

Critique of Kenya Defence Forces (Amendment) Bill, 2015

A joint submission by the Usalama Reforms Forum and Commonwealth Human Rights Initiative (CHRI)

Kenya Defence Forces (Amendment) Bill, 2015 introduces several commendable changes to Kenya Defence Forces Act, 2012, but raises serious concerns about impact it will have on accountability, transparency and independence as well as about re-defining the role and functions of the KDF reserve.

1. Commendable changes

The Bill is commendable in correcting mistakes, errors and inconsistencies in the KDF Act. For instance, clause 15(a) of the Bill that amends s. 33 of the Act clears the confusion between two types of deployment. At the same time, the Bill improves style and consistency of the Act by deleting repetitions (e.g. clause 22), updating terminology (e.g. clause 24) and spreading the provisions regarding torture, cruel, inhuman or degrading treatment to their logical places in the Act (clauses 2, 23 and 36).

Another commendable amendment is contained in clause 14 that seeks to amend s.32 of the Act. The amendment creates a mandatory obligation of the Defence Council to seek approval from the National Assembly before deploying KDF to restore peace in any part of Kenya affected by unrest or instability. Thus, it brings clarity to the crucial issue of who authorises KDF deployment in such a sensitive situation and, therefore, makes s.32 of Act conform to Article 241(3) (c) of the Constitution.

However, we submit that the Bill does not introduce any other substantial amendments that can significantly improve the functioning of the KDF in line with the Constitution of Kenya and country's laws.

2. Weakening accountability and transparency

The Bill contains a number of provision that can potentially lead to KDF being a less accountable and transparent service.

2.1. Deployment of KDF in situations of internal unrest or instability

Clause 3 of the Bill seeks to amend s. 8 of the Act by removing the procedure of Cabinet Secretary (CS) informing the National Assembly about KDF deployment in situations of emergency or disaster, or to restore peace in any part of Kenya affected by unrest or instability. As further reading of the Bill suggests, this procedure was moved to s. 31 of the Act (as per clause 13 of the Bill), but some crucial elements of the notice that the CS should submit to the National Assembly are deleted. Currently, s. 8 of the Act stipulates that the CS "shall inform the National Assembly promptly and in appropriate detail of the –

- (a) reasons for such deployment;
- (b) place where the Defence Forces is being deployed;
- (c) number of persons involved;
- (d) period for which the Defence Forces is expected to be deployed; and
- (e) expenditure incurred or expected to be incurred."

Clauses 3 and 13 of the Bill, read in conjunction, remove the requirements (c) and (e) – number of persons involved and expenditure incurred or expected to be incurred.

It thus, weakens the Parliamentary oversight over financial matters of internal KDF deployments to quell unrest or instability as well as the number of soldiers deployed, which has direct impact on national security, economic stability and lives of people in the areas where KDF is to be deployed. Without such information the National Assembly will not be likely to make an informed decision to authorise KDF deployment.

Recommendation:

We recommend that clauses 3 and 13 are deleted from the Bill.

2.2. Civilian oversight over KDF

Civilian oversight, including fiscal oversight, is important to guarantee that KDF remains at the service of people of Kenya and make instances of abuse and corruption as unlikely as possible. It is, therefore, unsettling that the Bill seeks to undermine civilian oversight over KDF.

2.2.1. Duty to report is abolished

Clause 4 (b) of the Bill removes a requirement of the CS to report to the Parliament and the President on compliance with policies and directions by amending s. 10(g) of the KDF Act. Now the CS only has to monitor this compliance *proprio motu* without any supervision. Likewise the obligation of the Defence Council to report to the Parliament and the President is to be removed through repealing s. 290 of the Act (clause 39).

2.2.2. Fiscal oversight is undermined

Moreover, by amending s. 10(h) of the Act, clause 4(c) of the Bill waters down civilian oversight even further by deleting the requirement for the CS to submit “itemized statements showing the utilization, savings of public funds, and the eliminations of unnecessary duplications” that must be annexed to an annual report to the Parliament and the President according to the current KDF Act.

