

ANNEX I

COMMONWEALTH HUMAN RIGHTS INITIATIVE (CHRI)

SUBMISSION TO THE TECHNICAL WORKING COMMITTEE I.

CHAPTER 15, DEFENCE AND NATIONAL SECURITY

POLICE REFORMS IN KENYA

DEAR HONORABLE MEMBERS,

Introduction

Kenya is in the midst of a constitutional moment.¹ The Kenyan people have elected a new government, effectuating the first peaceful transfer of power in the history of post-Independence East Africa. The Constitution, which once ensured the domination of a single political party, and under which widespread human rights abuse were condoned, is now under revision. Ordinary citizens are deeply engaged in the process of revising the principles underlying Kenyan democracy and in reshaping government institutions in accordance with those principles.

One of the institutions that need overhauling is the police force. Kenya Police Force (KPF) has in the past practiced regime policing, focusing substantial institutional energy on sustaining the power of the ruling party. It must now practice democratic policing. It must focus its efforts on providing service to the Kenyan people and on promoting respect for human rights and the rule of law.

On April 24-25, 2003, at the PanAfric Hotel in Nairobi, the CHRI² and the KHRC³ convened a conference on police reform in Kenya: "Police as a Service Organisation: An Agenda for Change." Among the conference's ninety participants were police officers, public servants, academics, activists, and journalists from Kenya, Tanzania, Uganda, South Africa, Nigeria, Australia, and India.⁴ The conference proceedings

¹ Bruce Ackerman, *We the People: Foundations* (1993).

² The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation with its secretariat based in New Delhi, India and with offices in Ghana and London. CHRI's mandate is to ensure the *practical* realisation of human rights in the 54 countries of the Commonwealth. In furtherance of this objective, CHRI has developed expertise on police institutions in India and has devoted substantial energy to advocating for police reform in that region. CHRI is currently undertaking a research project into the extent of police accountability in East Africa.

³ The Kenya Human Rights Commission (KHRC) is a non-partisan, non-profit making, membership non-governmental organisation based in Nairobi, Kenya. KHRC was formed in 1991 by Kenyan exiles and activists to promote democratisation, accountability, good governance, and respect for human rights in Kenya. KHRC has consistently monitored and documented human rights violations by the police and other agencies of government.

⁴ A complete list of participants appears as Appendix A to this Report.

were characterized by lively exchange of ideas, spirited debate, and candid self-assessment on the part of police leaders and government officials.

The CHRI-KHRC conference marked the first time in recent Kenyan history when representatives of the government, the police force, civil society, and the press together openly discussed the problems of policing in Kenya. What was said at the conference may herald a new beginning in the relationship between the Kenyan police and the Kenyan public.

In his opening speech, Hon. Dr. Chris Murungaru announced that the government has committed itself to police reform. Hon. Murungaru said that the government intends to “mak[e] democratic ideals of accountability a reality” and to move Kenyan law enforcement “from regime policing to democratic policing.”

Speaking at the valedictory session, Commissioner Edwin J. Nyaseda, Kenya’s new Commissioner of Police, described the task as follows:

What we are envisaging is a change of attitude of Police Officers toward their duties. The Police Service will be oriented towards meeting the needs of civilians and institutions of a democratic society for policing services of a high standard guided by the principles of integrity and respect for human rights, non-discrimination, impartiality and fairness.

The Problem with the Kenya Police Force

A number of research studies and surveys in the past have brought out some dysfunctional aspects of policing as a system: The Kenya Bribery Index 2002 reported that seven out of ten adult Kenyans allegedly paid a bribe to a police officer during the past year.⁵ According to UN Habitat, the average Kenyan estimates that half of the police force is corrupt and that over one-third of all crime committed in the country is attributable to police criminality.⁶ The Amnesty International has stated that in 2002 alone, more than one hundred Kenyans were shot and killed by police officers under circumstances that suggest the possibility of an extrajudicial execution.⁷ KHRC, on its part has documented more than 200 potential extrajudicial executions by security agents in each of the two previous years.⁸

Despite the apparent free hand that the police have been given to use lethal force in the fight against crime, levels of crime generally, and violent crimes in particular, are extraordinarily high. Nairobi remains one of the most insecure cities in the world.

⁵ Transparency International--Kenya, Kenya Bribery Index 2002 7 (2002), available at tikenya.org/documents/BribIndex02.pdf.

⁶ UN-Habitat, Crime in Nairobi: Results of a Citywide Victim Survey 35 (2002).

⁷ Amnesty International, Amnesty International Report 2003: Kenya (2003).

⁸ KHRC, Quarterly Human Rights Report, October-December 2001 (2002); KHRC, Quarterly Human Rights Report, October-December 2000 (2001).

