214</sup> At a meeting in May 2012, civil society groups told the Justice Initiative and Muslims for Human Rights that the types of abuses documented in this report had seriously damaged the ATPU's credibility amongst Kenya's Muslim communities. Several attendees at the meeting described the ATPU as a secretive unit that purposefully intimidates specific communities rather than providing real security.<sup>215</sup>

The ATPU's abuses damage the credibility of the government generally. The lawyer of those detained in November 2012, explained, "We have a new constitution and if we leave these types of practices unchallenged, the new constitution will not move forward... They are playing games with the constitution and it sets bad precedent."<sup>216</sup> Hassan Omar Hassan, Mombasa senator and a former commissioner of the Kenya National Commission on Human Rights (KNCHR), reflected, "The [Kenyan] government is looking for what's convenient rather than upholding the rule of law. The public is so fearful of the terrorism threat and is [so] prejudicial towards certain communities [that] it became acceptable for the government to do what public opinion allows."<sup>217</sup>



## CHAPTER 4

# Police Reform and the Legal Framework for Counterterrorism Policing

Kenya's pre- and post-election violence in 2007 and 2008, which resulted in approximately 1,200 violent deaths, many at the hands of the police or due to police inaction, made it obvious that the police failed to protect and serve Kenyans.<sup>218</sup> Following this violence, Kenyans adopted a new constitution and passed new legislation that provided improved human rights guarantees and new mechanisms aimed at reforming the police. The most important of these measures, for purposes of this report, were the new constitution's bill of rights;<sup>219</sup> the National Police Service Act (2011);<sup>220</sup> the Independent Policing Oversight Act (2011),<sup>221</sup> and the formation of the National Police Service Commission.<sup>222</sup> Combined, these reforms increased the potential for internal police accountability, independent oversight, and police vetting procedures. They placed limits on the use of force, use of firearms, and on the powers of arrest and detention. Importantly, in an attempt to end rampant impunity, the new legislation established an Internal Affairs Unit<sup>223</sup> and, separately, an Independent Policing Oversight Authority (IPOA) charged with investigating police crimes and misconduct.<sup>224</sup> The ATPU, which sits within the Kenya Police, is subject to the National Police Service Act and the scrutiny of these new police reforms and oversight mechanisms.

# International, Regional, and Domestic Human Rights Protections

Article 2(6) of Kenya's Constitution states that, "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."<sup>225</sup> With respect to the most relevant human rights treaties to this report, Kenya is a State Party to the African Charter of Human and Peoples' Rights (ACHPR);<sup>226</sup> International Covenant on Civil and Political Rights (ICCPR);<sup>227</sup> Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (CAT);<sup>228</sup> Convention on the Rights of the Child (CRC),<sup>229</sup> and the Rome Statute of the International Criminal Court. Collectively, these treaties prohibit extrajudicial killings; excessive use of force; torture and other forms of ill-treatment; disappearances; arbitrary detention, including renditions; and transferring detainees to another country where there is a real risk of torture. Kenya has also signed, but not ratified, the Convention for the Protection of All Persons from Enforced Disappearance (CED) in 2007.<sup>230</sup> The CED defines the term "enforced disappearance" as:

The arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>231</sup>

This form of secret detention is especially pernicious because it often sets the stage for other unlawful treatment, such as torture or extrajudicial executions.<sup>232</sup> The CED prohibits enforced disappearance in all circumstances, including war and other states of emergency.<sup>233</sup> Kenya, though only a signatory to the CED, must, in accordance with the Vienna Convention on the Law of Treaties, refrain from acts which would defeat the object and purpose of the CED.<sup>234</sup>

International and regional human rights law require Kenya to provide effective remedies and, in the words of the ACHPR, "adopt legislative or other measures to give effect to" the charter's rights.<sup>235</sup> Fulfilling this obligation may include the criminalization of human rights abuses, having in place procedures for investigations, holding perpetrators of human rights abuses accountable, and providing reparations to the victims. The African Commission on Human and Peoples' Rights has also determined that an "effective remedy" must be "available, effective and sufficient."<sup>236</sup> In *Dawda Jawara v. The Gambia*, the commission stated that a "remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect

of success, and it is found sufficient if it is capable of redressing the complaint.”<sup>237</sup> The obligation to provide an effective remedy pertains equally to instances where a state authority commits a human rights violation and instances where a private individual commits an act prohibited by international or regional human rights law.<sup>238</sup>

In addition to the constitution’s references to international and regional treaty law, the constitution contains a bill of rights that prohibits torture and cruel, inhuman or degrading treatment or punishment<sup>239</sup> and provides the right to a fair trial and *habeas corpus*.<sup>240</sup> These three rights are non-derogable.<sup>241</sup> The bill of rights also prohibits the arbitrary deprivation of life and liberty,<sup>242</sup> provides rights to detained persons, and spells out the components of a right to a fair and public hearing. These include, *inter alia*, being promptly informed of the reason for arrest; the right to remain silent; communicating with an advocate; not being compelled to make a confession or admission that could be used as evidence against yourself; being brought before a court no later than 24 hours after arrest; being charged or informed of the reason for detention at the first court appearance; being presumed innocent until proven otherwise; given adequate time and facilities to prepare a defense; to adduce and challenge evidence at trial; and the right to appeal.<sup>243</sup> Kenya’s constitution also makes it “a fundamental duty of the State and every organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.”<sup>244</sup> Furthermore, the constitution grants “every person...the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”<sup>245</sup>

## **National Police Service Act**

The National Police Service Act, signed into law in 2011, further buttresses many of Kenya’s constitutional rights. The act makes it a crime and disciplinary offense for police officers to subject people to torture or cruel, inhuman, or degrading treatment or punishment.<sup>246</sup> The act also makes it a disciplinary offense for a police officer to “unlawfully strike, or use or threaten violence against any police officer or any other person.”<sup>247</sup> In its rules on arrest and detention, the act grants the right for a detained individual to access “doctors and general medical assistance when required” and allows detainees to lodge complaints of ill-treatment.<sup>248</sup> Kenyan constitutional and statutory law also protects against torture, as well as arbitrary detention, including disappearances, by requiring that all detainees be logged, held in designated detention facilities, brought to court no later than 24 hours after being arrested, and have the right to *habeas corpus*.<sup>249</sup>

With respect to the right to life and use of force more generally, the National Police Service Act provides rules which state, in part:

A police officer shall attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result... The force used shall be proportionate to the objective to be achieved, the seriousness of the offense, and the resistance of the person against whom it is used, and only to the extent necessary....<sup>250</sup>

The National Police Service Act also states that officers intending to use firearms must, generally, identify themselves and give clear warning of their intention to use firearms.<sup>251</sup> The act notes that superior officials should “do everything in their power to prevent unlawful use of force or firearms,” and that following the orders of a superior is no excuse for the unlawful use of force.<sup>252</sup> When the use of force results in injuries, the act instructs police to “provide medical assistance immediately and unless there are good reasons, failing to do so shall be a criminal offence.”<sup>253</sup> The act also requires police to notify relatives or close friends of the injured persons.<sup>254</sup>

These rules are largely in keeping with international standards on the use of force. The United Nations Code of Conduct for Law Enforcement Officials (1979)<sup>255</sup> instructs, for example, that law enforcement officers may use force and firearms only if other means remain ineffective.<sup>256</sup> Article 5 of the UN’s Basic Principles on the Use of Force and Firearms by Law Enforcement Officials explains, “whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall...exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved.”<sup>257</sup> The Code of Conduct for Police Officials adopted by the Southern African Regional Police Chiefs Cooperation Organisation in 2001 states, “Police officials may only use force when strictly necessary and to the extent required for the performance of their duties adhering to national legislation and practices.”<sup>258</sup> Article 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.<sup>259</sup>

Kenya’s National Police Service Act similarly states that firearms may be used only for “saving or protecting the life of the officer or other person; and in self-defense or in defense of other person against imminent threat of life or serious injury.”<sup>260</sup>

## **Independent Policing Oversight Authority, Internal Affairs Unit, and National Police Service Commission**

The Independent Policing Oversight Act of 2011, established the Independent Policing Oversight Authority (IPOA) as another face of Kenya’s police reform. The objective of IPOA is to “hold the Police accountable to the public in the performance of their functions;” give effect to the responsibility of the police to be professional, disciplined, and to carry out their duties with transparency and accountability; and to “ensure independent oversight of the handling of complaints by the [Police] Service.”<sup>261</sup> To achieve these objectives, IPOA has wide authority to, *inter alia*, investigate complaints against the police, monitor and investigate policing operations, and to inspect police premises, including detention facilities.<sup>262</sup> It is also permitted to make prosecutorial and disciplinary recommendations and “present any information it deems appropriate to an inquest conducted by a court of law.”<sup>263</sup> To help ensure its function, police are required to report police-caused deaths or serious injuries to IPOA and to provide IPOA all relevant evidence and facts related to the incident.<sup>264</sup>

IPOA’s mandate requires it to investigate any death or serious injury caused by police while on duty.<sup>265</sup> It may also initiate an investigation into the police based on the receipt of complaints from members of the public or on its own motion.<sup>266</sup> The police must provide all documents or other materials relevant to IPOA authorities, and IPOA may search and seize police premises or other relevant locations, summon individuals, and take statements under oath.<sup>267</sup>

Separate from IPOA, the National Police Service Act established the Internal Affairs Unit within the police force to receive and investigate complaints against the police, promote discipline and good order, and keep a record of the facts of all complaints and investigations. It may also make disciplinary recommendations against a police officer.<sup>268</sup> The Independent Policing Oversight Authority may take over an ongoing investigation by internal affairs if the investigation is “inordinately delayed or manifestly unreasonable.”<sup>269</sup>

The constitution also established the National Police Service Commission (NPSC).<sup>270</sup> The NPSC is a vetting mechanism with the powers to recruit and appoint police officials, confirm appointments, and determine promotions and transfers within the police.<sup>271</sup> The NPSC also has the authority to “exercise disciplinary control over and remove persons holding or acting in offices within the [Police] Service.”<sup>272</sup>

## **Protections against Rendition and Non-Refoulement**

Outside the realm of policing laws and reforms, Kenya’s 1968 Extradition Act sets out legal procedures for transferring individuals to another country, which includes the requirements to issue an arrest warrant and bring the detainee to a court prior to extra-

dition.<sup>273</sup> East African government officials have admitted to using renditions—defined as the transfer of a suspect or fugitive from the custody of one state to the custody of another state without following the legal process—against suspected terrorists as a way to circumvent due process guarantees that they believe can slow down and damage an investigation.<sup>274</sup> In other cases, states have turned to renditions because they do not have extradition agreements in place. The High Court (Nairobi) has handed down at least three decisions reprimanding the ATPU for conducting and attempting to conduct renditions of individuals outside the due process guarantees set forth in Kenya’s constitution and the 1968 Extradition Act.<sup>275</sup> In one of those cases the court blocked a rendition before it occurred and in another case the court awarded damages to eleven victims rendered to Somalia in amounts ranging from 2,000,000 to 4,000,000 Kenyan Shillings (approximately US \$22,800.00 to 45,500.00).<sup>276</sup> At the time of writing, it appeared that the government would appeal the decision.

