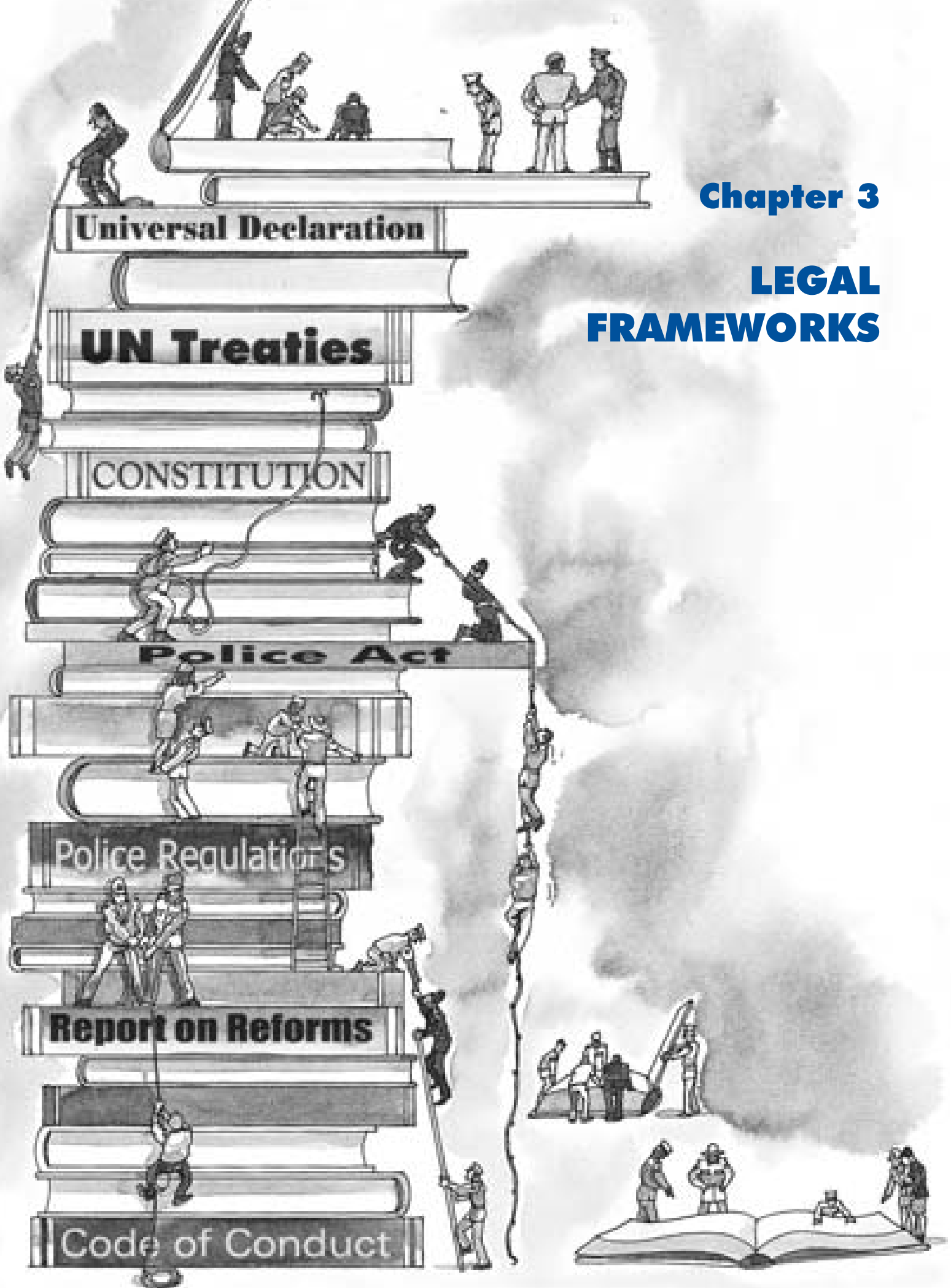


## Chapter 3

# LEGAL FRAMEWORKS





The need for police to be accountable for their actions has long been recognised in international and domestic law. Numerous United Nations (UN) declarations and treaties have entrenched norms of accountability and these are reflected in regional, Commonwealth and domestic standards. Many such norms and standards - whether they originate from the UN, the Commonwealth or regional groupings such as the African Union, the European Union, the Pacific Islands Forum, or the Organization of American States - speak directly to policing.

