

The Use of Lethal Force by the Police in Kenya (2021)



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Table of contents

<i>Acknowledgements</i>	2
<i>List of figures and tables</i>	3
Introduction	4
Methodology	8
Case definition	8
Sources	8
Analysis of episodes of the use of force by the police which resulted in death or serious injury	11
Indicators of the use and abuse of lethal force	12
Indexes of use of lethal force in Kenya compared with those for other countries	16
Spatial and temporal distribution of the use of force by the police in Kenya	18
Circumstances in which force was used by the police in Kenya	20
Recommendations	22
Reporting and recording cases of the use of force	22
Preventing abuse and minimising the use of lethal force	23
<i>References</i>	25
<i>Endnotes</i>	26

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The Network of African National Human Rights Institutions (NANHRI), the African Policing Civilian Oversight Forum (APCOF), and the Laboratório de Análise da Violência, of the State University of Rio de Janeiro (LAVUERJ) welcome the release of this report. The excessive use of force by police performing functions of public security is a challenge shared by several if not most African countries. Unfortunately, use of force in Africa is rarely documented and when it is, the data is often unavailable. It is in this regard the research provides the most comprehensive data on use of force by the Kenyan National Police Services (NPS) for the year 2021 and seeks to understand this through a set of indicators through which use of lethal force by the state can be measured.

We thank the Kenya-based institutions that collaborated with us on this study, namely the Independent Policing Oversight Authority (IPOA), the Kenya National Commission on Human Rights (KNCHR), the Independent Medical-Legal Unit (IMLU), and the Mathare Social Justice Centre (MSJC).

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List of figures and tables

List of figures

Figures 1: Number of episodes in which police shot someone dead, by month: 2021	19
Figures 2: Number of episodes in which police shot someone dead, by day of the week: 2021	20

List of tables

Table 1: Relevant episodes of the use of force recorded by participating institutions in Kenya: 2021	9
Table 2: Percentage of cases recorded by an institution that were also recorded by the IPOA	10
Table 3: Summary of recorded victims of police action in Kenya, by county: 2021	11
Table 4: Indicators of the use and abuse of lethal force for Kenya, compared with those for South Africa and Latin American countries	17
Table 5: Summary of recorded victims of police action in Kenya, by county: 2021	18



Introduction

The present study is the outcome of a collaboration involving:

- the Network of African National Human Rights Institutions (NANHRI);
- the Independent Policing Oversight Authority (IPOA) in Kenya;
- the Kenya National Commission on Human Rights (KNCHR);
- the Independent Medico-Legal Unit (IMLU), a Kenyan non-governmental organisation (NGO);
- the Mathare Social Justice Centre (MSJC), a community-based Kenyan organisation;
- the African Policing Civilian Oversight Forum (APCOF); and
- the Laboratório de Análise da Violência, of the State University of Rio de Janeiro (LAV-UERJ).

Abuse of force by public security agents is a sensitive issue in many countries. As the holder of the monopoly on legitimate violence, the state is entitled to use force to protect people's rights and to uphold the law. However, the use of force has to be contained so that it does not cause more harm than the harm it is meant to prevent.

According to international standards such as the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, and the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions – known as the Minnesota Protocol – lethal force can be used only in exceptional circumstances.

Principles regarding the use of force that are often contained in international documents and in national guidelines tend to include the following:

- a) *legality*, which requires that force be used only to pursue legal aims;
- b) *necessity*, that is, that there are no alternative and less violent means to achieve the same ends;

-
- c) *proportionality*, which means that the force used by state agents cannot significantly exceed that used by suspects or opposers;¹
 - d) *precaution*, which imposes a duty on the state to plan law enforcement operations in a manner that minimises the use of force; and
 - e) *accountability*, according to which the state has to duly investigate incidents of lethal force and inform the relatives of victims of the outcomes of such investigations.

Lethal force, that is, the use by state agents of instruments such as firearms that are likely to cause death, needs to be specifically controlled. In particular, lethal force must be used only in exceptional circumstances.

The African Commission on Human and Peoples' Rights, in its General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), specifically states the following paragraph 27:

... The intentional lethal use of force² by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary).

This, in turn, echoes Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

In other words, the principle of necessity can be applied only to the objective of saving lives, with the result that any other purpose, such as the protection of property, does not warrant the use of lethal force.

Kenya's National Police Service (NPS) Act of 2011 provides that the use of force by the police is warranted only when non-violent means are ineffective (Sixth Schedule, Article A1). Furthermore, it also explicitly mentions the principle of proportionality on which the use of force must be based and refers specifically to the objective to be achieved and the resistance faced (Sixth Schedule, Article A2). However, contrary to international norms, the Act permits the use of lethal force not only to protect life, but also to protect property and prevent escapes (Sixth Schedule, Article B1).

Despite all existing regulations, human rights reports in many countries are filled with cases of extrajudicial executions and cases of alleged abuse of force by state agents. When such cases arise, it is often hard to challenge the official version of events in court. In fact, in many countries, and in many instances, the criminal justice system appears to be unable to prosecute and sentence law enforcement officers who use force inappropriately. This can be attributed to several factors:

- a) The difficulty in obtaining evidence, especially where the victim is deceased;
- b) People being afraid to testify against public officials;
- c) The official version being given precedence, the presumption presumably being that law enforcement officers acted legally;
- d) Significant sectors of the population may support harsh and illegal interventions against delinquents;
- e) The absence of adequate and timely support and guidance for victims and witnesses in such cases – including a scarcity of witness-protection programmes; and
- f) Investigations by state agencies often proceed very slowly.

In any case, *use of force has to be subjected to limits and controls that go beyond the criminal test*. Considering that lethal force has to be minimised, there are many circumstances in which its use might not be considered criminal, yet it should nevertheless be avoided or restricted. In fact, given their mandate to use force, we argue that the possibility of *abuse of force should be treated as a professional hazard* by law enforcement officers and should be treated accordingly, rather than being seen as an extremely unlikely event that could only result from the moral flaws of a few errant officers.