Fiscal oversight is further affected repealing s. 289 of the Act (clause 38) that stipulates that KDF should have separate accounts and prescribes the procedure for audit. As Bill’s Memorandum of Objects and Reasons suggests the reasoning behind this amendment is that KDF do not hold accounts separate from those held by the Ministry of Defence. Apart from admitting the non-compliance with provisions of current KDF Act, which clearly states that the KDF accounts shall be separate, it is creating inconsistency in provisions regulating KDF’s finances, since s. 288 of the Act that requires designated Ministry to prepare the estimates of the KDF revenue and expenditure, thus suggesting a separate accounting for KDF.

2.2.3. Amendments contradict the Constitution

These amendments are contrary to the principle of subordination of the national security organs that include KDF to civilian authority¹ in general and the principle that “there shall be openness and accountability, including public participation in financial matters”² in particular.

Therefore, civilian oversight is severely undermined by destroying reporting obligations of the CS and Defence Council as well as rendering KDF’s accounts invisible to public scrutiny. While the latter impacts transparency and creates avenues for corruption, Parliament’s crippled ability to oversee KDF raises serious concerns about how it will impact the Defence Forces’ accountability.

¹ Article 239(5) of the Constitution;

² Article 201(a) of the Constitution.

Recommendation:

We recommend that clauses 4 (b), 4 (c) and 38 are deleted from the Bill.

2.3. Removal of civilian command and control of KDF in joint operations with National Police Service (NPS)

Clause 15(b) seeks to amend s. 33(3) of the Act that deals with situations when KDF is deployed to support NPS. Current version of the Act stipulates that KDF can be deployed to support NPS in situations of emergency and disaster. In such situations the NPS Inspector-General is responsible for “the administration, command, control and overall superintendence of the operation”. The clause in questions aims to remove Inspector-General’s command and control functions.

While recognising the importance of assistance that KDF can provide to the NPS in situations of emergency and disaster, we submit that civilian command should be retained. Responses to the situations like these should be informed by civilian and humanitarian logic, and should not be militarised. Read in conjunction with Bill’s clauses that hinder accountability and transparency of KDF discussed below this amendment also means shifting command and control (in part) in purely civilian operations to a less transparent and accountable body. Moreover, it is better to retain single command and control over all agencies participating in relief efforts to ensure coherent and focused response, and minimise the risk of non-coordination and/or miscommunication.

Recommendation:

We recommend that clause 15 (b) is deleted from the Bill.

2.4. Removal of the National Security Council’s role in KDF deployment to support NPS

Following the removal of civilian command over joint operations of KDF and NPS, the Bills seeks to further reduce civilian involvement in and oversight over such operations.

Clause 16 of the Act seeks to amend s. 34 of the Act that deals with KDF deployment to support NPS. Two issues are potentially problematic: 1) removal of the National Security Council’s role in such deployments; and 2) extending KDF support to “other authorities”.

2.4.1. National Security Council’s role

Under the KDF Act, KDF deployment in support of NPS may only be performed “in such area or at such place as the National Security Council may determine” and “shall be discontinued as National Security Council deems expedient and necessary”. These are the two functions that the amendments seeks to remove.

With the National Security Council removed from the picture, the deployment of KDF will be authorised by the National Assembly and directed and overseen by the Defence Council³. While it is likely to make decision-making – and therefore a response – quicker, it raises concerns.

Firstly, it will negatively affect Constitutional mandate of the National Security Council, which is to “exercise supervisory control over national security bodies”⁴ and “integrate the domestic, foreign and military policies relating to national security in order to enable the national security organs to co-operate and function effectively”⁵. The amendment effectively undermines the domestic dimension of

³ According to clause 10 of the Bill amending s. 20(1) of the Act;

⁴ Article 240(3) of the Constitution.

⁵ Article 240(6) (a) of the Constitution.

Council’s supervisory role. It also separates the roles of National Security Council and the Defence Council, assigning them areas of external and internal KDF deployment respectively, which is detrimental to National Security Council’s mandate too. Finally, the involvement of the National Security Council in domestic deployments is recommended because, unlike the Defence Council, it does not lack political representation and consists of elected and appointed politicians as well as KDF people.