As members of the United Nations, all Commonwealth countries recognise the UN system of international law and standards, premised on peace, justice and the protection of human rights. Most Commonwealth countries have signed or ratified international treaties, although it is true that even legally binding declarations, let alone solemn promises and model guidelines, cannot in themselves bring about in-country police reform. Nonetheless, it is important to recognise that a combination of international laws and standards, as well as national legal regimes, exist to provide a strong framework for accountable and democratic policing.

## **INTERNATIONAL STANDARDS: HUMAN RIGHTS, RULE OF LAW AND ACCOUNTABILITY**

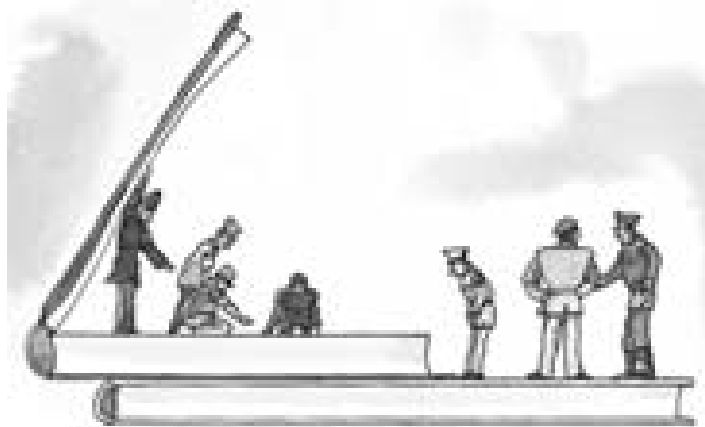
The Universal Declaration of Human Rights (UDHR), the seminal human rights document that all Commonwealth countries have agreed to, makes clear: "Everyone has the right to life, liberty and security of person."<sup>63</sup> This right, which is directly related to good policing, is at the core of the global human rights framework, encapsulated in the International Bill of Rights. Governments are expected to use the UDHR to guide their legislative, judicial and administrative practice. In particular, police organisations are expected to know and enforce the UDHR and uphold, defend and protect people's civil and political rights and freedoms, as well as foster an environment that will promote their economic, social and cultural rights.

### **The International Bill of Rights**

The International Bill of Rights comprises the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Ratification of these treaties oblige states to abide by the International Bill of Rights and any state denying those living within its borders the guarantee of all the rights articulated in the International Bill of Rights is contravening international law.

The rights outlined in the International Bill of Rights can be limited in certain circumstances, such as those related to morality, public order and the general welfare in a democratic society. However, there are certain rights that can never be suspended or limited, even in emergency situations. These non-derogable rights are: the right to life; freedom from torture; freedom from enslavement or servitude; protection from imprisonment for debt; freedom from retroactive penal laws; right to recognition as a person before the law; and the right to freedom of thought, conscience and religion.

The principles laid down in the UDHR have been refined and re-stated in legally binding treaties<sup>64</sup> that place specific legal obligations on all those involved in law enforcement. These international laws on human rights have been further expanded and reinforced in regional human rights instruments. Africa, Europe and the Americas each have their own human rights charter, along with associated mechanisms to ensure compliance,<sup>65</sup> 25 Commonwealth members have adopted the additional human rights obligations in these regional charters.<sup>66</sup>



The international framework is premised on human rights and the rule of law. The preamble to the UDHR specifically states that "...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."<sup>67</sup> This requires the existence of known rules that are fair and just in themselves and equally applied to all without discrimination and that the state obeys these rules, is not arbitrary or oppressive, and has in place effective mechanisms to ensure that the rule of law is upheld.

The role of the police is crucial in upholding the rule of law. Article 9.1 of the International Covenant on Civil and Political Rights, for instance, states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." This requires the police to rigorously ensure that due process in investigation, interrogation, and arrest is a reality; and the international framework thus creates standards against which to measure police accountability in-country.