Rendition is usually done quickly and quietly, and has become a hallmark of counterterrorism operations in many countries. In rendering a suspect, the sending state removes an individual’s right to effectively challenge his or her deprivation of liberty or the reasons for the transfer. This technique, which is a form of arbitrary detention, leaves the governments involved unaccountable and the detainees susceptible to a variety of human rights abuses, such as torture, enforced disappearance, incommunicado detention, and unfair trials. Rendition, because it lacks a legal process, also removes an individual’s right to raise concerns, prior to transfer, that he or she might face a real risk of torture by the receiving state. When this risk exists, international law prohibits such transfers from taking place under the legal principle known as *non-refoulement*. Article 3 of the CAT instructs states not to “expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>277</sup> The ICCPR, too, implicitly prohibits the transfer of an individual to another country in the face of a real risk of torture.<sup>278</sup> The Committee Against Torture has specifically held that suspects have an absolute right to “an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation” of torture.<sup>279</sup>

## Gaps in Law and Implementation

Despite improvements in Kenya’s domestic legislation in recent years, legal gaps remain. The police reform process has also suffered from slow progress and, at the time of writing, there were proposed amendments to the National Police Service Act and National Police Service Commission Act that, if implemented, would erode important human rights gains. All three of these factors—gaps, delays, and potential erosions—

make police reform an uphill battle and contribute to the ATPU's ability to operate outside the law.

## Legal Gaps

In 2013, the UN Committee Against Torture criticized Kenya for its failure to adequately provide legal protections against torture and other human rights abuses.<sup>280</sup> Many of these gaps were highlighted both in its “Concluding Observations” report and in a 2013 joint report by five Kenyan civil society groups, titled “State of Torture and Related Human Rights Violations in Kenya.”<sup>281</sup> The civil society report pointed out that Kenyan domestic law does not contain a definition of torture, “nor do they establish any means of attaining a remedy leaving it as a bald statement with no practical application.”<sup>282</sup> The committee agreed.<sup>283</sup> The 2013 civil society report also recommended that Kenya should “amend national laws so that any deportation, extradition, rendition, expulsion, [or] return where an individual would appear at risk of torture or other ill-treatment is legally prohibited,” a point with which the committee again agreed.<sup>284</sup> An additional gap in the law is that enforced disappearance is neither defined nor criminalized. As noted below, another problem is that Kenya’s Prevention of Terrorism Act of 2012 places no limits on the types of evidence—including evidence obtained by torture—that investigators can use to designate terrorist groups. In 2012, in response to a different report by the UN Committee Against Torture, Kenya recognized there were “gaps existing in the Penal Code, Evidence Act and Criminal Procedure Code” and said it would address this problem by passing the Prevention of Torture Bill, 2011, into law.<sup>285</sup> That bill had not, however, been signed into law at the time of writing, something that the committee chastised Kenya for in its 2013 review.<sup>286</sup> Based on all these gaps and legal deficiencies, passing stronger anti-torture legislation, ratifying the International Convention for the Protection of All Persons from Enforced Disappearance, strengthening non-refoulement protections, amending or repealing the Prevention of Terrorism Act, ratifying the optional protocols to the Convention Against Torture and the International Covenant on Civil and Political Rights, and declaring that Kenya recognizes the competence of the Committee Against Torture would significantly contribute to protecting individuals from ATPU abuses.<sup>287</sup>

## Slow Progress

Numerous delays in the police reform process have hampered Kenya’s human rights reforms and have therefore prevented the police from becoming less corrupt, more professional and accountable, better managed, and more respectful of human rights. After more than a year of waiting, the IGP, NPSC, and IPOA were in place, but the slowness of the reforms calls into question whether the political will exists to institute

the reforms. Amnesty International reported that many police institutions did not start to follow the new policing legislation—including new restrictions which limit the use of force and firearms, regulate arrest and detention, and enhance internal accountability and reporting obligations to IPOA—until after the IGP was appointed in December 2012. A 2013 report by Kenyan civil society groups similarly noted:

There was a cautious approach in the implementation of police reforms where the pace slowed down as Kenya approached its general elections in 2013. The vetting of Police Officers which is critical to the reforms agenda has been relegated as a non-priority...[because of internal fears] with regard to the approach the vetting should take. Complementary organs such as the National Police Service Commission and the Police Oversight Authority are in place but are faced with inadequate financial resources.<sup>288</sup>

The IPOA, in its December 2012 inaugural performance report, noted “there was no visible concerted or comprehensive effort to educate all police officers on the new arrangements and obligations under the Constitution of Kenya (2010) and National Police Service Act.”<sup>289</sup> It also advised, “there is urgent need to create awareness on reforms amongst all police officers. The NPSC needs to urgently carry out a needs assessment as regards welfare matters of the police while the Inspector General should undertake a structured reforms awareness programme within the NPS.”<sup>290</sup> The report lamented a lack of investigative staff, lack of sufficient internal capacity, and lengthy government procurement procedures.<sup>291</sup> The IPOA was invited to participate in three investigatory task forces, including the Sheikh Aboud Rogo task force, but according to its own internal report, IPOA “did not meaningfully participate in the investigations due to lack of internal investigative capacity and also had no control over the entire investigation process.”<sup>292</sup> Since the December, 2012, report, the authority has become increasingly active. It has opened an investigation into the alleged shooting of a woman by police in Mathare during an operation to arrest drug traffickers on July 15, 2013,<sup>293</sup> condemned “excessive use of force by the police” against members of civil society on May 14, 2013 and announced it would “investigate the circumstances surrounding the events,” and that “an opportunity [would] be given to the officers responsible to explain their actions;”<sup>294</sup> and announced it would investigate the killing of two civilians in Kisumu during riots in March 2013.<sup>295</sup> The IPOA has also initiated public awareness activities and issued a report, “Baseline Survey on National Policing Standards and Gaps,” that polled over 5,000 households in 36 counties and interviewed over 500 police officers between January and March 2013 and found that “33% of Kenyans interviewed have experienced a form of police malpractice in the past year. The cases range from assault, brutality, falsification of evidence, bribery and threat of imprisonment.”<sup>296</sup>

## Threats to Progress

As noted above, the National Police Service Act contains (in Schedule Six) important provisions on the use of lethal force, such as permitting the use of firearms only for “saving or protecting the life of the officer or other person; and in self-defense or in defense of other person against imminent threat of life or serious injury.”<sup>297</sup> To implement this and other new rules, the police must reform their old operational orders, often called Force Standing Orders, to ensure the police have the instructions necessary for how to implement the new National Police Service Act. In recognition of this, Kenya’s Truth, Justice and Reconciliation Commission (TJRC) recommended in a 2013 report:

[T]he rapid, effective and transparent implementation of the proposed police reforms, including the introduction of new standard operating procedures on the use of force based on international standards. In particular, Force Standing Order 51, which allows the use of lethal force to protect property, should be repealed.<sup>298</sup>

At the time of writing, however, a new bill was released that, if passed, would effectively reject the TJRC’s recommendation and overturn that act’s Schedule Six rules on the use of firearms. The new bill would expand the use of firearms to the protection of property, preventing a person charged with a felony from escaping custody, and preventing a person who attempts to rescue, or rescues, a person charged with a felony escape from custody.<sup>299</sup> This language would enable the police to carry out the types of killing that the police reforms were intended to end. Instead of curbing unnecessary police shootings, it would expand the use of lethal force to situations where no individual’s life is at risk. The bill also would permit the IGP to make regulations pertaining to the use of firearms or security equipment of foreign police services in Kenya.<sup>300</sup> This too would be an erosion of human rights progress if the IGP uses the provision to put in place use of force regulations for foreigners that are less strict than what is in place for the Kenyan police.<sup>301</sup>



## CHAPTER 5

# Prevention of Terrorism Act, 2012—A Human Rights Analysis

In October 2012, Kenya's former president, Mwai Kibaki, signed into law the Prevention of Terrorism Act in an attempt to strengthen counterterrorism powers in the country. The text of the law can be found online at: <http://www.kenyalaw.org:8181/exist/kenya-alex/actview.xql?actid=No.%2030%20of%202012>.

The legislation criminalized certain activities and allowed the government to sanction individuals and groups it labeled terrorist entities. It also quelled criticism from the United States and other foreign governments who had repeatedly pressured Kenya to pass anti-terrorism legislation.<sup>302</sup> The passed legislation, however, joined many other counterterrorism laws passed since September 11, 2001, that contained overly vague definitions of terrorism, created terrorist blacklists with inadequate due process guarantees, and expanded police powers, all of which can be used both against terrorist suspects and as a tool against political opponents, civil society, religious and ethnic groups, minorities, and common criminals.<sup>303</sup> This is particularly problematic in that once Kenya attaches the label of terrorism to any activity, article 35 of the act allows, subject to the article 24 derogation clause of the constitution, limitations on specified fundamental rights for the purposes of investigating, detecting, or preventing terrorist acts, and to balance opposing fundamental rights.<sup>304</sup> Unless a court closely scrutinizes its application, law enforcement can apply article 35 in an expansive manner.