Therefore, removal of the National Security Councils’ role to allow for and terminate domestic deployments in support of the NPS will further hinder oversight over KDF operations.

2.4.2. “Other authorities”

At the same time the Bill seeks to extend KDF support beyond the NPS to unspecified “other authorities”. Ambiguity and legal uncertainty may create a fertile soil for exploiting KDF deployments.

Recommendation:

We recommend that clause 16 is deleted from the Bill.

3. Strengthening the Executive’s hold on KDF

Concerns about endangering accountability and transparency of KDF, discussed in Section 2 of this submission, are even more worrisome given the increased control over KDF by the Executive.

3.1. Ability of the Parliament to assign functions to the CS

Clause 4 (a) of the Bills seeks to amend s. 10 (d) of the Act. According to current version of section in question the CS “shall perform such functions, in particular those necessary for the control and administration of the Defence Forces, as may be delegated to the Cabinet Secretary, by –

- (i) The President over the Defence Forces; or
- (ii) Parliament over the Ministry.”

Suggested edition of the s. 10 (d) puts simply that the CS shall “perform such functions as may be delegated by the President”. It, therefore, 1) renders the Parliament incapable of assigning functions to the CS; 2) removes limits over what functions can be assigned;⁶ 3) gives the President unchecked ability to assign unspecified functions over both KDF and the Ministry.

This is unwarranted and dangerous expansion of the Executive’s powers over the CS. It is even more worrisome given the abolishment of the Secretary’s reporting duties discussed above.

Recommendation:

We recommend that clause 4 (a) is deleted from the Bill.

3.2. President’s capacity to extend tenure of top KDF officers

Clause 11 seeks to amend s. 24 of the Act that specifies that the Chief of the Defence Forces, the Vice Chief of the Defence Forces and the Service Commanders “shall serve for a single term of four years or retire upon the attaining of the mandatory retirement age, whichever comes first”. Proposed amendment to this section will grant the President power to extend term of office of these officers for one year on the recommendation of the Defence Council.

While recognising the necessity for strong leadership and continuity in KDF, we submit that this amendment will potentially increase the Executive’s influence over KDF and may consequently affect

⁶ By deleting the phrase “in particular those necessary for the control and administration of the Defence Forces”;

KDF's impartiality. It is even more so, given the undermined civilian oversight over the Defence Council, discussed in section 2.2.

Overall, amendments discussed in section 3 of this Submission, put impartiality of KDF in danger, contrary to the Constitutional requirement that national security bodies shall not further any political interest or prejudice any political cause.⁷

Recommendation:

We recommend that clause 11 is deleted from the Bill.

4. Re-defining the role of reserve forces

The Bill introduces new “auxiliary reserve forces” and changes the conditions for temporary deployment of the rest of the reserve forces, thus redefining the role and, potentially, functions of the reserve.

4.1. Creating the auxiliary reserve forces

The Bill aims to create “auxiliary reserve forces”, consisting of the members of the disciplined forces of the Kenya Forest Service, the Kenya Wildlife Service and the National Youth Service pursuant to clause 34 of the Bill that inserts a new s. 260A into the Act. The auxiliary reserve forces are to be deployed by the President to serve with the Defence Forces in these situations. When deployed, the auxiliary reserve forces will be governed by all laws relating to and governing KDF.

Under the proposed s. 260A there will be seven situations, in which the auxiliary reserve forces may be deployed: 1) emergency; 2) disaster; 3) during war; 4) insurrection; 5) unrest; 6) hostilities; 7) otherwise in the defence of the nation whether within or outside Kenya. The conditions of deployment are ill-defined and deeply problematic.