The legal obligations that apply to the police, through binding treaties of the UN, are supported by resolutions and declarations of the international community that are intended to clarify and guide implementation. Most notable of these is the UN Code of Conduct for Law Enforcement Officials. This specifically requires that "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons."<sup>68</sup> It requires the police to uphold the rule of law, ensure the safety of citizens, be responsible, accountable and protect democratic values.<sup>69</sup>

When adopted more than 25 years ago, this Code of Conduct laid down three core features of acceptable policing: "Like all agencies of the criminal justice system, every law enforcement agency should be representative of, and responsive and accountable to the community as a whole."<sup>70</sup> A representative police organisation requires that staffing reflect the ethnicity, gender, language, caste and religious composition of the population it serves. Responsiveness demands that the police serve the people and not just the government. Most vital is the principle of accountability, which runs through these codes and principles and is a key feature of democratic policing.

A strong basis for accountability within police organisations is laid down by the obligation that officers have to report breaches of the UN Code of Conduct to appropriate or superior authorities. Equally, a key principle of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials<sup>71</sup> is that "Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use."<sup>72</sup> This places a significant responsibility on supervisory ranks to oversee the actions and decisions of police under their command, especially where force may be used; and requires clear managerial accountability in police establishments.

The UN Basic Principles also provide for accountability to courts, as well as for internal disciplinary mechanisms, particularly where injury or death is caused. While some countries have developed their own Codes or Guidelines for ethical conduct of officers and use of force, which are articulated in police training manuals or laid down by judgements of

Courts, too few Commonwealth governments have actually implemented the international standards in national legislation, and far too few respect the international rules in practice.<sup>73</sup>

As with the United Nations, human rights form the bedrock of the Commonwealth. However, Commonwealth declarations and communiqués offer only broad objectives for the creation of a more equitable and democratic society, rather than enforceable law. As realistic objectives, these statements set out a road map for states and the agencies of the Commonwealth - such as the Commonwealth Secretariat - to work toward, requiring practical steps be taken to ensure that national environments are conducive to meeting agreed goals and that obstacles to realising human rights and good governance are removed.

### **Working Together Globally**

New levels of global co-operation in policing increasingly insist on implementing agreed international policing standards at the national level and taking steps to promote accountability and good human rights practice in policing worldwide. All Commonwealth countries, except the Pacific nations of Kiribati, Samoa, Solomon Islands, Tuvalu and Vanuatu, are members of the International Criminal Police Organisation (INTERPOL), an association of cooperating states. INTERPOL has made clear that its premier goals of "mutual assistance and suppression of crime" must only be achieved in the spirit of the Universal Declaration of Human Rights<sup>74</sup> and that "all acts of violence or inhuman treatments, that is to say those contrary to human dignity, committed by the police in the exercise of their judicial and criminal police duties, must be denounced to justice".<sup>75</sup> Members of INTERPOL are expected to endorse and translate into practice its global human rights and anti-corruption standards to improve accountability and oversight of policing.

The 1991 Harare Commonwealth Declaration - the most significant of the Commonwealth statements because membership of the association requires countries to abide by it - includes promises to work for "...fundamental human rights, including equal rights and opportunities for all citizens...[and]...entrench the practices of democracy, accountable administration and the rule of law."<sup>76</sup> The important principle of accountability is a recurrent theme in Commonwealth declarations. Most recently, in 2003, while reaffirming the Commonwealth's fundamental values, Heads of Government again called for "...a political culture that promotes transparency, accountability and economic development."<sup>77</sup> Broad promises of "equality", "transparency", "accountability", "democracy", "good governance", "protection of human rights", "elimination of corruption" and "the rule of law" indicate the matrix upon which policing must rest.

The Commonwealth Expert Group on Development and Democracy in 2003 stated that Commonwealth governments should commit themselves to ensuring a "police force that responds to the law for its operations and the government for its administration" and that this should be "fully held to account."<sup>78</sup> In 2002, Commonwealth Law Ministers also mandated the Commonwealth Secretariat to assist in training for police officers in order to entrench greater respect for human rights.<sup>79</sup> This has been done by the Human Rights Unit of the Secretariat through the development of a training manual for police in West Africa. However, the Commonwealth has yet to make a definitive statement about the centrality of the police to realising its objectives.

### **Using Commonwealth Structures to Realise Local Police Accountability**

Standing alone, the Commonwealth machinery offers limited means to distil its objectives into workable and specific policies for individual member states beyond the policy discussions at the biennial Commonwealth Heads of Government Meetings (CHOGM). Only the UN conventions and standards have any legal enforceability. Therefore, it is fundamental that the Commonwealth call on member countries to ratify, implement and abide by these international treaties governing law enforcement and human rights. Also essential is developing a reporting mechanism to monitor whether individual countries have taken steps towards fulfilling the promises made in communiqués. Without this, the value of the Commonwealth association comes into question.