Given the difficulties of the criminal justice system in identifying and imposing sanctions for abuse of lethal force, it is even more important to resort to an *overall analysis of patterns of use of lethal force*. Specific indicators have been developed in the literature to establish whether the use of lethal force is proportionate and, therefore, legal or excessive. This is what the project, Monitor of Use of Lethal Force in Latin America,³ did for eight countries in the region in 2022: Brazil, Colombia, El Salvador, Mexico, Venezuela, Chile, Jamaica and Trinidad and Tobago. The project developed a set of indicators of use and abuse of lethal force, and a common methodology to measure them. that allowed for international comparison. It focused on the use of firearms by on-duty police officers, since such data is much easier to obtain in the respective countries than data for off-duty officers or for the use of less-than-lethal weapons.

In South Africa, an analysis of lethal force by the police was also carried out by APCOF using a similar methodology (Cano, 2021⁴).

Given that indexes of use and abuse of lethal force already exist for the Latin American countries mentioned and for South Africa, this report will – to the extent that available information makes this possible – compare similar data for Kenya with that from these countries. This will provide a backdrop against which Kenya can be better evaluated. Nevertheless, it has to be remembered that most of the countries concerned were chosen precisely because they tend to have a problem with the excessive use of force.

The purpose of the present study is to analyse the use of force by the police in Kenya, with specific emphasis on lethal force. Accordingly, existing evidence that was collected by the participant organisations will be analysed and available indexes will be compared with those of other countries. Again, it should be emphasised that most of the Latin American countries that appear in the Monitor of Lethal Force were chosen because of their excessive levels of use of force and extrajudicial killings by law enforcement officers. Thus, the fact that a country compares favourably with many of these countries does not necessarily mean that there is no reason for concern.

In Kenya, external oversight of the police is officially assigned to the IPOA, an independent but official body whose main objective is to ‘hold the Police accountable to the public in the performance of their functions’ (section 5 of the IPOA Act, 2011).

Among other functions, the IPOA is mandated to ‘investigate any death or serious injury[,] including death or serious injury while in Police custody, which [is] the result of Police action or [was] caused by members of the Service while on duty, (section 25(1) of the IPOA Act). Its mandate also permits it to ‘monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service’ (section 6(d) of the IPOA Act). It can even take over ongoing internal investigations if such investigations are being delayed or are unreasonable (section 7(1)(b) of the IPOA Act).

However, in order for these investigations by the IPOA to take place, it first needs to be notified thereof by the police, which service is legally obliged to do so in terms of section 25(2) of the IPOA Act. Previous studies and NGO reports have emphasised that many deaths occurring during police interventions are simply never communicated to the IPOA (Probert, Kimari & Ruteere, 2020⁵). In fact, the authors of these studies and reports point out that the reporting, by the NPS to the IPOA, of cases involving death or serious injury resulting from police conduct dropped dramatically from around 80 per semester in 2013 to less than 20 between 2015 and 2017. In other words, the police stopped reporting such cases to the IPOA for some reason.

Thus, one of the main challenges regarding the IPOA's work has been to obtain information on relevant cases from the police.

Since the present study will consider sources of information other than that from the IPOA, this may also contribute to ascertaining the degree of coverage of IPOA sources.



Methodology

Case definition

This study focused on cases of *use of force by the NPS by any means that resulted in death or serious injury and which occurred during 2021*. Accordingly, the use of force by public security organisations other than the NPS was not taken into account.

In addition, deaths in police custody were included. Even though it was often not clear whether or not the police had used force in such cases, the responsibility for the life and personal integrity of a person in custody ultimately lies with the institution.

Only cases where the victim was clearly identified were considered. This was also essential in order to avoid repetition, that is, the same fact being reported by more than one organisation. If victims were not identified, it would be difficult to check whether a case was in fact the same as another one. Consequently, cases of people who had disappeared after having last been seen with the police were not included – unless a body had been found – despite the fact that some of these cases may indeed have involved summary executions.

Sources

The main sources for this report were cases gathered by the four participant Kenyan organisations for the year 2021, namely:

- a) The Independent Policing Oversight Authority (IPOA), which has as its statutory mandate oversight over the police;
- b) The Kenya National Commission on Human Rights (KNCHR), which, as the national human rights institution of Kenya, has a constitutional mandate to promote and protect human rights;
- c) The Independent Medico-Legal Unit (IMLU), a civil society organisation with a national reach that is concerned with policing oversight; and
- d) The Mathare Social Justice Centre (MSJC), which is a grassroots initiative undertaken in an informal settlement where the use of lethal force is highly prevalent.

Each of these four organisations presented their records in accordance with the preceding case definition. However, a procedure had to be devised so that a single database could be developed so that organisations did not need to share confidential information with one another.

First, cases were ordered by date and location. Secondly, in meetings where all four organisations were present, cases were reviewed by date and location as well, starting with 1 January 2021 and ending on 31 December 2021.

Thirdly, information on a case was used to code relevant variables in a new and final database. No names or identifying information were recorded on this final database in order that confidential information might be preserved. Each new case received a serial number as an identification code.

If two or more organisations had a case with the same date and place, identifying information was read out so that it could be determined whether or not it was in fact the same case. If it was, relevant information from all the organisations was merged and the main variables of the case were coded. Again, no names or identifying information were recorded on the final database.

Among the four participating institutions, the total number of relevant episodes recorded in 2021 was 162. These were distributed among each of the four institutions, as shown in Table 1:

Table 1: Relevant episodes of the use of force recorded by participating institutions in Kenya: 2021

Institution	Number of episodes
IPOA	106
IMLU	79
MSJC	15
KNCHR	11
All institutions	162

From Table 1, it can be seen that the IPOA was the main source, with two-thirds of all cases recorded, followed by the IMLU, with around a half of such cases, then the MSJC and KNCHR. Yet the most relevant result here is that the IPOA did not receive about one-third of the cases, which were recorded by other institutions. This means that the IPOA records were a significant underestimation due to under-reporting. Furthermore, the actual number of cases was in all likelihood higher than the 162 recorded by all the institutions – had there been more participating institutions, particularly at the local level, other cases would presumably have been discovered.

As for the degree of overlapping between cases originating from different organisations, Table 2 presents the percentage of cases recorded in each institution that were also recorded by the IPOA.