As of this writing, defense lawyers have already raised concerns about how the state is implementing the Prevention of Terrorism Act. One lawyer informed the Justice Initiative and Muslims for Human Rights that the ATPU has begun requesting, as permitted by the law, custodial extensions for the purpose of concluding an investigation.

However, in contravention of the law, the lawyer said that the suspects have not been presented before the court during the extension request and have not received copies of the application for custodial extension.<sup>305</sup> Another lawyer, who said he has provided legal representation or other assistance in approximately 12 ATPU-related cases in Mombasa, said the act provides the authorities with “a very strong, terrible weapon in hand that denies the rights of the accused...They were running roughshod over people’s rights without this law and now this law is [even more] terrible.”<sup>306</sup>

## Vaguely and Broadly Defined

Human rights groups have routinely criticized anti-terrorism legislation that contains vague and broad language and permit states to engage in excessive investigatory, detention, confiscation, and punitive action. Kenya’s Prevention of Terrorism Act permits all four by allowing Kenya to attach the label of terrorism to a broad range of acts. Without defining its terms, the act criminalizes, as forms of terrorism, activities that, *inter alia*, create a “serious risk to the health or safety of the public,” “result in serious damage to property,” or that “prejudices national security or public safety.”<sup>307</sup> But the act does not define any of these vague terms. The act is similarly vague in its definition of terrorism, defining it as an activity carried out with the intent of “intimidating or causing fear amongst members of the public or a section of the public,” “intimidating or compelling the Government or international organization to do, or refrain from any act,” or “destabilizing the religious, political, Constitutional, economic or social institutions of a country, or an international organization.”<sup>308</sup>

Adding to its vagueness, the act does not require the Inspector-General to apply for an *ex parte* order from a judge for the police to seize property when “it is not reasonably practicable, having regard to the urgency of the situation” so long as he notifies a judge within 72 hours.<sup>309</sup> The act, however, provides no clear criteria to determine what defines an “urgent” situation. As a final example of the act’s vagueness, the IGP may, where reasonable grounds exist, recommend that the cabinet secretary declare a person, group, or trust a terrorist group and subject it to various sanctions. To acquire this designation, the terrorist labeled group need only to act “in association with” another designated entity.<sup>310</sup> The term “in association with,” when broadly defined, would provide the government with excessively sweeping powers to take action against nearly any person, group, or trust that comes in contact with another designated entity.

The act includes an exception clause, which ensures protests, demonstrations, and work stoppages do not constitute terrorist acts if those activities are not intended to result in: violence against a person, endangerment of the life of a person, a public

health or safety risk, or serious damage to property.<sup>311</sup> This exception clause, although it too contains vague and broad terms, might rein in the law's potential for unleashing excessive policing powers. However, in practice exception clauses for political demonstrations and labor strikes have, as noted by an NGO report on the impact of counterterrorism legislation, "not prevented the extension of counter-terrorism policing to lawful practices or the policing of public order."<sup>312</sup>

## Mens Rea

Another common criticism by human rights groups of counterterrorism legislation is that it punishes people for engaging in terrorist-related activities even when there was no intent of wrongdoing.

Many offenses named in Kenya's Prevention of Terrorism Act require the state to demonstrate an offense occurred only when an individual knowingly carried out an act or when an individual knew that his or her actions were intended to contribute to a terrorist act. But several of the provisions have no such requirement. As a result, the act sanctions activities that may have tenuous connections to terrorism or which may involve innocent mistakes. Article 46 permits the cabinet secretary to refuse or revoke the registration of a company or association when the cabinet secretary believes that the company or association has made available, or is likely to make available, directly or indirectly, any resources in support of a terrorist group.<sup>313</sup> This provision does not, however, require that the company or association have intentionally provided its support to a terrorist group. Article 3, which regulates how the government designates terrorist groups, also contains no explicit requirement for the designated entity to have known it was committing, preparing, or attempting to commit a terrorist act or associating with a designated entity.<sup>314</sup> The most clearly threatening part of Article 3 is that it potentially permits the state to label a civil society group as a terrorist entity for unknowingly associating with another person or group that has been designated as a terrorist entity.

## Criminalization of Membership

Overly broad anti-terrorism legislation can inhibit freedom of speech, association, and assembly by criminalizing all members of a specified group regardless of individual conduct. Article 24 of Kenya's Prevention of Terrorism Act, which criminalizes individuals for being members of designated terrorist entities regardless of the individuals' specific actions, exemplifies this.<sup>315</sup> Article 24 carries a penal sentence of up to 30 years.<sup>316</sup>

International human rights law permits states to protect against specific acts such as violent protests or damage to property, but does not allow states to automatically presuppose the intent to commit such unlawful acts on the basis of membership in a particular group. Instead, a state must determine on a case by case basis if any limitation it places on an individual's rights is justified. Under the ICCPR, freedom of association may only be restricted when prescribed by law and as necessary "in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."<sup>317</sup> Under the ACHPR, a state must justify any encroachment it makes on the right to freedom of assembly by demonstrating it is prescribed by law and in the interest of national security, or the safety, health, ethics, and rights and freedoms of others.<sup>318</sup> Even groups labeled as terrorist may carry out activities that have no criminal component, so automatically criminalizing any and all engagement with a terrorist designated group may punish innocent people. Article 25 of the Kenyan Prevention of Terrorism Act runs this risk by criminalizing organizing, facilitating, or assisting in organizing or facilitating a meeting where an individual knows or has reason to believe the meeting's purpose is to support the terrorism group or further the activities of the terrorism group.<sup>319</sup>

## Due Process Guarantees

A general lack of due process pervades the Prevention of Terrorism Act. The constitution requires the police to bring a detainee to court within 24 hours of apprehension, whereupon the detainee is usually placed into the custody of the court. The act, however, allows a court to extend an individual's detention in police custody for purposes of investigation for up to 30 days upon an application from the police, and a judge can continue to extend the detention for a further period of up to a total of 90 days.<sup>320</sup> The application requires the police officer to specify the offense and describe the evidence available.<sup>321</sup> This allowance of pre-charge investigative detention extends the time for which an individual may be held before a trial and creates conditions conducive to unlawfully prolonged detention and ill-treatment.<sup>322</sup>

By permitting the police broad latitude to designate terrorist groups, the act also violates the Kenyan Constitution's requirement that "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."<sup>323</sup> According to the act, the IGP may, where "reasonable grounds" exist, recommend that the cabinet secretary declare a person, group, or trust a "specified entity" that has committed, prepared to commit, attempted, participated in, or facilitated a terrorist

act or that is associated with another specified entity.<sup>324</sup> The burden of proof, “reasonable grounds,” is a low bar for the government to meet. The reasonable grounds requirement is commonly the burden required for arrest warrants or summons to appear rather than designations which affect an entity’s legal rights.<sup>325</sup> The government, therefore, does not, according to the act, have to prove beyond a reasonable doubt that the entity has committed a prohibited activity. While setting a low threshold of liability for administrative procedures is not uncommon in domestic legal systems, the fact that membership into a designated group is a criminal offense with a lengthy sentence of up to 30 years, makes the Kenyan law unusually problematic.

The act grants a person, group, or entity the right to challenge a terrorist entity designation beforehand; however these procedures are inadequate and they do not clearly state how an entity is to be notified of its impending designation. Instead, the act only requires that “the affected entity [shall receive] an opportunity to demonstrate [to the IGP] why it should not be declared as a specified entity.”<sup>326</sup>

Challenging the designation of an entity after the fact is also limited and involves serious curtailments of due process. The specified entity may petition the IGP to revoke the designation.<sup>327</sup> But it is not clear what method of review would ensue, although the IGP may recommend the designation be revoked if there are “reasonable grounds.”<sup>328</sup> If the IGP is not satisfied that there are reasonable grounds to revoke the order, the specified entity may still petition the High Court to review the IGP’s determination.<sup>329</sup>

The High Court review includes several elements that are contrary to a fair hearing. The entirety of the High Court designation review may take place in the judges’ chambers rather than in an open courtroom, which eliminates an important safeguard.<sup>330</sup> Although certain restrictions may be applied to public trials where national security concerns arise, restricting public access should only occur in exceptional circumstances.

Additionally, the act does not give the applicant the express right to provide oral testimony or written submissions to the court. The High Court may also exclude the applicant (and counsel), from accessing evidence upon which the court relies.<sup>331</sup> Such exclusions infringe on the principle of equality of arms—the Human Rights Committee’s requirement that both sides should have the same opportunities in the courts, including the opportunity to “contest evidence and allegations adduced by the other party.”<sup>332</sup> Restricted access may also seriously curtail the applicant’s ability to effectively respond to allegations. For example, if the withheld evidence states that the applicant attended a terrorist training camp on specific dates, he or she would not know to provide an alibi for the specific dates.<sup>333</sup> The act also does not prohibit the government from presenting to the High Court evidence obtained through torture or other such means prohibited by international law.<sup>334</sup> Article 3(8)(a-b) of the act allows the court to receive and consider any information it determines relevant.<sup>335</sup> All of these violations of the

principles of a procedurally fair process are especially problematic because individuals can be criminally prosecuted and imprisoned for up to 30 years for being a member of designated terrorist groups.