There is no peer review mechanism in the Commonwealth, and the biennial CHOGM meetings do not yet review implementation of countries' human rights commitments. In practice, governments in the Commonwealth often fail in their duty to protect their citizens' rights and security. Worse, some governments derogate from the rule of law and continue to use abusive policing practices, including detention without fair trial and torture. The Commonwealth must acknowledge the importance of human security, and leaders must ensure that crime and internal instability are addressed within the framework laid down by Commonwealth principles.

The Commonwealth Ministerial Action Group (CMAG), comprised of a rotating group of Foreign Ministers, investigates serious or persistent violations of the principles enunciated in the Harare Commonwealth Declaration. CMAG has traditionally taken a narrow perspective on its mandate, focusing on the unconstitutional overthrow of governments rather than on the broader principles of democracy, human rights and rule of law. The powers of CMAG permit only limited measures leading to the suspension or expulsion from the association - and then only in instances of grave or persistent violation.<sup>80</sup> Civil society groups can petition CMAG and make submissions about violations of the Harare principles, including violations related to police misconduct.

Cumulatively, the international legal framework, as well as the many standards, resolutions and guidelines that nations have solemnly agreed to, require policing across the Commonwealth be implemented in ways that promote and do not violate human rights. In particular, the international community has sought to lay down binding norms to address common problems that beset policing.

## Torture Is Absolutely Prohibited

The prohibition of torture is absolute, no matter the circumstances. The right to be free from torture is protected under the International Bill of Rights, and any state denying these rights to those living within its borders is contravening international law. The UDHR states that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>81</sup> This is reinforced by the binding provisions of the International Covenant on Civil and Political Rights (ICCPR) and, in more detail, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) - the seminal international treaty on torture.

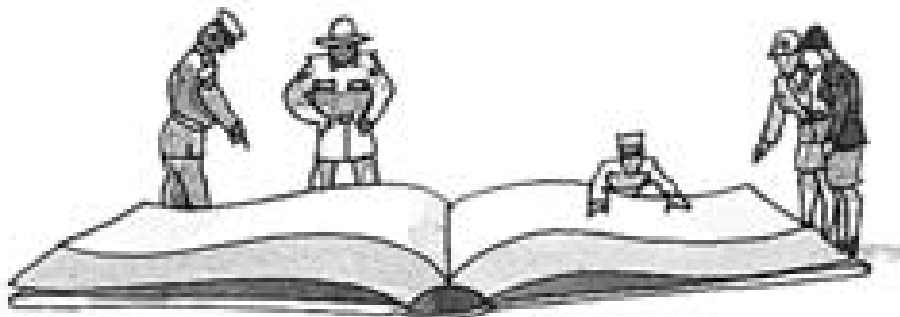
The prohibition of torture is absolute, no matter the circumstances.

The CAT defines torture as any act committed by state agents or persons holding positions of authority, such as the police, by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purposes of obtaining information or confession, punishment, intimidation or for any reason based on any kind of discrimination. The right to be free from torture cannot be suspended or limited in any circumstance - even in war, threat of war, political instability or public

emergency - and it can't be defended on the basis of orders from superiors. Torture cannot be used to obtain information or a confession, nor to intimidate or punish.

Governments must treat the use of torture as a criminal offence; make all efforts to prevent torture; explain that it is prohibited in police training and instructions to police; thoroughly investigate allegations; and ensure that victims and witnesses who complain of torture are protected and get compensation and rehabilitation.

Together, the provisions of the CAT and ICCPR provide an extremely strong basis for holding police officials to account if they commit or permit torture. However, it is a matter of grave concern that 24 members of the Commonwealth have not yet ratified or acceded to the CAT and only three out of 53 nations have ratified the CAT Optional Protocol which allows visits to places of detention by independent bodies.<sup>82</sup> Eighteen members have not even ratified or acceded to the basic ICCPR (see Annexure B). This indicates not only the lack of commitment by a significant portion of the Commonwealth to upholding the basic principles that bind the association, but also reflects the parlous state of policing in many countries.