Table 2: Percentage of cases recorded by an institution that were also recorded by the IPOA

Institution	Total number of recorded cases	% of those cases also recorded by IPOA
IMLU	79	53.2%
KNCHR	11	27.3%
MSJC	15	6.7%

Thus, the majority of cases that reach the IMLU are also received by the IPOA. As for cases recorded by the KNCHR, only one in four is also recorded by the IPOA. As for the MSJC, its cases are hardly ever recorded by the IPOA. Such outcomes should give an indication of which cases do not reach the IPOA and what could be done to improve the IPOA's coverage. Even though the MSJC is a local organisation – unlike the IMLU and the KNCHR – the percentage of cases recorded by the IPOA is calculated on the basis of the number of cases recorded by each organisation, with the result that the percentages concerned should be unaffected by the territorial coverage of each of them.

As for the gravity of the incidents, those cases received by the KNCHR and the MSJC were particularly serious, since practically all of them involved deaths, with their being very few cases of injuries. On the other hand, the IPOA and the IMLU record both deaths and injuries.



Analysis of episodes of the use of force by the police which resulted in death or serious injury

Table 3 contains a summary of the victims in all relevant cases included in the database.

Table 3: Summary of recorded victims of police action in Kenya, by county: 2021

Category	Number of episodes
Number of civilians shot dead by police	80
Number of passers-by shot dead in crossfire between suspects and the police	3
Number of civilians killed by police through other means (other than firearm)	19
Number of suspects dead in police custody	11 ⁶
Total number of fatal victims whose death can be attributed to police (action or omission)	111
Number of civilians shot and wounded by police	21
Number of passers-by shot and wounded in crossfire	0
Number of civilians wounded by police through other means (other than firearm)	100
Total number of non-fatal victims whose injuries can be attributed to police (action or omission)	121

In 2021, 80 civilians in total were shot dead by the police, while two other persons were killed in crossfire between suspects and the police. However, only 21 civilians were injured by police gunfire, which is around a quarter of the number of victim fatalities. This imbalance can only be explained in two ways: either a) there was a pattern of excessive use of force by the police, in terms of which many more people ended up dead rather than injured; or b) there is a higher likelihood of reporting of deceased victims when compared with those injured, which means that the level of underreporting would be much higher for injured civilians. The actions of police officers in which means other than a firearm were used caused a total of 19 civilian deaths, with 100 being injured. This ratio between fatalities and non-fatalities falls far more within expected thresholds. It also gives rise to the question whether there may be a much higher

likelihood of reporting in respect of fatalities than in the case of injuries (see explanation 'b' above as a possible reason for the much higher number of victim fatalities brought about by the use of firearms).

In any case, if the accuracy of the data is to be believed, firearms are far more lethal than any other means employed by the police but result in a smaller number of injuries.

Apart from people killed and wounded by police action, there were another ten individuals who died in police custody: two of them were allegedly victims of suicide and, with regard to the other eight, the cause of death was undetermined. These ten individuals were in reality the responsibility of the state, so their deaths can be attributed to the actions of the institution which housed them – even though their deaths were not a direct consequence of the actions of police officers.

Indicators of the use and abuse of lethal force

In order to allow comparability with Latin American countries, the *events of interest* for the calculation of indexes are those in which firearms were intentionally⁷ used by or against on-duty public security agents and which resulted in injury or death, excluding suicides and accidents.

There are several reasons for selecting only cases involving firearms. First, this is a criterion that is easily applied in various countries with different registration systems, since police use of firearms is more frequently and reliably coded and reported than other means entailing the use of force. Also, given the fact that a firearm is a highly lethal weapon, it tends to result in the vast majority of victim fatalities caused by state agents in most countries – including Kenya according to the data provided above.

Restricting cases to those in which agents were on duty stems from the lack of homogeneity in the way that various countries record cases where off-duty police officers are involved in fatal incidents. These situations may include reactions to attempted robberies, undertaking private security work, episodes of domestic violence, conflicts with neighbours, participation of state agents in criminal activities, etc. In addition to this diversity, and to the different methods of coding, there is no consensus regarding the extent to which police officers in each of these cases are deemed to be intervening as an agent of the state or as a private individual, for instance when reacting to a robbery witnessed during their free time.

The concept of *public security agent* which is used to calculate the indicators in Latin American countries includes: a) national, regional and local police; b) the army when it performs public security functions; and c) members of other public agencies that perform public security functions. In South Africa, cases were limited to those involving officers of the South African Police Service (SAPS) and of metropolitan police forces, for these were the bodies reporting to the Independent Police Investigative Directorate (IPID). With regard to Kenya, cases are, as already explained, also restricted to those involving participation of officers of the NPS.

The indexes used are presented below and are divided into two groups: incidence and abuse. The former attempts to measure the frequency of the use of force. However, a high incidence does not mean that the level of lethal force is necessarily excessive, for there may be circumstances that account for or justify it. Abuse-of-force indicators, on the other hand, aim to measure precisely whether there is evidence to support the claim that the use of force was excessive and therefore illegal.

Indexes of the incidence (I) of the use of lethal force

- I-1. Absolute number of civilians killed by on-duty public security agents, by gunshot;
- I-2. Number of civilians killed by on-duty public security agents, by gunshot, for every 100 000 inhabitants (rate);
- I-3. Number of civilians killed by on-duty public security agents, by gunshot, for every 1 000 public security agents (rate);
- I-4. Number of civilians killed by on-duty public security agents, by gunshot, for every 1 000 people arrested (rate); and
- I-5. Number of civilians killed by on-duty public security agents, by gunshot, for every 1 000 firearms seized (rate).

The *incidence indexes* seek to measure the intensity of the phenomenon, first in absolute terms (I-1), then, secondly, as weighted by the population (I-2) and the number of public security agents (I-3), given that one could expect a greater number of episodes of the use of force as the population and the size of the police force increase. Thirdly, the indicators are weighted by events that imply a greater probability of the use of lethal force, such as arrests (I-4) and firearm seizures (I-5). During arrests and firearm seizures, there is a greater likelihood of resistance to authority than with other events, thereby increasing the possibility of the use of force. Since, as mentioned previously, the use of lethal force is internationally regulated by the principle of proportionality, the carrying of firearms by civilians is a crucial factor in justifying the legitimate use of lethal force, though only in cases where there is an imminent threat to someone's life. In other words, the carrying of firearms by the population is almost a necessary condition – albeit an insufficient one on its own – to warrant the use of lethal force by security agents.