## Severity of Punishment

Finally, the act does not designate a minimum level of severity to define an act of terrorism. In 2010, the UN special rapporteur on human rights and counterterrorism stated that definitions of terrorism broader than acts “intended to cause death or serious bodily injury,” involving “lethal or serious violence,” or constituting “the intentional taking of hostages” pose problems for the mutual reinforcement of human rights and counterterrorism.<sup>336</sup> Under the act, any violence against a person (regardless of the extent of injury caused), or any action that endangers a person’s life (including negligent or reckless action not intended to cause death), can constitute a terrorist act so long as it is conducted for the prohibited purposes in article 2(b).<sup>337</sup> The act also includes prohibited activities that do not necessarily involve any physical threat to people at all.<sup>338</sup>

## CHAPTER 6

# Conclusion

The ATPU is Kenya's main domestic counterterrorism force. The September 2013 attack on Nairobi's Westgate Shopping Mall demonstrated how real and immediate the threat of terrorism is. But in the process of carrying out its counterterrorism responsibilities, the ATPU has committed a wide array of human rights abuses that violate international, regional, and domestic law. This report traces ATPU abuses from 2007 to date, including its use of excessive force during house raids; torture and ill-treatment of detainees; arbitrary detentions, including the disappearance of Badru Mramba; and sending terrorist suspects to countries where they face a real risk of torture. This report also presents credible evidence of unlawful ATPU killings that, at a minimum, warrants robust and effective investigation.

These abuses are not only unlawful, but counterproductive. Violent extremists use such abuses to justify violence and to recruit others. Counterterrorism-related human rights abuses also erode community trust in government, as this report demonstrates is occurring in Mombasa. This cuts off authorities from the very communities that can be most helpful in reducing extremist violence. As the African Commission on Human and Peoples' Rights has stated, "too often extreme measures to curtail rights simply create greater unrest."<sup>39</sup> It is particularly disturbing that many ATPU abuses occurred after 2010, after Kenya embarked on a committed effort to develop stronger human rights protections.

With this poor human rights record, it is critical that Kenya and the international community at large support the country's sweeping police reforms aimed at ending unlimited police powers. More specifically, Kenya's accountability mechanisms, such as its courts and the Independent Police Oversight Authority, must place the ATPU under close scrutiny and hold ATPU officials accountable for committing human rights

abuses. Victims of these abuses must also receive reparations. Finally, it is imperative that Kenya does not backtrack on the human rights progress it has made by amending its robust rules prohibiting the use of force. Instead, those rules should remain, the Prevention of Terrorism Act should be repealed or amended to meet international human rights standards, and the Kenyan government should expand its human rights commitments through such measures as passing an anti-torture bill, accepting additional international human rights monitoring mechanisms, and ratifying the International Convention for the Protection of All Persons from Enforced Disappearance.

# Notes

1. Hamza Mohamed, "Q&A: Al-Shabab defends Nairobi attack: Military spokesman explains to Al Jazeera why mall siege was launched, and what will happen next," *Al Jazeera*, September 25, 2013, at <http://www.aljazeera.com/indepth/features/2013/09/2013923628350977.html>, accessed October 21, 2013. <http://www.aljazeera.com/indepth/features/2013/09/2013923628350977.html>, accessed October 21, 2013.

2. It is not always clear who the perpetrators are, but the U.S. embassy in Kenya reported on January 14, 2013: "In the past year, there have been over 30 attacks involving grenades or explosive devices in Kenya. At least 76 people died in these attacks, and around 220 people were injured...Ten of these attacks occurred in North Eastern Province, mainly in Dadaab, Wajir, and Garissa. Four attacks occurred in Mombasa. Six grenade and improvised explosive device (IED) attacks have occurred in Nairobi, illustrating an increase in the number of attacks and an advance in the sophistication of attacks. Targets included police stations and police vehicles, nightclubs and bars, churches, a mosque, a religious gathering, a downtown building of small shops, and a bus station. One of the deadliest attacks occurred in Nairobi on November 18, 2012, when an IED detonated on a passenger bus in Eastleigh, killing ten. The most fatal attack in Kenya this past year occurred on July 1, 2012, with two simultaneous assaults on churches in Garissa. In this attack, 17 people were killed and about 50 people were injured." U.S. Department of State, Bureau of Consular Affairs, *Travel Warning (Kenya)*, January 14, 2013, at [http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_5859.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_5859.html), accessed May 7, 2013.

3. *Zuhura Suleiman v. Commissioner of Police and three others*, High Court at Nairobi (Nairobi Law Courts), Miscellaneous Application 441 of 2010, September 30, 2010; *Mohamed Aktar Kana v. Attorney General*, High Court at Nairobi (Nairobi Law Courts), Constitutional Application 544 of 2010, September 28, 2010.

4. See, Open Society Justice Initiative, *Counterterrorism and Human Rights Abuses in Kenya and Uganda: The World Cup Bombing and Beyond* (November 2012).

5. See, Muslim Human Rights Forum, "Horn of Terror: Report of US-led Mass Extra-ordinary Renditions from Kenya to Somalia, Ethiopia, and Guantanamo Bay, January–June 2007: Presented to the Kenya National Commission on Human Rights on 6th July 2007," July, 2007; and Human

Rights Watch, “Ethiopia/Kenya: Account for Missing Rendition Victims: Secret Detainees Interrogated by US Officials Are Still in Custody,” Press Release, October 1, 2008, at <http://www.hrw.org/news/2008/10/01/ethiopiakenya-account-missing-rendition-victims>, accessed August 23, 2012.

6. *Salim Awadh Salim and 10 Others v. Commissioner of Police and three others*, High Court at Nairobi (Constitutional and Judicial Review Division), Petition No. 822 of 2008, July 31, 2013, paras. 22–23.

7. See, generally, Muslim Human Rights Forum, “Horn of Terror: Report of US-led Mass Extraordinary Renditions from Kenya to Somalia, Ethiopia, and Guantanamo Bay, January-June 2007: Presented to the Kenya National Commission on Human Rights on 6th July 2007,” July, 2007; Human Rights Watch, “*Why Am I Still Here?*” *The 2007 Horn of Africa Renditions and the Fate of Those Still Missing*, October 2008, p. 11.

8. *Salim Awadh Salim and 10 Others v. Commissioner of Police and three others*, High Court at Nairobi (Constitutional and Judicial Review Division), Petition No. 822 of 2008, July 31, 2013, para. 96.

9. See, Human Rights Watch, “Ethiopia/Kenya: Account for Missing Rendition Victims: Secret Detainees Interrogated by US Officials Are Still in Custody,” Press Release, October 1, 2008, at <http://www.hrw.org/news/2008/10/01/ethiopiakenya-account-missing-rendition-victims>, accessed August 23, 2012.

10. Reprive, *Mohamed Abdulmalik*, (prisoner profile), at [www.reprive.org.uk/mohammedabdulmalik](http://www.reprive.org.uk/mohammedabdulmalik), accessed June 18, 2013.

11. Reprive, *Mohamed Abdulmalik*, (prisoner profile), at [www.reprive.org.uk/mohammedabdulmalik](http://www.reprive.org.uk/mohammedabdulmalik), accessed June 18, 2013.

12. Reprive, *Mohamed Abdulmalik*, (prisoner profile), at [www.reprive.org.uk/mohammedabdulmalik](http://www.reprive.org.uk/mohammedabdulmalik), accessed June 18, 2013.

13. Reprive, *Mohamed Abdulmalik*, (prisoner profile), at [www.reprive.org.uk/mohammedabdulmalik](http://www.reprive.org.uk/mohammedabdulmalik), accessed June 18, 2013.

14. Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide since September 11* (June 2012), p. 5.

15. See, for example, allegations of human rights abuses at the Twitter account @HSMPress, which describes itself as “Harakat Al-Shabaab Al Mujahideen is an Islamic movement that governs South & Cen. Somalia & part of the global struggle towards the revival of Islamic Khilaafa,” at <https://twitter.com/hsmprss>. Last accessed August 24, 2012, prior to account suspension.

16. The Constitution of Kenya, 2010, arts. 19–58.

17. National Police Service Act, No. 11A of 2011.

18. The Independent Policing Oversight Act, No. 35 of 2011.

19. The Constitution of Kenya, 2010, art. 246.

20. National Police Service Act, No. 11A of 2011, art. 87.

21. The Independent Policing Oversight Act, No. 35 of 2011.

22. See, United States Department of State, *The Anti-Terrorism Assistance Program: Report to Congress for Fiscal Year 2003*, at [www.state.gov/documents/organization/35833.pdf](http://www.state.gov/documents/organization/35833.pdf), accessed September 6, 2012, pp. 2–3. The ATPU has also received support from other governments, including the United Kingdom.

See, for example, Open Society Justice Initiative, *Counterterrorism and Human Rights Abuses in Kenya and Uganda: The World Cup Bombing and Beyond* (November 2012), pp. 44–45.

23. Hamza Mohamed, “Q&A: Al-Shabab defends Nairobi attack: Military spokesman explains to Al Jazeera why mall siege was launched, and what will happen next,” *Al Jazeera*, September 25, 2013, at <http://www.aljazeera.com/indepth/features/2013/09/2013923628350977.html>, accessed October 21, 2013.

24. The U.S. embassy in Kenya reported on January 14, 2013: “In the past year, there have been over 30 attacks involving grenades or explosive devices in Kenya. At least 76 people died in these attacks, and around 220 people were injured.... Ten of these attacks occurred in North Eastern Province, mainly in Dadaab, Wajir, and Garissa. Four attacks occurred in Mombasa. Six grenade and improvised explosive device (IED) attacks have occurred in Nairobi, illustrating an increase in the number of attacks and an advance in the sophistication of attacks. Targets included police stations and police vehicles, nightclubs and bars, churches, a mosque, a religious gathering, a downtown building of small shops, and a bus station. One of the deadliest attacks occurred in Nairobi on November 18, 2012, when an IED detonated on a passenger bus in Eastleigh, killing ten. The most fatal attack in Kenya this past year occurred on July 1, 2012, with two simultaneous assaults on churches in Garissa. In this attack, 17 people were killed and about 50 people were injured.” U.S. Department of State, Bureau of Consular Affairs, Travel Warning (Kenya), January 14, 2013, at [http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_5859.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_5859.html), accessed May 7, 2013.