## Use of Force Must be Minimum and Moderated

The most symbolic and extreme power given to the state by the people in a democracy is the exclusive right to use force to secure peace and order. Internationally, recognition that this power must be moderated led to the development of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which limits use of force to when it is strictly necessary for lawful law enforcement purposes and, above all, that it must be proportionate.<sup>83</sup> The circumstances in which deadly force may be used are strictly limited.<sup>84</sup>

### Police Shootings in South Africa

For many years, police officers in South Africa were allowed to shoot suspected criminals under the Criminal Procedure Act<sup>85</sup>, even when there was no direct threat to the officer or the public. This contravened the UN Basic Principles, as firearms may be used only when there is serious threat to life. It was only after the transition to democracy in South Africa that efforts were made to end this breach of international standards. In 1998, Parliament drafted a new Section of the Act consistent with international human rights law and the new Constitution, but it was never implemented.

In 2002, the Constitutional Court ruled that the old law violated the right to life and was in breach of international law; and criticised the Government for not implementing the revision. The Government now has to properly ensure that the directions of the Constitutional Court and international standards on the use of force and firearms are entrenched by regulations and incorporated into police training.

The UN Basic Principles recommend that governments safeguard their citizens by ensuring there is an independent administrative or prosecutorial authority that decides when force is to be used; that it is properly reported every time firearms are used; and that it is made a criminal offence for law enforcement agencies to use disproportionate force. Significantly, superiors in command who have permitted the use of illegal force, done nothing to stop it, failed to report it, or tried to suppress the facts are to be held responsible as well. In order to protect those who refuse to obey illegal orders, the Basic Principles recommend no criminal or disciplinary sanction be imposed on a police officer who refuses to carry out an order to use force and firearms which is not in compliance with the UN Code of Conduct and the Basic Principles.

Governments are urged to have in place measures that predispose police to use minimum force. These must also be periodically reviewed. The Basic Principles recommend that governments provide police establishments with non-lethal and defensive alternatives to guns; lay down what weapons may be carried and when; carefully select who can use firearms; and ensure that they are proficient in their use as well as cognisant of human rights, ethics and the prohibition of force in the investigation process.

### Step-by-Step

The Basic Principles offer a step-by-step procedure for officers to follow before the use of force or firearms can be justified as legal. It requires the police to:

- apply non-violent means as far as possible before resorting to the use of force and firearms;
- only use force and firearms in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- minimise damage and injury as well as respect and preserve human life;
- provide prompt assistance and medical aid to any injured person whenever unavoidable use of force was applied, and to notify this person's relatives or close friends as soon as possible;
- promptly report to a superior officer any incident involving injury or death caused by the use of force and firearms; and
- never use firearms except in situations that involve self-defence or defence of others against imminent threat of death or serious injury, to prevent the perpetration of a serious crime involving threat to life, to arrest a person presenting such a danger and resisting the police authority, to prevent that person's escape, and only when less extreme means are insufficient.

### Zero Tolerance for Corruption

Corruption is generally defined as an act of abuse of power for personal gain or for the advantage of a group or class. In recent studies uncovering the magnitude of corruption across the globe, the police have fared very badly, coming high on everyone's list of most corrupt state institutions. Corruption is incompatible with the profession of law enforcement and systemic corruption within the police obstructs its fundamental purposes. Instead it promotes criminality, insecurity and impunity - the very evils the police aim to quell.

Taking particular note of the corroding effects of corruption on effective policing, INTERPOL has adopted Global Standards to Combat Corruption in Police Forces/Services, which promote high standards of honesty, integrity and ethical behaviour and asks members to detect, hold accountable and "bring to justice police officers and other employees of police

forces/services who are corrupt."<sup>86</sup> The UN Code of Conduct explicitly requires law enforcement officials to not be corrupt and to combat corruption when they encounter it.<sup>87</sup> The UN and INTERPOL also require states to establish independent, well-funded monitoring and oversight mechanisms that are able to carry out investigations and bring to justice those who engage in corruption and dishonesty.<sup>88</sup>

By ratifying a human rights treaty, a state is legally obliged to bring in-country laws and policies in line with the agreed international standards and make the rights a reality.