Indexes of the abuse (A) of lethal force

- A-1. Homicides by gunshot caused by on-duty public security agents (I-1) as a percentage of total intentional homicides;
- A-2. Ratio between civilians killed by gunshot by on-duty public security agents (I-1) and public security agents killed (AK) by gunshot in homicides while on duty;
- A-3. Lethality index: Ratio of the number of civilians killed by gunshot by on-duty public security agents (I-1) to the number of civilians wounded by gunshot by on-duty public security agents;⁸
- A-4. Ratio of the lethality index of civilians (civilians killed divided by civilians wounded) to the lethality index of public security agents (agents killed divided by agents wounded) (All of these correspond to people killed or wounded by gunshot in incidents involving the participation of on-duty public security agents); and
- A-5. Average number of civilians killed by gunshot by on-duty public security agents (I-1), per incident, taking into account all incidents causing civilian deaths or injuries by gunshot.

The *indexes of abuse of lethal force* aim to measure the degree to which patterns of excessive use of lethal force occur in a country or region. In principle, as explained above, a high incidence

level, while concerning, does not automatically mean that the use of force has been abusive. It is possible that lethal force may have been used in response to a violent situation in which the lives of police officers have been threatened. For this reason, incidence indexes must be complemented by abuse indexes.

The *proportion of intentional homicides that result from the intervention of public security agents* (A-1) compares the lethality occasioned by public agents with the overall levels of lethal violence existing in a country. In a country where the homicide rate is low, a high number of victim fatalities caused by the police could hardly be justified as proportionate, especially since they can only make legitimate use of their firearms when there is an imminent threat to their lives or the life of others. In such sense, this indicator constitutes a test of proportionality with regard to the use of force. In a study by Cano (1997) in cities and countries where there was no reason to suspect abuses, the proportion of fatalities due to police intervention was around 5%. When this percentage surpassed 10%, this was a clear indication of the abusive use of force. In short, the proportion must remain below 10% and, when it does not, this is incompatible with the moderate and legal use of lethal force.

The *ratio between civilians killed by gunshot by public security agents and public security agents who are victims of firearm homicides* (A-2) is an even better indicator of the principle of proportionality, interpreted here as the degree of force exercised by both sides. It has to be remembered that law enforcement officials can use lethal force only in response to an imminent threat to someone's life. If public security agents are never victims but nonetheless are responsible for a high number of civilian victims, it is hard to justify that the latter situation occurs exclusively to protect the lives of the former. Instead, this would point to the existence of summary executions in which public agents kill civilians when they could arrest them.

In general, a higher number of victim fatalities is to be expected among those who confront law enforcement officials, as opposed to among the officers themselves. There are a number of reasons for this: the police tend to operate in groups; they are trained; they often use bulletproof vests, etc. Nevertheless, according to Chevigny (1991), when the ratio in this regard exceeds 10 to 1, this is a strong indication of the excessive use of force. Therefore, the acceptable upper limit in respect of this indicator would be 10.

The *ratio of civilians killed to civilians wounded* during interventions by public security agents – also called the lethality index (A-3) – is perhaps the clearest test of abuse of lethal force. It also addresses the principle of proportionality. Medical literature on armed conflicts reveals a greater number of wounded victims compared with the number of dead. In the Vietnam War, the ratio was four wounded for every person killed from 1964 to 1973, and, in the conflict between Israel and Lebanon in 1982, the ratio of wounded to killed was 4.5 (Coupland & Meddings, 1999). The International Red Cross also states that 'the ratio of dead to survivors in modern conflicts tends to be about 1:4' (Giannou & Balden, 2010). However, these lethality levels occur in scenarios in which the attacker's intention is to kill, whereas, in a context of public security, the principles of necessity and proportionality should apply and a reduction in the lethality index should be a priority. Also, the obligation to provide medical assistance for victims of the use of force by the police should help reduce the number of fatalities. In fact, in the context of law enforcement, there is a difference between use of force that is potentially lethal and use of force which is intentionally lethal – with the latter hopefully being only a very rare occurrence (e.g. when a kidnapper is threatening to imminently kill his or her victim). On the other hand, in a war situation, force that is intentionally lethal is commonly accepted.

There are also diverse circumstances that may produce a negative bias in respect of this indicator. Records of deaths during an armed confrontation may rise over time, since people that are wounded initially may end up dying (Holcomb et al., 2006). Thus, the number of dead, and the value of the index, may, in turn, be underestimated. In contrast, Fazal (2014) describes how lethality may decline over time as a result of medical advances that save people who would otherwise have died.

Despite these limitations, the lethality index is one of the most widely used indicators in the literature on the use of lethal force by the police (Cano, 1997; Silva et al., 2012). As indicated above, the value of this index should always be below 1. Values exceeding that threshold, with more lethal than non-lethal outcomes, point to excessive use of force and, possibly, summary executions. Yet, as already explained, this indicator is dependent on the availability and reliability of records of incidents of use of force that result in non-lethal injuries. In South Africa, Bruce and O'Malley (2001) found a lethality index of 0.35 with regard to SAPS shootings that occurred between 1996 and 1998 in the Western Cape, the Eastern Cape and the Free State. In other words, the result for these three provinces was within expected parameters pertaining to the legal use of force.

The ratio of the lethality index of civilians to that of law enforcement officials (A4) compares the two lethality indexes and further tests the principle of proportionality. There is no literature to define a specific threshold of acceptability in this case. However, if the lethality in relation to civilians is much higher than it is against officers – that is, if the index is much higher than 1 – this would indicate an excessive use of force. Public officials tend to justify the number of victim fatalities caused by police interventions as being a consequence of the risk that agents are exposed to when facing heavily armed and highly dangerous criminals. If this risk is in fact real, the value of this indicator should stay close to or below 1.

Lastly, the *average number of civilians killed per incident (A-5)* is an indirect way of detecting the presence of massacres – episodes of multiple summary executions – in which a high number of deaths occur. In such situations, the indicator rises significantly above 1, while a value not far above 1, or below 1, can be expected in situations of relative normalcy.