25. Interview with Kenyan intelligence official, May 31, 2013.

26. Kenya Police, The Anti-Terrorism Police Unit, at [www.kenyapolice.go.ke/antiterrorism\\_unit.asp](http://www.kenyapolice.go.ke/antiterrorism_unit.asp), accessed February 14, 2013.

27. Security Council, “Letter dated 4 March 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council” UN Doc. S/2004/181 (10 March 2004) (containing “Third Report of the Republic of Kenya Submitted to the United Nations Counter-Terrorism Committee (CTC)”).

28. Interview with ATPU official, May 2012. It is unclear if this task force was a reference to the Nairobi-based National Counter Terrorism Center (NCTC), which the government established in January 2004 to coordinate Kenya’s anti-terrorism activities, and which also works closely with the ATPU. (See, U.S. Department of State of the Coordinator for Counterterrorism, *Country Reports on Terrorism*, April 2005, at <http://www.state.gov/j/ct/rls/crt/45388.htm>, accessed June 18, 2013.)

29. Interaction between Muslims for Human Rights and police official, Mombasa, Kenya.

30. Interview with witness, Mombasa, Kenya.

31. International Crisis Group, *Kenya’s 2013 Elections*, Report N°197, 17 January 2013, p. 43, at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/197-kenyas-2013-elections.pdf>, accessed September 3, 2013.

32. “Kenya terror strikes target Israelis,” BBC News, November 28, 2002, available at <http://news.bbc.co.uk/2/hi/africa/2522207.stm>, accessed September 3, 2013.

33. Interview with ATPU official, May 2012. He also said, “We don’t do things outside Kenyan law,” adding, “we sack them [ATPU officers] if they act outside the law.” He could not, however, provide examples of ATPU officers being disciplined or prosecuted for human rights abuses.

34. Interview with Kenyan intelligence official, May 31, 2013.
35. Interview with Kenyan intelligence official, May 31, 2013.
36. Interview with Kenyan intelligence official, May 31, 2013.
37. Interview with Kenyan intelligence official, May 31, 2013.
38. Nyambega Gisesa, "Who is behind the unlawful killings of terror suspects?," *Standard* (Digital), September 3, 2013 at [http://www.standardmedia.co.ke/?articleID=2000092707&story\\_title=who-is-behind-the-unlawful-killings-of-terror-suspects&pageNo=1](http://www.standardmedia.co.ke/?articleID=2000092707&story_title=who-is-behind-the-unlawful-killings-of-terror-suspects&pageNo=1), accessed September 9, 2013.
39. In addition to ATPU abuses, human rights groups have documented a growing pattern of counterterrorism-related human rights abuses by other Kenyan security forces. For example, from November 2011 to March 2012, Kenya's military and police responded to alleged terrorist attacks in North Eastern Province with indiscriminate and violent round-ups of ethnic Somali Kenyans and Somali refugees. (See, generally, Human Rights Watch, *Criminal Reprisals: Kenyan Police and Military Abuses against Ethnic Somalis*, May 2012, at [www.hrw.org/sites/default/files/reports/kenya0512webwcover.pdf](http://www.hrw.org/sites/default/files/reports/kenya0512webwcover.pdf), accessed May 7, 2013.) In November 2012, in Garissa, the military and police severely injured dozens of people and set fire to markets after three soldiers were shot dead. In September and October 2012, the people of Garissa and Mandera faced similar abuses after security officers were attacked. (Human Rights Watch, "Kenya: End Police Reprisals in Northern Region: Police Abuse Villagers After Attacks on Security Forces," Press Release, October 25, 2012, at <http://www.hrw.org/news/2012/10/25/kenya-end-police-reprisals-northern-region>, accessed May 7, 2013.)
40. "Gov't should probe NEP human rights abuse claims" (Editorial), *Friday Bulletin: The Weekly Muslim Update*, Issue No. 471, May 11, 2012, p. 2.
41. Human Rights Watch, "Kenya: End Police Reprisals in Northern Region: Police Abuse Villagers After Attacks on Security Forces," Press Release, October 25, 2012, at <http://www.hrw.org/news/2012/10/25/kenya-end-police-reprisals-northern-region>, accessed May 7, 2013.
42. See, generally, Open Society Justice Initiative, *Counterterrorism and Human Rights Abuses in Kenya and Uganda: The World Cup Bombing and Beyond* (November 2012).
43. See, Human Rights Watch, "Ethiopia/Kenya: Account for Missing Rendition Victims: Secret Detainees Interrogated by US Officials Are Still in Custody," Press Release, October 1, 2008, at [www.hrw.org/news/2008/10/01/ethiopiakenya-account-missing-rendition-victims](http://www.hrw.org/news/2008/10/01/ethiopiakenya-account-missing-rendition-victims), accessed August 23, 2012.
44. *Salim Awadh Salim and 10 Others v. Commissioner of Police and three others*, High Court at Nairobi (Constitutional and Judicial Review Division), Petition No. 822 of 2008, July 31, 2013, paras. 22–23.
45. See, generally, Muslim Human Rights Forum, "Horn of Terror: Report of US-led Mass Extraordinary Renditions from Kenya to Somalia, Ethiopia, and Guantanamo Bay, January-June 2007: Presented to the Kenya National Commission on Human Rights on 6th July 2007," July, 2007; Human Rights Watch, "Why Am I Still Here?" *The 2007 Horn of Africa Renditions and the Fate of Those Still Missing*, October 2008, p. 11.
46. *Salim Awadh Salim and 10 Others v. Commissioner of Police and three others*, High Court at Nairobi (Constitutional and Judicial Review Division), Petition No. 822 of 2008, July 31, 2013, para. 96.
47. See, Human Rights Watch, "Ethiopia/Kenya: Account for Missing Rendition Victims: Secret Detainees Interrogated by US Officials Are Still in Custody," Press Release, October 1, 2008, at [www.hrw.org/news/2008/10/01/ethiopiakenya-account-missing-rendition-victims](http://www.hrw.org/news/2008/10/01/ethiopiakenya-account-missing-rendition-victims), accessed August 23, 2012.

hrw.org/news/2008/10/01/ethiopiakenya-account-missing-rendition-victims, accessed August 23, 2012.

48. The Constitution of Kenya, 2010, arts. 19–58.
49. National Police Service Act, No. 11A of 2011.
50. The Independent Policing Oversight Act, No. 35 of 2011.
51. The Constitution of Kenya, 2010, art. 246, 2010.
52. National Police Service Act, art. 87, No. 11A of 2011.
53. The Independent Policing Oversight Act, No. 35 of 2011.
54. Interview with lawyer, Mombasa, Kenya.
55. Interview with lawyer, Mombasa, Kenya.
56. “Four-day Westgate Mall siege over, says President Uhuru Kenyatta,” *Standard* (Digital), September 24, 2013, at [http://www.standardmedia.co.ke/?articleID=2000094206&story\\_title=uhuru-four-day-westgate-mall-siege-over](http://www.standardmedia.co.ke/?articleID=2000094206&story_title=uhuru-four-day-westgate-mall-siege-over), accessed October 21, 2013.
57. Hamza Mohamed, “Q&A: Al-Shabab defends Nairobi attack: Military spokesman explains to Al Jazeera why mall siege was launched, and what will happen next,” *Al Jazeera*, September 25, 2013, at <http://www.aljazeera.com/indepth/features/2013/09/2013923628350977.html>, accessed October 21, 2013.
58. Hamza Mohamed, “Q&A: Al-Shabab defends Nairobi attack: Military spokesman explains to Al Jazeera why mall siege was launched, and what will happen next,” *Al Jazeera*, September 25, 2013, at <http://www.aljazeera.com/indepth/features/2013/09/2013923628350977.html>, accessed October 21, 2013.
59. See, for example, George Kegoro, “Painful lessons from the Westgate terror attack,” *Daily Nation* (op-ed), September 28, 2013, at <http://mobile.nation.co.ke/blogs/Terrorism-security-Islam-Kenya/-/1949942/2029614/-/format/xhtml/-/qo1h4p/-/index.html>, accessed October 21, 2013; and George Kegoro, “Let’s be wary of unreasoned responses to terrorism,” *Daily Nation* (op-ed), October 12, 2013, at <http://mobile.nation.co.ke/blogs/Terrorism-security-Islam-Kenya/-/1949942/2029614/-/format/xhtml/-/qo1h4p/-/index.html>, accessed October 21, 2013. (“Following the Westgate attack, there have been strong reactions from the Muslim community, whose leaders have moved to distance their religion from the attack.”)
60. See, “Terror Suspect Charged in Kenyan Court over Westgate Attack,” *Xinhua*, October 11, 2013, at <http://english.cri.cn/6966/2013/10/11/2702s791857.htm>, accessed October 24, 2013; and Dominic Wabala, “High school student held over Westgate attack,” *Star*, October 9, 2013, at <http://www.the-star.co.ke/news/article-138807/high-school-student-held-over-westgate-attack>, accessed October 24, 2013.
61. Swaleh was visited by Muslims for Human Rights representatives at Makupa Police Station on October 15, 2013.
62. “Kenya charges man with terrorist plot, links him to mall attack,” *Reuters*, October 11, 2013, at <http://news.yahoo.com/kenya-charges-man-terrorist-plot-links-him-mall-155948531.html>, accessed October 24, 2013. (“Anti-terrorism police arrested Swaleh Abdallah Said on Thursday and he led them to a house in Mombasa where they found explosives, a grenade, two mobile phones and passports, prosecutors told the magistrate’s court.”) See, also, “Suspect charged in Mombasa over terror links,”

*Capital News*, October 11, 2013, at <http://www.capitalfm.co.ke/news/2013/10/suspect-charged-in-mombasa-over-terror-links/>, accessed October 24, 2013 (“He was arrested on Thursday morning by a team of officers from the Anti Terrorism Police Unit...”).