The UN has now agreed on a Convention Against Corruption, which has been signed by 27 Commonwealth members and ratified by Kenya, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Sri Lanka and Uganda. Under it, governments will be obliged to make sure their public services, including the police, have safeguards that promote efficiency and transparency including legislating corruption as



a criminal offence. Regional conventions - the Inter-American Convention against Corruption and the African Union Convention on Preventing and Combating Corruption - also apply to 14 Commonwealth members, and require that states take effective measures to punish public officers, including police officers, for acts of corruption.<sup>89</sup> With the new Convention Against Corruption in place, signatory countries are taking steps to begin cleaning up in a difficult terrain. Nigeria recently arrested a former Police Chief on 70 corruption charges, involving theft, money laundering and extortion. He is accused of stealing money from the police force and spending it on shares and property.<sup>90</sup>

### **The Commonwealth and Corruption**

The Commonwealth regularly highlights the need to eliminate corruption. In 1997, an Expert Group developed the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption and in 1999, Heads of Government agreed that corruption must be tackled comprehensively at national and international levels. They suggested several steps relevant to police organisations including:<sup>91</sup>

- imposition of controls on funding of political parties that might prevent bribery of public sector officials (including police);
- reforms aimed at maximising transparency and certainty in administrative processes;
- improving the management, efficiency and delivery of public services, including the introduction of codes of conduct with appropriate sanctions for breaches;
- open and transparent processes for budget preparation, execution and monitoring;
- rigorous accounting, financial reporting and independent auditing systems; and
- regular consultation and collaboration with civil society.

In 2003, Heads of Government identified the Commonwealth Secretariat's work on "strengthening democratic institutions, culture and processes" as an antidote to systemic corruption; endorsed the UN Convention against Corruption; and mandated a Commonwealth working group to focus on a specific area of corruption.<sup>92</sup>

## **INTERNATIONAL STANDARDS IN PRACTICE**

By ratifying a human rights treaty, a state is legally obliged to bring in-country laws and policies in line with the agreed international standards and make the rights a reality. The state is also required to report periodically to the bodies that monitor treaties on progress towards compliance with treaty obligations. If effective, this reporting system would significantly reduce persistent human rights violations and ensure regular scrutiny of progress, including in policing.

In practice, however, these monitoring bodies are hampered by regular delays, reluctance to share complete details, and unwillingness to implement recommendations. For example, reporting to the UN Human Rights Committee, which oversees the implementation of the ICCPR, reveals persistent delays - the UK's fourth report, due on January 2002, was only

received in November 2003; while New Zealand's third periodic report was submitted after a 3-year delay; and in 2005 the Committee noted that Kenya's second report was more than 18 years late and did not contain sufficient information on practical measures taken to implement the ICCPR, nor on their effectiveness.<sup>93</sup>

### **Using International Instruments for Local Police Accountability**

Under the international human rights regime, responsibility lies with the state - and it is the state that must account for violations by police officers of citizens' human rights. When binding international standards are violated or ignored by police, individuals and organisations can use international mechanisms to create awareness of the problem, and to introduce (or speed up) in-country processes for accountability and reform. Some of the UN Committees<sup>94</sup> will accept information from non-governmental organisations, other UN agencies, intergovernmental organisations, academic institutions and the media. Some of the treaty committees can also accept complaints from individuals whose rights have been violated.<sup>95</sup>

The Commission on Human Rights also asks experts to study particular human rights issues, and has a system of 'special procedures'. These procedures have occasionally brought police-specific violations of human rights - brutality, summary executions and bias - to global attention. The confidential '1503 procedure' allows complaints to be made about violations of human rights and fundamental freedoms. The Commission discusses the issue with the offending government, and then decides on the recourse it will take. NGOs can activate the '1235 Procedure', which forms the basis for an annual public debate on gross human rights violations committed by a particular government. If the state does not take steps to improve the situation, one possible - though extreme - consequence might be an ECOSOC<sup>96</sup> resolution condemning that state for the violations. These high-profile international resolutions are intended to shame the state into correcting the situation.

In Sri Lanka, where police have been involved with large-scale disappearances<sup>97</sup> and where "torture is frequently resorted to...by the police, especially during the first days following arrest and detention of suspects"<sup>98</sup>, five organisations submitted information on the systematic practice of torture to the UN Committee Against Torture. As a consequence, a member of the Committee's Working Group on Enforced or Involuntary Disappearances visited the island in 1999 and the intervention played a significant role in forcing the establishment of accountability mechanisms like the Human Rights Commission, the National Police Commission, the Disappearance Investigation Unit and the Prosecution of Torture Perpetrators Unit.