All of the above-mentioned indexes are unable to determine if there was abuse of force in a specific case, for this would require an in-depth criminal investigation, but they do reveal whether the overall pattern of use of force is compatible with the legal principles and, therefore, whether force is being used in a legal manner (see, for example: Cano, 2021; Chevigny, 1991; CELS, 2002; Sozzo, 2002; Silva et al., 2017).

As already mentioned, it is precisely the doubts about the performance of the criminal justice system in relation to the excessive use of force that highlights the need for a comprehensive approach through the use of indexes.

Of the international principles that govern the use of force by state agents, legality and necessity are very difficult to evaluate using indicators, precisely because they would require assessing the actual circumstances in each case. Consequently, the indicators relate mainly to the principle of proportionality. Proportionality can be understood in different ways:

- Proportionality regarding existing levels of violence in the context in which security agents work (This overall level of violence is measured by the index that relates police killings to the total number of homicides (A-1); and

-
- Proportionality with respect to the threat that law enforcement agents face when they deal with suspects, which can be assessed by comparing the number of victims on both sides (indexes A-2 and A-4).

Also, proportionality is reflected in the indicators that compare dead and wounded, such as A-3 and A-4.

Indexes of use of lethal force in Kenya compared with those for other countries

For the calculation of the indexes for Kenya, victim figures were obtained from the four participating institutions, as explained above. Population data was taken from the 2019 National Census (KNBS, 2019). Homicide (murder) figures were taken from the 2021 *Kenya Annual Crime Year Book* published by the National Crime Research Centre (2021), although the last available estimate, which was used here, referred to the year 2018.

As for the total number of NPS officers, there was no official data. Thus, we used a figure originating from an audit⁹ carried out in 2019.

The number of guns seized and of arrests made is something that only the NPS would have, but they have not made any information available regarding these aspects.

Likewise, there are no available data on police officers killed or injured, which renders the calculation of indexes A2 and A4 impossible.

Table 4 presents a summary of all indexes for the countries where the relevant information was obtained.

The rate of civilians shot dead by the police in Kenya is 0.17 per 100 000 inhabitants, which is less than a third of the South African rate and is also much lower than that for all Latin American countries include in this report, which typically exceed values of 2 and 3. The only two countries that have a comparable value, though this is still higher than that for Kenya, are Colombia and Mexico, which are precisely the countries in respect of which there are serious concerns regarding the validity of official records, which are supposed to be severely underestimated. Nevertheless, as already explained, Kenyan figures are also considered to be underestimated in that not all cases are reported to the IPOA.

As for the rate of civilians shot dead by the police per 1 000 officers, the relevant value is 0.81 for Kenya, which is almost four times higher than the South African rate. Again, this value is well below that of most Latin American countries, where abuse of force is common. The only exception is Colombia, where official figures are, as explained above, suspected to be severely underestimated.

The indexes of abuse reveal interesting patterns. The proportion of all homicides (murders) resulting from police shootings is 5.5% in Kenya, which is about three times higher than that for South Africa. The figure for Kenya is, however, comparable with the figures for Latin American countries such as Jamaica and Trinidad and Tobago – in some cases it is higher and in others lower. In any case, only Brazil and, in particular, Venezuela exceed the accepted threshold of 10%.

The civilian lethality index, that is, the ratio of civilians killed to civilians injured, yields an extreme value for Kenya (3.9), which is in fact the highest figure among all countries included

in the comparison. The index is plagued by problems regarding the reliability of the data, particularly in respect of injured victims. This notwithstanding, if there is not a significant undercount regarding people injured by police gunshots in Kenya, the conclusion would be that Kenyan police are clearly using lethal force excessively, thereby causing many more lethal than non-lethal outcomes, whereas the opposite should be the case.

The last index for which there is relevant information for Kenya is the average number of civilians shot dead by the police per incident. The value for Kenya is 1.24 deaths per incident, the highest of all countries for which it was possible to calculate such index. Since there are no known thresholds for this index in the literature, it is difficult to know whether or not the value of 1.24 should be considered alarming in itself. But, if considered in conjunction with the lethality index, the scenario for Kenya is troubling.

Table 4: Indicators of the use and abuse of lethal force for Kenya, compared with those for South Africa and Latin American¹⁰ countries

Indicators	Kenya (2021)	South Africa (2017–2018)	Brazil (2019)	Chile ¹¹ (2019)	Colombia (2019)	El Salvador (2019)	Jamaica (2019)	Mexico (2019)	Trinidad & Tobago (2019)	Venezuela (2018)
I-1. Civilians killed (CK)	82	358	5 350	-	220	195	86	389	43	5 287
I-2. CK per 100 000 inhabitants	0.17	0.62	2.6	-	0.50	3.10	3.54	0.31	3.19	16.6
I-3. CK per 1 000 agents	0.81	0.22	10.2	-	0.50	6.90	5.22	1.53	4.66	26.7
I-4. CK per 1 000 arrests*	-	0.22	-	-	1.00	4.90	32.70	0.96	4.51	56.6
I-5. CK per 1 000 weapons seized*	-	18.99	47.9	-	10.70	57.10	129.1	21.06	48.42	395.6
A-1. % homicides due to state intervention	5,5%	1.76%	11.2%	-	2%	8.1%	6.0%	1.1%	7.99%	30.30%
A-2. Ratio between CK and AK*	-	12.61	114.1	-	1.8	39	86	2.67	10.75	-
A-3. Civilian lethality index	3.9	-	-	-	0.25	2.6	1.03	2.3	1.59	-
A-4. Lethality ratio	-	-	-	-	0.1	7.18	3.1	2.72	3.18	-
A-5. Average of civilians killed per incident	1.24	0.74	-	-	0.2	0.7	0.07	-	0.75	-

(*) Indicators calculated only for the SAPS, since data in respect of metropolitan police forces was unavailable.

Spatial and temporal distribution of the use of force by the police in Kenya

The distribution by county of lethal and non-lethal outcomes of police intervention in Kenya is indicated in Table 5. Again, the 2019 National Census was used to calculate the rates.