63. Interview with witness, Mombasa, Kenya.

64. Interview with witness, Mombasa, Kenya.

65. A Muslims for Human Rights representative was in the courtroom to witness Swaleh’s statement.

66. A Muslims for Human Rights representative was in the courtroom to witness Swaleh’s statement. See, also, “Kenya charges man with terrorist plot, links him to mall attack, Reuters,” October 11, 2013, at <http://news.yahoo.com/kenya-charges-man-terrorist-plot-links-him-mall-155948531.html>, accessed October 24, 2013.

67. Willis Oketch, “Westgate terror suspect denied bail amidst fears of fleeing Kenya,” *Standard* (Digital), October 18, 2013, at [http://www.standardmedia.co.ke/mobile/?articleID=2000095755&story\\_title=westgate-terror-suspect-denied-bail-police-fear-he-might-flee](http://www.standardmedia.co.ke/mobile/?articleID=2000095755&story_title=westgate-terror-suspect-denied-bail-police-fear-he-might-flee), accessed October 21, 2013.

68. The trial was observed by a representative from Muslims for Human Rights, October 17, 2013.

69. See, “Kenyan police arrests five more terror suspects in Mombasa,” Xinhua, November 15, 2012, at [http://www.shanghaidaily.com/article/article\\_xinhua.asp?id=107845](http://www.shanghaidaily.com/article/article_xinhua.asp?id=107845), accessed May 7, 2013. The media also quoted the head of the Coast Criminal Investigation Police, Ambrose Munyasia, as saying, “Anti-terrorism police officers visited the home and after there they went to another assignment.” See, Anthony Kitimo, “Rogo’s children arrested in raid,” *Daily Nation*, November 14, 2012, at <http://www.nation.co.ke/News/Rogos-children-arrested-in-raid/-/1056/1619702/-/qjv8l6z/-/index.html>, accessed May 7, 2013. (Original on file with author.)

70. Interview with Abubakar (pseudonym) and Hussein (pseudonym), Mombasa, Kenya.

71. See, “Kenyan police arrests five more terror suspects in Mombasa,” Xinhua, November 15, 2012, at [http://www.shanghaidaily.com/article/article\\_xinhua.asp?id=107845](http://www.shanghaidaily.com/article/article_xinhua.asp?id=107845), accessed May 7, 2013. The media also quoted the head of the Coast Criminal Investigation Police, Ambrose Munyasia, as saying, “Anti-terrorism police officers visited the home and after there they went to another assignment.” (This confirms the involvement of the ATPU on the house raid described below in this report and strongly indicates the ATPU’s involvement in the subsequent detentions and beatings of other terrorist suspects that night and into the next day.) See, Anthony Kitimo, “Rogo’s children arrested in raid,” *Daily Nation*, November 14, 2012, at <http://www.nation.co.ke/News/Rogos-children-arrested-in-raid/-/1056/1619702/-/qjv8l6z/-/index.html>, accessed May 7, 2013. (Original on file with author.)

72. Interviews with multiple witnesses, Mombasa, Kenya.

73. Interview with Abubakar (pseudonym), Hussein (pseudonym), and male witness, Mombasa, Kenya.

74. Interview with Abubakar, (pseudonym) Mombasa, Kenya.

75. Interview with Abubakar (pseudonym), Mombasa, Kenya. Abubakar showed representatives from the Justice Initiative and Muslims for Human Rights the bloodied shirt that he said Ahmed was wearing at the time he was beaten. He also showed where blood had soaked through a plastic rug on the floor of the room. (Photographs and video taken on November 14, 2012, Mombasa, Kenya, on file with author.)

76. Interview with Hussein (pseudonym), Mombasa, Kenya.
77. Ahmed, Issa, Yahya, Khalid, and Mohammad are pseudonyms.
78. Nyambega Gisese, “Look at our bodies, we can’t be trained militants, Rogo’s sons tell security agencies,” *Standard* (Digital), September 1, 2013, at [http://www.standardmedia.co.ke/mobile/?articleID=2000092528&story\\_title=look-at-our-bodies-we-can-t-be-trained-militants-rogo-s-sons-tell-security-agencies](http://www.standardmedia.co.ke/mobile/?articleID=2000092528&story_title=look-at-our-bodies-we-can-t-be-trained-militants-rogo-s-sons-tell-security-agencies), accessed September 4, 2013.
79. The Constitution of Kenya, 2010, art. 49(f).
80. Interview with multiple male witnesses, Mombasa, Kenya.
81. Willis Oketch, “Rogo’s kin ‘plotted to bomb police,’” *Standard* (Digital), November 23, 2012, at [http://www.standardmedia.co.ke/?articleID=2000071285&story\\_title=Rogo%E2%80%99s-kin-%E2%80%98plotted-to-bomb-police-stations%E2%80%99](http://www.standardmedia.co.ke/?articleID=2000071285&story_title=Rogo%E2%80%99s-kin-%E2%80%98plotted-to-bomb-police-stations%E2%80%99), accessed May 7, 2013.
82. Interview with two male witnesses, Mombasa, Kenya.
83. Office of the Director of Public Prosecutions, Letter to Officer in Charge, Anti-Terrorism Police Unit (Mombasa), Ref: MSA/ADV/14(1), April 23, 2013.
84. Interview with lawyer, April 29, 2013, Nairobi, Kenya.
85. Interview with lawyer, April 29, 2013, Nairobi, Kenya.
86. Interview with lawyer, April 29, 2013, Nairobi, Kenya.
87. Interview with female witness, November 17, 2012, Mombasa, Kenya.
88. Interview with Fatima (pseudonym), two female witnesses, and Hania (pseudonym) on November 17, 2012, Mombasa, Kenya.
89. Interview with Fatima (pseudonym), November 17, 2012, Mombasa, Kenya.
90. Interview with Fatima (pseudonym), November 17, 2012, Mombasa, Kenya.
91. Interview with Hania (pseudonym), November 17, 2012, Mombasa, Kenya.
92. Human Rights Watch, “Kenya: End Police Reprisals in Northern Region: Police Abuse Villagers After Attacks on Security Forces,” Press Release, October 25, 2012, at <http://www.hrw.org/news/2012/10/25/kenya-end-police-reprisals-northern-region>, accessed May 7, 2013.
93. Human Rights Watch, “Kenya: End Police Reprisals in Northern Region: Police Abuse Villagers After Attacks on Security Forces,” Press Release, October 25, 2012, at <http://www.hrw.org/news/2012/10/25/kenya-end-police-reprisals-northern-region>, accessed May 7, 2013.
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95. Human Rights Watch, “Kenya: End Police Reprisals in Northern Region: Police Abuse Villagers After Attacks on Security Forces,” Press Release, October 25, 2012, at <http://www.hrw.org/news/2012/10/25/kenya-end-police-reprisals-northern-region>, accessed May 7, 2013.
96. Witness Statement to Muslims for Human Rights, July 19, 2013.
97. Witness Statement to Muslims for Human Rights, July 19, 2013.

98. See, Open Society Justice Initiative, *Counterterrorism and Human Rights Abuses in Kenya and Uganda: The World Cup Bombing and Beyond* (November 2012).
99. Interview with Ibrahim (pseudonym), Mombasa, Kenya.
100. Interview with Ibrahim (pseudonym), Mombasa, Kenya.
101. Interview with Ibrahim (pseudonym), Mombasa, Kenya.
102. *Omar Awadh Omar and others v. Attorney General*, Constitutional Court of Uganda, Constitutional Petition No. 55 of 2011, November 15, 2011 (affidavit of Habib Suleiman Njoroge, para. 10).
103. *Omar Awadh Omar and others v. Attorney General*, Constitutional Court of Uganda, Constitutional Petition No. 55 of 2011, November 15, 2011 (affidavit of Habib Suleiman Njoroge, para. 15).
104. *Omar Awadh Omar and others v. Attorney General*, Constitutional Court of Uganda, Constitutional Petition No. 55 of 2011, November 15, 2011 (affidavit of Mohammed Hamid Suleiman, paras. 6 and 8).
105. *Isa Ahmed Luyima and others v. Attorney General*, Constitutional Court of Uganda, Constitutional Petition No. 56 of 2011 (affidavit of Isa Ahmed Luyima, paras. 5-6; and affidavit of Batematyo Abubakari, paras 11-12).
106. *Isa Ahmed Luyima and others v. Attorney General*, Constitutional Court of Uganda, Constitutional Petition No. 56 of 2011 (affidavit of Isa Ahmed Luyima, para. 5).
107. *Isa Ahmed Luyima and others v. Attorney General*, Constitutional Court of Uganda, Constitutional Petition No. 56 of 2011 (affidavit of Isa Ahmed Luyima, para. 6).
108. *Isa Ahmed Luyima and others v. Attorney General*, Constitutional Court of Uganda, Constitutional Petition No. 56 of 2011 (affidavit of Isa Ahmed Luyima, paras. 7–8).
109. *Isa Ahmed Luyima and others v. Attorney General*, Constitutional Court of Uganda, Constitutional Petition No. 56 of 2011 (affidavit of Isa Ahmed Luyima, para. 8).
110. Interview with lawyer, Mombasa, Kenya.
111. Interview with Kenyan intelligence official, May 31, 2013.
112. Muslim Human Rights Forum, “MHRF statement on killing of Sheikh Aboud Rogo,” August 27, 2012; Jonathan Horowitz, “Rumblings Along the Coast,” *Foreign Policy*, September 11, 2012, at [www.foreignpolicy.com/articles/2012/09/11/rumblings\\_along\\_the\\_coast?page=0,0](http://www.foreignpolicy.com/articles/2012/09/11/rumblings_along_the_coast?page=0,0), accessed October 18, 2012.
113. Muslim Human Rights Forum, “MHRF statement on killing of Sheikh Aboud Rogo,” August 27, 2012; Jonathan Horowitz, “Rumblings Along the Coast,” *Foreign Policy*, September 11, 2012, at [www.foreignpolicy.com/articles/2012/09/11/rumblings\\_along\\_the\\_coast?page=0,0](http://www.foreignpolicy.com/articles/2012/09/11/rumblings_along_the_coast?page=0,0), accessed October 18, 2012.
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225. The Constitution of Kenya, 2010, art. 2(6).
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227. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 ("ICCPR").
228. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, 23 I.L.M. 1027 ("CAT").
229. Convention on the Rights of the Child, 1577 UNTS 3, 28 ILM 1456 ("CRC").
230. International Convention for the Protection of All Persons from Enforced Disappearance, U.N. Doc. A/RES/61/177, 14 I.H.R.R. 582 ("CED"). As a signatory to the CED, Kenya must "refrain from acts which would defeat the object and purpose of a treaty." See, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 18.
231. International Convention for the Protection of All Persons from Enforced Disappearance, U.N. Doc. A/RES/61/177, 14 I.H.R.R. 582 ("CED"), art. 2.
232. In Comm. 204/97, *Movement Burkinabé des Droits de l'Homme et des Peuples/ Burkina Faso* (2001), the Commission stated, "The guarantee of the physical integrity and security of the person is also enshrined in Article 6 of the African Charter, as well as in the Declaration on the Protection of all Persons against Forced Disappearances, adopted by the General Assembly of the United Nations in Resolution 47/133 of 18<sup>th</sup> December 1992, which stipulates in article 1(2) that '*any act leading to forced disappearance excludes the victim from the protection of the law and causes grave suffering to the victim and his family. It constitutes a violation of the rules of international law, especially those that guarantee to all the right to the recognition of their legal status, the right to freedom and security of their person and the right not be subjected to torture or any other inhuman or degrading punishment or treatment. It also violates the right to life or seriously imperils it*'. The disappearances of persons suspected or accused of plotting against the instituted authorities, including Mr. Guillaume Sessouma and a medical student, Dabo Boukary, arrested in May 1990 by the presidential guard and who have not been seen since then constitute a violation of the above-cited texts and principles." (para 44).
233. International Convention for the Protection of All Persons from Enforced Disappearance, U.N. Doc. A/RES/61/177, 14 I.H.R.R. 582 ("CED"), art. 1.
234. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 18.
235. African Charter on Human and Peoples' Rights, 1520 U.N.T.S. 217 ("ACHPR"), art. 1; see also International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 ("ICCPR"), art. 2(3).
236. *Liesbeth Zegveld v. Eritrea*, ACHPR, Comm. 250/2002, Nov. 2003, para. 37; see also *Ilesanmi v. Nigeria*, ACHPR, Comm. 268/2003, April 2005, para. 45.
237. *Dawda Jawara v. The Gambia*, ACHPR, Comm. 147/95 and 149/96, May 2007, para. 32.