While ratification of international treaties and standards is important, it is of little value without local implementation, and promises made by heads of government on the international stage have no meaning without effective domestic action. Ratification requires that specific systems be put in place to ensure that police will comply with the high standards of an international agreement, for example, to abolish torture. In many cases, this involves overhauling old and infirm criminal justice systems and prioritising police reform - often too hard a political decision for many Commonwealth governments to take.

## NATIONAL FRAMEWORKS

While international standards can support greater accountability, the reality is that accountability begins at home. International instruments provide a framework for democratic policing, but in practice, national constitutions and police laws are more immediately relevant to the conduct of police officers and organisations. As such, it is vital that legislation establishes a clear and effective domestic environment to entrench police accountability. Besides establishing the structure of police organisations, some Commonwealth constitutions also define specific arrangements for their accountability; and these can facilitate more democratic policing. Setting up oversight bodies such as Ombudsmen, National Human Rights Commissions and Police or Public Service Commissions in Constitutions provides stable guarantees for a more accountable police organisation.

Well-framed constitutional provisions on policing and accountability shape sound policing systems. These are likely to be free from political interference because Constitutions are far more difficult to amend than any other law, thus making tampering with police arrangements more difficult. The Constitutions of all Caribbean Commonwealth states provide for Public or Police Service Commissions to deal with personnel issues in their police organisations, including the critical accountability devices of discipline and dismissal. Most Constitutions in the South-East Asian and Pacific countries of the Commonwealth provide for similar bodies to deal with staff issues. The Constitutions of Ghana, Sierra Leone, The Gambia, and Nigeria provide for Police Councils<sup>99</sup> that are intended to ensure that the police have sufficient personnel, resources and equipment to undertake their operational role, leaving the head of police responsible for command and control of police operations.

In the absence of entrenched Constitutional provisions, policing is governed by Acts of parliament, which set out the objectives of policing, structure, hierarchy, responsibilities, and powers. The Maldives is the only country in the Commonwealth that currently does not have a police Act and the police are run through orders given by the Police Chief, in close coordination with the President, who is the Commander in Chief of domestic security agencies. Most Commonwealth countries' police Acts are published in English, except Cyprus (in Greek) and Mozambique (in Portuguese).

Typically, the scope of police powers and responsibilities cover: prevention and detection of crime; apprehension of offenders; maintenance of public order; protection of persons from injury or death; protection of property from damage; and provision of essential services in emergencies. Since much police legislation in the Commonwealth is antiquated - in some cases, pre-dating the Universal Declaration of Human Rights - most police Acts make no

### **Recent Constitutions Pay More Attention To Police Accountability**

Uganda, Nigeria, South Africa and Fiji have some of the more recent Constitutions in the Commonwealth. Newer Constitutions tend to place greater emphasis on police accountability, providing greater detail about police arrangements, perhaps as a reaction to past police abuse. For example, the 1994 Nigeria Constitution specifically requires police officers to observe, respect and implement provisions regarding fundamental rights and civil liberties, and also provides a framework for dealing with complaints against the police. The new Uganda and Fiji Constitutions establish Human Rights Commissions that act as watchdogs over human rights violations by all government agencies, including violations by the police. The post-apartheid South African Constitution establishes oversight offices of a Public Protector and a Human Rights Commission, as well as an independent agency to deal with public complaints against the police.

reference to the protection of human rights and civil liberties, and tend to focus instead on colonial-style "maintenance of law and order." Old legislation need not necessarily be problematic, if it is amended to incorporate international standards and the basic requirements of rights-based democratic policing.

| <b>Police Acts More Than Half A Century Old</b> |                        |             |
|---|------------------------|-------------|
| <b>Jurisdiction</b>                             | <b>Name of Act</b>     | <b>Date</b> |
| India   | Police Act             | 1861        |
| Bangladesh                                      | Police Act             | 1861        |
| Sri Lanka                                       | Police Ordinance       | 1866        |
| Western Australia (Australia)                   | Police Act             | 1892        |
| Jamaica   | Constabulary Force Act | 1935        |
| Dominica  | Police Act             | 1940        |
| Malawi  | Police Act             | 1946        |
| St. Vincent and the Grenadines                  | Police Act             | 1949        |
| The Gambia                                      | Police Act             | 1950        |
| Bombay (India)                                  | Bombay Police Act      | 1951        |
| Belize  | Police Act             | 1951        |
| Antigua and Barbuda                             | Police Act             | 1952        |
| Tanzania  | Police Force Ordinance | 1953        |