Table 5: Summary of recorded victims of police action in Kenya, by county: 2021

County	Number of episodes	Civilians shot dead by police	Civilians shot dead by police per 100 000 inhabitants	Civilians killed by police through other means	Civilians shot and injured by police	Civilians injured by police through other means	Civilians injured by police through other means per 100 000 inhabitants
Baringo	1	6	0.90				0.00
Busia	3	1	0.11	1		1	0.11
Embru	5	1	0.16	2	4	6	0.99
Homabay	1	0	0.00	1	0.00	1	0.00
Kajiado	2	0	0.00	2			0.00
Kakamega	2	5	0.27				0.00
Kiambu	3	6	0.25	1	3		0.00
Kilifi	15	3	0.21		5	17	1.17
Kisii	5	1	0.08			1	0.08
Kisumu	7	3	0.26	3	3	1	0.09
Kitui	2	0	0.00			2	0.18
Kwale	5	3	0.35			3	0.35
Laikipia	1	0	0.00	1			0.00
Lamu	5	0	0.00			5	3.47
Makueni	1	0	0.00				0.00
Meru	3	1	0.06		1	3	0.19
Migori	1	0	0.00				0.00
Mombasa	25	15	1.24	2	1	15	1.24
Muranga	1	0	0.00	2			0.00
Nairobi	56	32	0.73	3	2	30	0.68
Nakuru	3	0	0.00			6	0.28
Nyandarua	3	1	0.16			1	0.16
Nyeri	2	0	0.00		2	3	0.40
Taita Taveta	4	2	0.59			4	1.17
Tana River	1	0	0.00			1	0.32
Tharaka Nithi	1	1	0.25				0.00
Turkana	1	1	0.11				0.11
Vihiga	1	0	0.00			1	0.147
West Pokot	1	0	0.00				0.00
Undetermined	1	0		1			
Total	162	82	0.17	20	21	101	0.21

The number of victims shot and killed by the police was the highest in the main metropolitan areas such as Nairobi and Mombasa, which is to be expected owing to their larger populations. However, when we calculate the rate per 100 000 inhabitants, it is still these areas – particularly Mombasa – that have the highest incidence. In other words, Mombasa and Nairobi concentrate the use of lethal force by the police, and this cannot be explained simply on the basis of their population. For instance, Mombasa has an incidence which is seven times higher than the national average. Apart from the two counties referred to, Baringo and Taita Taveta also exceed the 0.50 level, which is already three times higher than the national average.

As for civilians killed by the police through other means, their numbers are low, as already explained, and they do not seem to be concentrated in any particular county. The same applies to civilians shot and injured by the police.

The number of civilians injured by the police through means other than firearms is higher again in Nairobi and Mombasa. However, when we divide by the population, it is the county of Lamu that is out on top, followed by Mombasa and Taita Taveta. Nairobi, on the other hand, does not stand out as much, even though it is still above the national average.

The number of episodes in which the police shot and killed someone was higher in the initial months of 2021 and lower in the last few months of that year, particularly after August. This might point to a decreasing trend in the use of lethal force, or there might be some kind of seasonality associated with these dynamics. Since we only have the data for one year, it is not possible to test either hypothesis.

As for the days of the week on which civilians were shot dead by the police, there does not seem to be a clear pattern. The days with the highest number of cases were Mondays and Wednesdays. However, episodes of such deaths were very rare on Fridays.

Figure 1: Number of episodes in which the police shot someone dead, by month: 2021

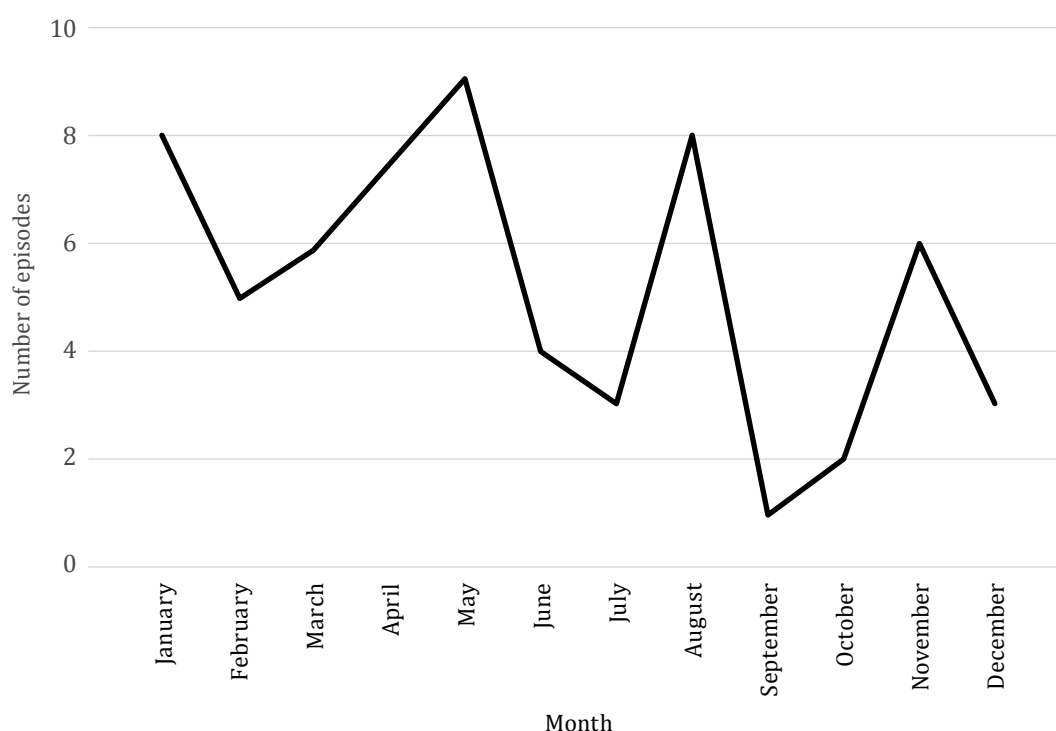
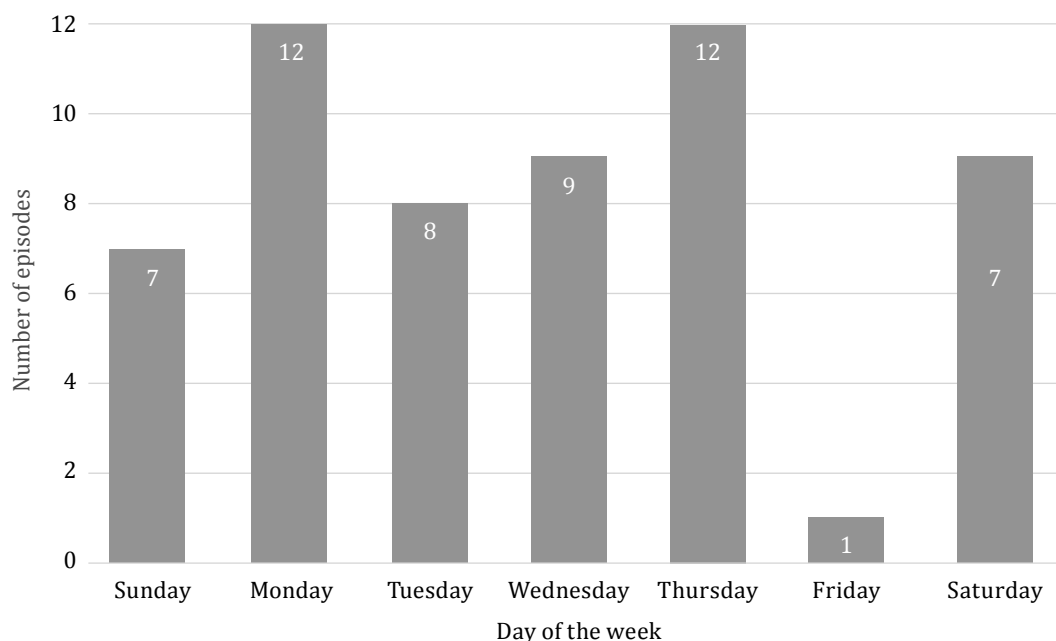