4.1.1. Conditions for deployment are different from the rest of the reserve forces

Sections 262 and 263 of the KDF Act specify the conditions as to when the reserve forces can be deployed. By providing a separate conditions for deployment for auxiliary reserve forces, the Bill separates them from the rest of the reserve forces. As such, while the rest of the reserve forces can be mobilised for temporary or permanent service depending on the seriousness of a security threat, no such distinction exists for the auxiliary reserve forces. Furthermore, while the temporary deployment of the rest of the reserve forces is limited to 28 days,⁸ no such limit exists for the auxiliary reserve forces.

4.1.2. Situations are not defined in law

We submit that the listed situations are vague, not defined in law and thus leave much room for interpretation. What is the difference between insurrection, unrest and hostilities? Who makes a determination whether a given situation on the ground amounts to one of the listed? If adopted, s. 260A will offer little guidance due to its imprecision, and may open avenues for abusive interpretation.

4.1.3. The list is not exhaustive

It is extremely worrisome that the list of situations in which auxiliary reserve forces can be deployed is not exhaustive. It thus leaves much discretion to the President to decide when to deploy auxiliary

⁷ Article 239(3) of the Constitution.

⁸ The Bill seeks to extend this period to 60 days (discussed below in section 4.2).

reserve forces. It is mandatory that provisions that allow for the deployment of military force do not contain open-ended lists like this to avoid abuse and/or exploitation.

Therefore, it raises serious concerns about possible abuses of deploying the auxiliary reserve forces, since they can be deployed for unlimited period of time under ill-defined conditions subject to President's interpretation.

Recommendation:

We recommend that clause 34 is deleted from the Bill.

4.2. Temporary deployment of reservists

Clause 35 of the Bill seeks to amend s. 262(1)(b) of the Act that deals with the temporary deployment of reservists. Current version of the paragraph in question reads as follows: “[At any time the President, by notice in the Gazette, may temporarily call out reservists, whether by class or by name to] support the civil power in the maintenance of order in the event of disturbances, insurrection, hostilities or public emergency for a period not exceeding twenty-eight days”.

The amendment proposes to 1) substitute the role of the reserve to support the civil power to the support of the NPS; 2) provide for a new list of situations that warrant deployment of the reserve namely, emergency, disaster, insurrection, hostilities, unrest or instability; 3) extend the maximum period of deployment for 28 to 60 days.

Like the situations that allow for deployment of the auxiliary reserve forces, these situations are not defined in law, vague and, therefore, make broad interpretation possible. Furthermore, no justification is given for extending the maximum period of deployment.

All things considered, amendments to temporary deployment of reservists and creation of the auxiliary reserve forces redefine the role of the reserve to allow for potentially widespread deployment of the reserve forces in ill-defined situations for extended (or, in case of auxiliary reserve forces-unlimited) period of time. This increases a risk of unnecessary militarised interventions in internal security matters, and may potentially have a negative impact on human rights and the livelihood of the affected communities.

Recommendation:

We recommend that clause 35 is deleted from the Bill.

Summary of recommendations

Despite few positive changes that the Bill seeks to introduce to Kenya Defence Forces Act, 2012, we recommend that the Bill is to be significantly redrafted.

Firstly, the Bill weakens accountability and transparency of KDF operations by preventing the National Assembly from making informed decisions about KDF deployment in situations of internal unrest and instability, undermining civilian oversight and removing Inspector-General from command over KDF in joint operations of KDF and NPS.

Furthermore, amendments proposed by the Bill threaten KDF independence by strengthening Executive influence over KDF through removing Parliament's ability to assign functions to the CS and through establishing Presidential power to extend tenure of top KDF officer.

Finally, the Bill redefines role and functions of the KDF reserve by creating the auxiliary reserve forces with ill-defined conditions for deployment, which creates infinite possibilities for abuse and exploitation of this part of the reserve. Proposed amendments on temporary deployment of the rest of

the KDF reserve come as another dangerous re-definition of KDF reserve's role by extending its mandate, diluting conditions of deployment and stretching the period over which the KDF reserve can be deployed.

Therefore, we recommend deleting clauses of the Bill that introduce these changes, namely, clauses 3, 4, 11, 13, 15 (b), 16, 34, 35 and 38. We also encourage the law-makers to engage into wide public consultations over the nature and content of the Bill.

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