An explicit mandate to protect human rights leaves no room for ambivalence even if it is not always practiced. The 2004 Amendment to the Malta Police Act sets a new standard for progressive police legislation, encapsulating a modern understanding of the role of police officers within a wider appreciation of fundamental human rights, fair trial principles

in particular.<sup>100</sup> The 1990 Police Services Act of the Ontario Provincial Police, Canada, explicitly points out that in its functioning, the police service must recognise the importance of safeguarding the fundamental rights guaranteed by Canadian laws, the need for sensitivity in a multicultural society, and the need of the police to be representative of the community.<sup>101</sup> The 2003 Act in Northern Ireland provides an oath of office that includes upholding human rights; and while the 2002 Pakistan Police Order does not use the expression "human rights"<sup>102</sup> it mentions, as one of the duties of the police force, the "protection of life, property and liberty of citizens."<sup>103</sup>

Newer legislation does not, however, always mean progressive policing. For example, the Police Acts of Malaysia (1967) and Uganda (1994) grant absolute non-liability for police officers for any act done under authority of a warrant and oblige courts to judge in favour of police officers in such cases.<sup>104</sup> This may allow a police officer who has a warrant authorising an arrest to argue that the excessive use of force

A law alone is often too blunt an instrument to provide appropriate solutions to the daily dilemmas faced by police officers on the ground and by police leaders engaging with governments and communities; but the law provides the framework for the difficult exercise of police discretion.

used in making that arrest cannot be questioned and the mere existence of the warrant means that a court must find him/her not guilty of any wrongdoing. Sometimes the impunity granted by police legislation is extremely wide, particularly in times of emergency, which creates a serious weakness in systems for police accountability.

### **Emergency Measures**

Limitations or caveats in the Constitution or Police Act particularly related to suspending certain rights in times of emergency often result in a de facto culture of impunity. In Bangladesh, the Special Powers Act provides for immunity from prosecution or other legal proceedings for anything done in good faith under this Act.<sup>105</sup> The Joint Drive Indemnity Act 2003 indemnifies the members of the joint forces, including the police "designated to carry out responsibilities in aid of civil administration during the period between 16 October 2002 and 9 January 2003" for "arrests, searches, interrogation and [other] steps taken" during this period. The executive had ordered a joint operation by the police and the army to tackle high crime and over 40 deaths were attributed to the security forces, and many people reported torture. Similarly, Sri Lanka passed a law indemnifying the police for any act done in good faith to restore law and order between August 1977 and December 1988.<sup>106</sup>

Alternatively, progressive police legislation, such as that of the Australian states of New South Wales and Queensland, make sure that policing is conducted with guaranteed oversight. Permanent civilian oversight bodies with substantial powers and strong, professional internal disciplinary systems are provided for in a framework for accountability that is not easily displaced. The concept of "operational autonomy" is also contained in many progressive Commonwealth Police Acts, usually by vesting the police chief with responsibility and ultimate accountability for operational and administrative decisions, which aims to insulate the police from illegitimate political directions.

Taking examples from the most progressive police legislation in the Commonwealth, it is possible to identify key elements of a strong legal framework for democratic policing and police accountability. These include:

- a human rights mandate in the definition of police duties;
- clear procedures of democratic control and supervision that encompass the principles of natural justice and the rule of law;
- fair, adequate and strong internal disciplinary systems inside police organisations;
- cooperation between internal and external mechanisms of police accountability;
- at least one independent agency to receive complaints about the police;
- multiparty oversight over the police by elected representatives in parliaments, legislatures or local councils; and
- mandatory interaction between the police and the public.

Legislation provides only the formal guidelines for policing. Good policing requires far more than merely a good law and, in fact, is possible even where police legislation is less than perfect. A law alone is often too blunt an instrument to provide appropriate solutions

to the daily dilemmas faced by police officers on the ground and by police leaders engaging with governments and communities; but the law provides the framework for the difficult exercise of police discretion. In a proper democratic system, police accountability solely to the law is not sufficient - police must also be accountable to communities, government agencies and independent oversight bodies. It is only this complex web of oversight and accountability that will guarantee the kind of policing that the vision of the Commonwealth promises.