238. *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACHPR, Comm. 245/02, May 2006, para. 143 (“Human rights standards do not contain merely limitations on State’s authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.”) See also, *Commission nationale des droits de l’Homme et des libertés v. Chad*, Comm. 74/92, October 1995, para. 20 (“if a State neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.”)

239. The Constitution of Kenya, 2010, arts. 25(a) and 29.

240. The Constitution of Kenya, 2010, arts. 25(c) and 25(d).

241. The Constitution of Kenya, 2010, art. 25.

242. The Constitution of Kenya, 2010, arts. 26 and 29.

243. See, generally, the Constitution of Kenya, 2010, arts. 49 and 50.

244. The Constitution of Kenya, 2010, art. 21(1).

245. The Constitution of Kenya, 2010, art. 22(1).

246. National Police Service Act, No. 11A of 2011, arts. 88 and 95.

247. National Police Service Act, No. 11A of 2011, Eighth Schedule, para 1(a).

248. National Police Service Act, No. 11A of 2011, Fifth Schedule, para 9.

249. The Constitution of Kenya, 2010, arts. 25(d) and 49(f); and National Police Service Act, No. 11A of 2011, Fifth Schedule, paras. 8 and 10,

250. National Police Service Act, No. 11A of 2011, Sixth Schedule, Part A, paras 1 and 2.

251. National Police Service Act, No. 11A of 2011, Sixth Schedule, Part B, para. 2.

252. National Police Service Act, No. 11A of 2011, Sixth Schedule, Part C, para. 1 and Part A, para. 11.

253. National Police Service Act, No. 11A of 2011, Sixth Schedule, Part A, para. 3(a).

254. National Police Service Act, No. 11A of 2011, Sixth Schedule, Part A, para. 3(b).

255. Code of Conduct for Law Enforcement Officials, U.N. Doc. A/34/46 (1979).

256. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990), art. 4.

257. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990), art. 5.

258. Code of Conduct for Police Officials, adopted by the Southern African Regional Police Chiefs Cooperation Organisation (SARPPCO) (2001), art. 3.

259. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990), art. 9.

The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, like the National Police Service Act, also instructs states to ensure that any person injured or affected by the use of force is provided assistance and medical aid at the earliest possible moment. Relatives or close friends of the injured or affected person should also be notified at the earliest possible moment. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, August 27 to September 7, 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990), arts. 5(c) and (d).

260. National Police Service Act, No. 11A of 2011, Sixth Schedule, Part B, para. 1.

261. The Independent Policing Oversight Act, No. 35 of 2011, art. 5.

262. The Independent Policing Oversight Act, No. 35 of 2011, art. 6.

263. The Independent Policing Oversight Act, No. 35 of 2011, arts. 6(a) and 6(h).

264. The Independent Policing Oversight Act, No. 35 of 2011, art. 25(2).

265. The Independent Policing Oversight Act, No. 35 of 2011, art. 25(1).

266. The Independent Policing Oversight Act, No. 35 of 2011, art. 7(1)(a).

267. See, generally, the Independent Policing Oversight Act, No. 35 of 2011, art. 7.

268. See, generally, the Independent Policing Oversight Act, No. 35 of 2011, art. 87.

269. The Independent Policing Oversight Act, No. 35 of 2011, art. 7(1)(b).

270. The Constitution of Kenya, 2010, art. 246.

271. The Constitution of Kenya, 2010, art. 246.

272. The Constitution of Kenya, 2010, art. 246.

273. Extradition (Commonwealth Countries) Act (Kenya), December 30, 1968, at [www.unhcr.org/refworld/docid/3ae6b4ed40.html](http://www.unhcr.org/refworld/docid/3ae6b4ed40.html), accessed August 21, 2012.

274. Center on Global Counterterrorism and Cooperation and IGAD Security Sector Program, *Fighting Terror through Justice: Implementing the IGAD Framework for Legal Cooperation Against Terrorism*, New York and Addis Ababa, May 2012, p. 1.

275. *Zuhura Suleiman v. Commissioner of Police and three others*, High Court at Nairobi (Nairobi Law Courts), Miscellaneous Application 441 of 2010, September 30, 2010; *Mohamed Aktar Kana v. Attorney General*, High Court at Nairobi (Nairobi Law Courts), Constitutional Application 544 of 2010, September 28, 2010; and *Salim Awadh Salim and 10 Others v. Commissioner of Police and three others*, High Court at Nairobi (Constitutional and Judicial Review Division), Petition No. 822 of 2008, July 31, 2013.

276. *Mohamed Aktar Kana v. Attorney General*, High Court at Nairobi (Nairobi Law Courts), Constitutional Application 544 of 2010, September 28, 2010; and *Salim Awadh Salim and 10 Others v. Commissioner of Police and three others*, High Court at Nairobi (Constitutional and Judicial Review Division), Petition No. 822 of 2008, July 31, 2013, paras. 96–105. See, also, Jonathan Horowitz, *Case Watch: Kenya Judge Rules against “War on Terror” Renditions*, Open Society Justice Initiative, September 3, 2013, at <http://www.opensocietyfoundations.org/voices/case-watch-kenya-judge-rules-against-war-terror-renditions>, accessed September 3, 2013.

277. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, 23 I.L.M 1027 (“CAT”), art. 3.

278. See, generally, *Alzery v. Sweden*, Human Rights Committee, No. 1416/2005 (October 25, 2006).

279. *Agiza v. Sweden*, Committee Against Torture, Communication No. 233/2003, paras. 13.7 and 13.8 (2003).

280. UN Committee Against Torture, Concluding Observations on the Second Periodic Report of Kenya (May 5–31, 2013), paras. 6 and 7.

281. See, also, the final report of the World Organisation Against Torture (OMCT) and its coalition partners after conducting a mission to Kenya to assess the way forward in implementing the recommendations issued over the past years by UN anti-torture bodies. (“Our experiences during the mission mirror the findings of the UN Committees on legal reforms.”) World Organisation Against Torture, “Kenya: Torture reforms must tackle implementation gap and end impunity,” Press Release, October 5, 2013, at <http://www.omct.org/monitoring-protection-mechanisms/statements/kenya/2013/10/d22401/>, accessed October 24, 2013.

282. The Kenyan Section of the International Commission of Jurists, Legal Resources Foundation, Kenya Alliance for Advancement of Children, Coalition of Violence against Women—Kenya, and World Organization Against Torture, *State of Torture and Related Human Rights Violations in Kenya: Alternative Report to the UN Committee against Torture Informing its Review of Kenya’s Second Periodic Report at its 50<sup>th</sup> Session (6-31 May 2013) on the Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p. 14

283. UN Committee Against Torture, Concluding Observations on the Second Periodic Report of Kenya (May 5–31, 2013).

284. The Kenyan Section of the International Commission of Jurists, Legal Resources Foundation, Kenya Alliance for Advancement of Children, Coalition of Violence against Women—Kenya, and World Organization Against Torture, *State of Torture and Related Human Rights Violations in Kenya: Alternative Report to the UN Committee against Torture Informing its Review of Kenya’s Second Periodic Report at its 50<sup>th</sup> Session (May 6–31, 2013) on the Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p. 25; UN Committee Against Torture, Concluding Observations on the Second Periodic Report of Kenya (May 5–31, 2013), para. 20.

285. Kenya, Second Report by the Republic of Kenya on the Measures Taken To Comply with the Provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/KEN/2, para. 14.