About 37% of Nairobi residents report having been a victim of robbery in the past year and 22% report having been a victim of theft. Eighteen percent report having been physically assaulted in the past year.⁹

Corruption continues to be an extraordinary problem within the ranks of the police. According to surveys conducted by Transparency International-Kenya, KPF is the most corrupt agency in the government. Transparency's survey results suggest that the average Kenyan pays 1,270 Kenyan shillings (about 15 US dollars) in bribes to police officers in an average month.¹⁰

According to UN-Habitat, "[r]eporting levels to police are low because victims do not believe that the police can assist them in dealing with the matter – either because there seems to be no chance of them resolving the crime, or because they do not believe that the police are competent enough to help them."¹¹

At the conference, senior police officers acknowledged both: that the public lacks confidence in KPF's competence and integrity; and that the public's perceptions are in many respects accurate. In describing KPF's internal system for processing citizen complaints, Superintendent Gideon Kibunja Mwangi said that citizens complain of police brutality, torture, assault, rape, "trigger-happiness," illegitimate arrest, harassment, incivility, disregard of human rights, disregard of political freedoms, corruption, and extortion, among other things. He said that citizens also complain about police inaction, about police giving excuses for doing nothing in the face of crime and victimization. Superintendent Kingori Mwangi acknowledged that citizen complaints are "often justified" but attributed this, at least in some part, to a scarcity of resources

Prof. Yash Pal Ghai, chairman of the Constitution of Kenya Review Commission (CKRC), briefly described the colonial origins of policing in Kenya and the use of police by the colonial regime to bolster its own authority and suppress dissent. He noted, a "remarkable continuity" from colonial times to the present, in terms of the role and structure of the police force. In the voluminous testimony received by the CKRC concerning the police he said, citizens repeatedly expressed the view that the police had operated as tools of the government, rather than as servants of the public; that the police had turned a blind eye to politically-motivated massacres and ethnic violence; and appeared to be free to violate human rights with impunity. The CKRC heard testimony that the police had neglected good detective work and forensic work and had instead increasingly relied on torture as a means of extracting confessions.

According to Prof. Ghai, citizens expressed deep concern about arrests without warrant and illegal search, and seizure. They further expressed familiarity with a

⁹ UN-Habitat, *supra* note 6.

¹⁰ Transparency International--Kenya, Kenya Bribery Index 2002, *supra* note 5.

¹¹ UN-Habitat, *supra* note 6.

practice known colloquially as “the Friday collection:” where police make arrests on Friday evening, immediately solicit bribes from those arrested, then tell those who refuse that they cannot have access to a lawyer or magistrate until Monday. They testified to a “total lack of security” in their daily lives because of the involvement of police in criminal activities. Many citizens said that the police routinely refuse requests for P3 forms – the essential document for filing a complaint – in cases of alleged police misconduct or criminality. Such consistent testimony from so many bears out, Prof. Ghai said, that the police has “become a lawless force unto themselves quite apart from acting under an oppressive regime.”

What Can You Do?

Perhaps more than any other government agency, the police maintain a presence in the daily lives of Kenyan citizens. On the roads, at large athletic and cultural events, at public meetings and demonstrations, at crime scenes, the police do their work among the people and have an extraordinary impact on people's lives. As the noted criminologist David Bayley has written, "the police are to the government as the edge is to the knife."

Because police are so often the public face of government, the government, in a sense, can be no more service-oriented or law-abiding than the police are. Where the police are corrupt, where the police torture and abuse human rights, where the police commit crimes, ordinary citizens will rightly charge the government as a whole with these activities, and will be justifiably suspicious of all government institutions.

The ongoing constitutional review process represents an historic opportunity to break with the past practice of policing in this country. By defining the principles according to which law enforcement will be conducted in the new Kenya, by ensuring that police leaders will be able to make operational decisions free of illegitimate interference from outside the chain of command, by establishing new channels for holding the police accountable, and by strengthening existing channels of accountability, the National Constitutional Conference can create a legal and institutional environment in which reform can take place.

A few specific priorities are discussed below.

1. **Define the government's obligation with respect to police service.** There is no statement in current law that describes the kind of police service to which Kenyan citizens are entitled or that imposes any particular obligation on the government to provide police service. The new Constitution can correct that deficiency and, in so doing, define the standard against which the police will henceforth be judged. CHRI proposes the following language: *It is an obligation of the government of Kenya to maintain a police service that provides security to the people of Kenya, that protects the*

fundamental rights recognized in this Constitution, and that adheres to the rule of law at all times.