Figure 2: Number of episodes in which police shot someone dead, by day of the week: 2021



Circumstances in which force was used by the police in Kenya

The very scant description that accompanied case records on the database was read and coded in order to try to explore the circumstances in which the police made use of force resulting in death and injury. This was a first attempt at considering preventive measures. However, a far more detailed analysis of such circumstances, based on a detailed description of the facts, is certainly warranted.

Focusing first on the episodes of *people shot dead by the police*, we found the following circumstances:

- Three cases defined as public demonstrations (public-order management incidences), one as an altercation and one as intercommunity strife. (All five of these episodes can be deemed *public-order policing* cases, which should be dealt with using less-than-lethal weapons whenever possible so that loss of life is prevented.)
- Two cases of robbery.
- One case relating to the enforcement of COVID regulations. (Needless to say, no enforcement of a health measure justifies a death. It has been alleged that the police made excessive use of force in 2020 in order to apply COVID regulations, but we do not have the data for this year in order to test this.)
- One case of suspected terrorism, which tends to be a situation where the use of lethal force is more likely.
- Six cases in which there was an indication that forced disappearances or extrajudicial killings were involved. (For example, a person was last seen in police custody and was discovered dead days later. These are the most disturbing cases and should be thoroughly investigated by the criminal justice system.)

Secondly, among the circumstances in which *police interventions resulted in injuries*, either by firearm or through other means, there were the following cases:

- Three cases relating to the enforcement of COVID regulations;
- One case of an alleged human rights abuse where the victim was said to have been forced to cut his dreadlocks;
- One case of violence against a junior police officer by a senior police officer;
- One case of robbery; and
- Three cases arising out of public-order management during demonstrations.

Apart from situations in which the police intentionally used force, we also have, as already related, a total of 10 people who died in custody for several reasons, two of which were alleged suicides. Thus, prevention of deaths in custody should be a priority.



Recommendations

The recommendations that follow are divided in two sections. The first section deals with the way in which cases are recorded and reported. The second relates to measures designed to prevent or minimise the use of force by the police.

Reporting and recording cases of the use of force

The following recommendations are made regarding the process of recording and reporting cases of police use of force:

1. *Strengthen and streamline reporting by the NPS to the IPOA* so that every single relevant case of use of police force in which there are victims is referred promptly to the IPOA. Protocols are already being reviewed to this effect. It may be a sound idea to also create an official system of incentives (positive or negative) regarding reporting by the NPS to the IPOA.
2. *Verify the degree of coverage of NPS reporting of relevant cases by carrying out a search of cases of police use of force reported in the press* and comparing the resulting information with cases submitted by the NPS.
3. Enhance the process of *collaboration between the IPOA, MSJC, KNCHR, IMLU* and other possible interested partners in order to *share pertinent information* on cases – while taking into account the existing laws relating to confidentiality and data protection – so that the databases of each organisation are compatible with one another. As far as possible, single databases should be created among different organisations.
4. *Improve data information systems of the IPOA* and of other organisations so that data on the use of force is *more detailed and is categorised or coded*¹² in a way that allows for deeper analyses. In order for this to happen, more coded fields should be created, together with clear definitions on how to populate them. The first step would be to code the number of fatal and non-fatal outcomes for each episode. Also, this new information should allow for the creation of typologies of the nature of the episode, and this, in turn, should help in devising prevention strategies.

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5. Register and code the *information related to the complainant*, whether it be an organisation, a relative of the victim, an officer involved in the incident, an officer who arrived at the scene, etc.
 6. Register, in the information system, the *initial nature of the incident as reported originally*, and later register the *final nature of the incident after the investigation by the IPOA has been concluded* in order to determine whether any changes occurred.
 7. *Investigate whether injuries arising from police interventions are more under-reported than deaths*. If this is not the case, the existing figure of 3.9 deaths for every injury would reveal a pattern of extreme abuse requiring urgent and stringent measures to counteract it.