286. UN Committee Against Torture, Concluding Observations on the Second Periodic Report of Kenya (May 5–31, 2013), para. 6. (“While noting that the National Police Service Act (2011) criminalises torture and ill-treatment committed by police officers and provides for appropriate penalties, the Committee remains deeply concerned that the draft Prevention of Torture Bill [2011] is still not enacted.”)

287. The Convention against Torture protocol requires States’ parties to set up, designate, or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism). Under the protocol, States’ parties must allow visits by the monitoring mechanisms where persons are or may be deprived of their liberty. Ratifying the Optional Protocol of the International Cov-

enant on Civil and Political Rights allows the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. Declaring, under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, that Kenya recognizes the competence of the Committee Against Torture allows the committee to receive and consider communications from, or on behalf of, individuals who claim to be victims of a violation of the Convention.

288. The Kenyan Section of the International Commission of Jurists, Legal Resources Foundation, Kenya Alliance for Advancement of Children, Coalition of Violence against Women—Kenya, and World Organization Against Torture, *State of Torture and Related Human Rights Violations in Kenya: Alternative Report to the UN Committee against Torture Informing its Review of Kenya's Second Periodic Report at its 50<sup>th</sup> Session (6-31 May 2013) on the Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, pp. 12–13.

289. Independent Policing Oversight Authority, Inaugural Performance Report (June to December 2012), p. 6.

290. Independent Policing Oversight Authority, Inaugural Performance Report (June to December 2012), p. 14.

291. Independent Policing Oversight Authority, Inaugural Performance Report (June to December 2012), p. 6 and 13.

292. Independent Policing Oversight Authority, Inaugural Performance Report (June to December 2012), p. 14.

293. IPOA, “IPOA to Investigate Shooting of Woman during Operation,” Press Release, July 19, 2013, at <http://www.ipoa.go.ke/ipoa-media/press-releases/133-ipoa-to-investigate-shooting-of-woman-during-operation.html>, accessed October 22, 2013.

294. IPOA, “Police Oversight Authority Condemns Excessive Use of Force during Protests,” Press Release, May 16, 2013, at <http://www.ipoa.go.ke/ipoa-media/press-releases/132-police-oversight-authority-condemns-excessive-use-of-force-during-protests.html>, accessed October 22, 2013.

295. IPOA, “Police Oversight Authority to Investigate Kisumu Shooting,” Press Release, April 2, 2013, at <http://www.ipoa.go.ke/ipoa-media/press-releases/131-police-oversight-authority-to-investigate-kisumu-shooting.html>, accessed October 22, 2013.

296. Independent Policing Oversight Authority, Inaugural Performance Report (June to December 2012), p. 14; and IPOA, “Oversight Authority Releases Report on Policing Standards and Gaps,” Press Release, September 11, 2013, at <http://www.ipoa.go.ke/ipoa-media/press-releases/181-ipoa-launches-baseline-survey.html>, accessed October 22, 2013.

297. National Police Service Act, No. 11A of 2011, Sixth Schedule, Part B, para. 1.

298. Kenya Truth, Justice and Reconciliation Commission, *Report of the Truth, Justice and Reconciliation Commission* (2013), at [http://www.tjrkenya.org/images/documents/TJRC\\_report\\_Volume\\_4.pdf](http://www.tjrkenya.org/images/documents/TJRC_report_Volume_4.pdf), accessed July 24, 2013.

299. National Police Services (Amendment) Bill, 2013. See also, Sarah Mount, “Let’s Regulate Police Powers to Use Guns,” *Star*, June 24, 2013 and Yashi Ghai and Sarah Mount, “Uhuru’s Choice: Either Rule by Consent or Continue with Coercion,” *Star*, July 27, 2013.

300. National Police Services (Amendment) Bill, 2013. See, also, Yashi Ghai and Sarah Mount, “Uhu-ru’s Choice: Either Rule by Consent or Continue with Coercion,” *Star*, July 27, 2013.

301. In addition to the abovementioned amendments to the National Police Service Act, there is a bill being proposed that amends the National Police Service Commission Act that would erode the independence of the police and the IGP. See National Police Service Commission (Amendment) Bill, 2013. For a detailed review of this issue, see Sarah Mount, “Let’s Regulate Police Powers to Use Guns,” *Star*, June 24, 2013.

302. See, for example, U.S. Department of State Bureau of Counterterrorism, *Country Reports on Terrorism 2011*, July 2011, at [www.state.gov/documents/organization/195768.pdf](http://www.state.gov/documents/organization/195768.pdf), accessed August 21, 2012, p. 17. Prior to the bill’s being enacted, an ATPU official told the Justice Initiative and Muslims for Human Rights, “We want an anti-terrorism law but we don’t have one. We want to eat meat, but don’t have the teeth.” Interview with ATPU official, May 2012.

Civil society groups, however, criticized a draft of the 2012 act—as they did to similar bills in 2003 and 2006—for its expansion of police powers and its potential to limit fundamental freedoms and discriminate against religious groups. See, “Critics say Kenya’s proposed terror law can be used by state to fight political opponents,” *Horn of Africa News*, September 27, 2012; Wambui Ndonga, “Propose Changes to Terror Law,” *All Africa*, September 24, 2012, available at <http://allafrica.com/stories/201209250026.html>; “Kibaki signs historic Anti- terrorism Bill,” *Standard* (Digital), October 14, 2012, available at [http://www.standardmedia.co.ke/?articleID=2000068354&pageNo=2&story\\_title=](http://www.standardmedia.co.ke/?articleID=2000068354&pageNo=2&story_title=), accessed November 6, 2013.

In response to these criticisms, the 2012 bill incorporated last minute improvements based on meetings with some members of civil society and religious leaders. A Kenyan intelligence official also explained that the act “helps with interrogations, rights of the offenders, and confiscation of terrorist profits...The Penal Code wasn’t adequate. Now we’re more effective.” He added, “Both side of the divide really benefited...the CT [counterterrorism bill] discussion was open to the public and we had good negotiations.” Interview with Kenyan intelligence official, May 31, 2013. See also, “Kibaki signs historic Anti-terrorism Bill,” *Standard Digital*, October 14, 2012, at [http://www.standardmedia.co.ke/?articleID=2000068354&story\\_title=Kibaki-signs-historic-Anti-terrorism-Bill](http://www.standardmedia.co.ke/?articleID=2000068354&story_title=Kibaki-signs-historic-Anti-terrorism-Bill), accessed June 18, 2013.

303. Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide since September 11* (June 2012), p. 5.

304. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 35.

305. Email exchange with lawyer, received July 28, 2013 (on file with author).

306. Interview with lawyer, Mombasa, Kenya.

307. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, arts. 2(a).

308. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 2(b).

309. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 37(2).

310. Prevention of Terrorism Act, 2012, ENYA GAZETTE SUPPLEMENT NO. 149K, art. 3(1)(b)(iii).

311. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 2(b)(3).

312. Commonwealth Human Rights Initiative, *Stamping Out Rights: The impact of anti-terrorism laws on policing* (2007), p. 27.

313. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 46.
314. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 3.
315. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 24.
316. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 24.
317. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (“ICCPR”), art. 22.
318. African Charter on Human and Peoples’ Rights, 1520 U.N.T.S. 217 (“ACHPR”), art. 11.
319. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 25.
320. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 32(10).
321. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 33.
322. See Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide since September 11* (June 2012), p. 62.
323. The Constitution of Kenya, 2010, art. 47.
324. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 3(1–3).
325. Stephen Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva Academy of International Humanitarian Law and Human Rights (2011) at 24, available at <http://www.geneva-academy.ch/docs/Standards%20of%20proof%20report.pdf>, accessed November 6, 2013.
326. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 3(2).
327. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 3(5).
328. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 3(6).
329. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 3(7).
330. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 3(8)(a). Human Rights Committee, General Comment 32, UN Doc. CCPR/C/GC/32, July 24, 2007, paras. 28–29.
331. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 3(9).
332. See Human Rights Committee, *General Comment 32*, UN Doc. CCPR/C/GC/32, Jul. 24, 2007, para. 13; *Jansen-Gielen v. The Netherlands*, No. 846/1999, Human Rights Committee, May 14, 2001, para. 8.2.
333. See e.g. *A and Others v. United Kingdom*, No. 3455/05, Eur. Ct. H.R., Feb. 19, 2009, para. 220.
334. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (“CAT”), art. 15.
335. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 3(8)(a–b).
336. “Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ten areas of best practices in countering Terrorism,” UN Doc. A/HRC/16/51, (Dec. 22, 2010), para. 28, available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=18100](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=18100).

337. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 2(a)(i-ii).
338. Prevention of Terrorism Act, 2012, KENYA GAZETTE SUPPLEMENT NO. 149, art. 2(a)(iii-ix).
339. African Commission on Human and Peoples' Rights, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Comms. 143/95 and 150/96, November 1999, para. 33.

## Open Society Justice Initiative

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, and Washington, D.C.

## Muslims for Human Rights

Muslims for Human Rights is a non-governmental organization based in Mombasa, Kenya. It was founded in 1997 to promote the struggle for human rights, with a view to contributing towards the national and international struggle to protect and further the enjoyment of human rights and civil liberties by all. Its mission is to promote a culture of constitutionalism and the progressive realization of human rights.



The Kenyan government has credited its Anti-Terrorism Police Unit (ATPU) with thwarting dozens of terrorist plots, and arresting or killing dozens of terrorist suspects. But the ATPU has committed a wide array of human rights abuses that violate international, regional, and domestic law.

This report, based on over 40 interviews, includes credible allegations of extrajudicial killings, beatings of terrorist suspects, arbitrary detention, renditions, and the disappearance of at least one man by the ATPU. It traces ATPU abuses from 2007 to the present, including actions taken in response to the September, 2013, attack on Nairobi's Westgate Mall which killed over sixty people.

The report argues that these abuses are counterproductive to combatting terrorism and destroy the trust between communities and Kenya's security forces. It calls for ATPU officers to be held accountable for past abuses, for the unit to be subject to proper oversight, and for foreign aid donors to stop funding ATPU units associated with rights abuses.