2. **Establish a broad-based process for the appointment and removal of the Commissioner of Police.** Under current law, the President has unbounded authority to appoint, and to dismiss, the Commissioner of Police. The President can change the leadership of the police force at any time and for any reason. This has resulted in the police leadership having to prioritize, above all else, the task of maintaining the patronage of the President and the ruling party. The Draft Constitution proposed by the CKRC begins to correct this problem by requiring the approval of Parliament before any individual can be appointed to the office of Commissioner. The new constitution might also establish a role for Parliament in any attempt to remove the Commissioner before the conclusion of his or her term of office. In other countries, like South Africa, the President is also required to convene a commission of inquiry prior to seeking the removal of the head of the police force.
3. **Provide security of tenure and a fixed term of office for the Commissioner of Police.** With some amount of job security, the Commissioner of Police would be able to prioritize the rule of law and the interests of the Kenyan people over the demands of powerful individuals outside the regular chain of command. The Draft Constitution proposed by the CKRC achieves this by establishing a fixed term of office for the Commissioner of Police and by providing that he or she may only be removed "for good cause."

Many police officers and observers of the police have argued that the duration of the term of office that the Draft Constitution would establish - -ten years-- is too long. These critics have said that such a long term of office might retard the process of change in the police force and demoralize junior officers by slowing down promotion through the ranks. They have advocated for a term of office lasting three to five years, renewable once.

4. **Establish institutions of civilian oversight.** There is a worldwide trend toward the establishment of independent institutions that allow citizens from outside the government to participate in overseeing the functioning of police force. These institutions have been embraced by citizens and police officers alike for a number of reasons. First, they can help the police become more efficient and fair in certain aspects of their operations, such as in the handling of citizen complaints or in the disciplining of officers who engage in misconduct. Second, they can make administrative processes, like the promotion and transfer of officers, more transparent.

Third, by making police processes more efficient, transparent, and fair, they can render the police more credible in the eyes of the public and thereby improve the relationship between the police and the public. This improved relationship, in turn, strengthens the capacity of the police to enforce the law.

Broadly speaking, two kinds of institutions have been established in other countries for the purpose of making the police more directly accountable to the people.

The first type of institution exerts actual supervisory power over the police force in certain areas of police functioning. One such supervisory institution, Nigeria's Police Service Commission, has disciplinary control over the Nigerian police force, and has power to appoint all of the officers in the police leadership below the rank of Inspector General, the top officer in the force. Nigerian law mandates that the members of the Police Service Commission shall be prominent citizens from outside the government and the police force. The members of the Commission serve fixed terms of office and have security of tenure.

The second type of civilian oversight institution does not have supervisory powers but instead has responsibility for handling the investigation of certain categories of citizen complaints against the police and other allegations of police misconduct. One such complaints entity, South Africa's Independent Complaints Directorate (ICD), has jurisdiction over three types of cases: cases involving the death of a person in custody or a death that allegedly was the result of police action; cases involving alleged criminal activity by a police officer; and cases in which police officers allegedly engaged in conduct explicitly prohibited by South Africa's Police Regulations. The ICD has discretion either to investigate these cases itself or to work with investigators within the police force. It then refers the findings of its investigation to appropriate prosecutorial and/or disciplinary authorities.

Both types of institutions were established by the UK Parliament when it reorganized the Northern Ireland police in 2000 after decades of violence between religious communities in that country: a supervisory entity, the Northern Ireland Policing Board, and a complaints entity, the Police Ombudsman.

Some have argued that the new constitution should establish a single entity for civilian oversight of the entire Kenyan government, rather than specialized entities for oversight of individual agencies. According to this argument, having too many civilian oversight entities dilutes the impact

and institutional prestige of each one. Even accepting this argument, however, a stronger case can be made for establishing specialized entities for the oversight of the police than for other agencies of government. As discussed above, the police are more present in the lives of ordinary Kenyans than other agencies of government. Moreover, unlike other agencies of government, the police are authorized to use physical force against Kenyan citizens. For these reasons, the volume and sensitivity of complaints against the police are particularly high, and the need for civilian oversight of the police is particularly great.

5. **Create a unitary police force.** Whatever arguments may once have existed for maintaining both the regular Kenyan police force and the Administration Police, the purpose of the dual structure of policing in Kenya is no longer clear. Not only are most Kenyan citizens uncertain of the relationship between the two police forces, it appears that police officers themselves are often confused about the division of labor and about their answerability to provincial and district authorities. Moreover, it appears that the Administration Police have been more vulnerable to illegitimate political control, and consequently more implicated in past abusive practices, than the regular Kenya police. The National Constitutional Conference should seriously consider the creation of a unitary police force under the command of the Commissioner of Police.

At the very least, the division of labor between the two police forces must be clarified, their lines of command and responsibility must be disentangled, and the Kenyan people must be made better aware of their relationship.

By addressing the five priorities listed above, the National Constitutional Conference can lay a foundation for deep, sustainable police reform. Constitutional provisions that define the government's law enforcement obligation, that protect the police from illegitimate influence, that create accountability mechanisms to restore and maintain public trust, and that clarify the institutional structure of policing are the first steps toward a renaissance in the relationship between the Kenyan police and the Kenyan public.