Preventing abuse and minimising the use of lethal force

Recommendations as to how the police in Kenya could reduce the use of lethal force can be summarised as follows:

1. Improve *training* as well as access to less-lethal weapons so that *public-order and mob policing* can be carried out with the minimum use of force and, particularly, firearms. Improve training directed at *enforcing laws and/or regulations* so as to ensure that the bare minimum of force is used.
2. Thoroughly *investigate* cases where there is any indication of a *summary execution* so that the perpetrators can be brought to justice and the whole process is widely publicised in order to discourage other possible perpetrators.
3. Study possible *measures to prevent deaths in custody*, such as medical and psychological evaluations or the installation of cameras.
4. Conduct a *study on the use of force in Nairobi and Mombasa* in order to understand why the use of force is more prevalent in these counties. The results of this study may serve as input for possible prevention measures in these geographical areas.
5. Consolidate the *legal and regulatory framework regarding the use of force*. This can be done by adopting a *unique piece of legislation* such as the Model Bill on the Use of Force by Law Enforcement Officials proposed by the Institute for International and Comparative Law in Africa and APCOF. This would offer a comprehensive and non-contradictory legal orientation for police officers which is respectful of international law. Such new legislation should explicitly *ban the use of lethal force to protect property or to prevent escapes*, unless somebody's life is at risk. The Assessment of the Kenya NPS's progress towards meeting the Common Standards for Policing in Eastern Africa (APCOF, 2022), which has been endorsed by the NPS, also recommends the adoption of new regulations on the use of force. Complementary to a bill on the use of force, any guidelines on the use of force, such as those that were drafted jointly by the KNCHR and the NPS, need to be reviewed to ensure that they are consistent with such bill and with international principles.

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6. *Create a commission within the NPS to review all cases involving lethal outcomes, whether they be civilians or police officers, in order to reflect on what could have been done differently so as to avoid fatalities. The findings of this commission – which findings should not have disciplinary consequences in order to maximise cooperation – should inform protocols, doctrine and training.*
 7. *Promote protection of witnesses and victims of cases of the use of lethal force through the Witness Protection Agency and the Victim Protection Board, respectively.*

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Endnotes

- 1 Some authors and pieces of texts on jurisprudence consider “proportionality” to also mean an assessment of the benefits resulting from the use of force versus the harm it may cause, that is, proportionality is judged in this way assessed according to the purpose of the agent (see, for example, Heyns 2017, pg. 13). However, in the present report, proportionality will be assessed basically in relation to the resistance and threat presented by suspects.
- 2 ‘Intentional lethal use of force’ is intended to mean that weapons are used with the intention to kill.
- 3 <https://www.monitorfuerzaletal.com/>.
- 4 <https://apcof.org/wp-content/uploads/use-of-lethal-force-by-the-police-in-south-africa-.pdf>.
- 5 <https://apcof.org/wp-content/uploads/apcof-study-of-ipoa-deaths-from-police-action-kenya-eng-041-3.pdf>.
- 6 One of these 11 people was assaulted and tortured by police so this victim is also counted as a civilian killed by police through other means of aggression. Among the other 10 cases, 2 are considered to be suicides and for the rest the cause of death is not determined.
- 7 There were no reported cases of accidental shots, that is, cases where the weapon was fired without the person holding it intending to do so (e.g. while the weapon was being cleaned or because it fell down). Thus, the word ‘intentional’ as used here means that the holder of the weapon intended to shoot.
- 8 In order for this indicator to be meaningful, data also needs to be collected about non-lethal incidents, i.e., cases of use of force that result in injuries but not fatalities.
- 9 See <https://www.the-star.co.ke/news/2019-03-19-kenya-has-101288-police-officers-audit-shows>.
- 10 Chile produced no official data for this purpose. So, all the information for Chile contained in the report on Latin American countries originated from the press. Since the present report considers only official data, all cells for Chile have been left blank.
- 11 Chile produced no official data for this purpose. So all the information for Chile contained in the report on Latin American countries originates from the press. Since this report considers only official data, all cells for Chile are left blank.
- 12 ‘Coding’ in this context means assigning numeric values to each response (for instance, 1: male; 2: female; 3: other) so that the variables can be aggregated into categories and can be easily analysed. If gender is left open for each person to write down the response, rather than coding it, there will be many different variations: ‘male’, ‘Male’, ‘female’, ‘Female’, etc.; hence the information will be very difficult to analyse.

About the author

Ignacio Cano got his joint Ph.D. in sociology and social psychology at the Universidad Complutense de Madrid (Spain) in 1991. From 1991 to 1993 he worked with UNHRC in El Salvador, with UNHCR. He was also a member of the United Nations Truth Commission for El Salvador. He later developed post-doctoral research at the universities of Surrey (UK), Michigan, Arizona (USA) and Lancaster (UK), centred on research methodology and programme evaluation. From 1996 onwards, he worked in Rio de Janeiro, Brazil, on topics related to violence, human rights, public security and education in an NGO called ISER. In 2000, he joined the department of social sciences of the State University of Rio de Janeiro, where he is now a full professor of sociology. He is a founder of the Laboratory for the Analysis of Violence (LAV) of the same university. He is currently based at Instituto de Investigaciones Sociales, Universidad Autónoma de México.

About this report

Excessive use of lethal force is a contributing factor in undermining the legitimacy of the police. This report uses a set of indicators through which the use of lethal force by the state can be measured to better understand the patterns and risks of use of force in Kenya.

About APCOF

The African Policing and Civilian Oversight Forum (APCOF) is a network of African policing practitioners from state and non-state institutions. It is active in promoting police reform through strengthening civilian oversight over the police in Africa. APCOF believes that strong and effective civilian oversight assists in restoring public confidence in the police; promotes a culture of human rights, integrity and transparency within the police; and strengthens working relationships between the police and the community.

APCOF achieves its goals through undertaking research and providing technical support and capacity building to state and non-state actors including civil society organisations, the police and new and emerging oversight bodies in Africa.

APCOF was established in 2004, and its Secretariat is based in Cape Town, South Africa.

About the Laboratório de Análise da Violência

The Laboratory for the Analysis of Violence (LAV-UEJR) was founded in 2002 as a Research Centre connected to the Institute of Social Sciences of the State University of Rio de Janeiro, Brazil. Its mission is to foster public security and human rights and to diminish violence through the production of applied knowledge.

About the Network of African National Human Rights Institutions

The Network of African National Human Rights Institutions (NANHRI) is a not-for-profit- regional umbrella organization that brings together 46 National Human Rights Institutions (NHRIs) in Africa. Founded in 2007, NANHRI is registered under Kenyan laws as an independent legal entity. Its Secretariat is hosted by the Kenya National Commission for Human Rights in Nairobi. The Network works towards the establishment and strengthening of NHRIs in Africa. It provides capacity building, facilitates coordination and cooperation amongst NHRIs by linking them with other key human rights actors at the regional and international levels.

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