



African Policing Civilian Oversight Forum

Submission to the National Taskforce on Improvement of Terms and Conditions of Service and other Reforms for Members of the National Police Service and Kenya Prisons Service

9 February 2023

1. Introduction

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this submission to the National Taskforce on Improvement of Terms and Conditions of Service and other Reforms for Members of the National Police Service and Kenya Prisons Service (National Taskforce) in response to the call for public comments and inputs into its work. APCOF is a not-for-profit trust based in South Africa, working on issues of police accountability and governance in Africa. More information about APCOF's work is on its website: www.apcof.org.za.

Our submission focuses on the use of lethal force by the National Police Service (NPS), and draws substantially on our collaborative study with partners from the Independent Police Oversight Authority (IPOA), the Kenya National Commission for Human Rights (KNCHR), Mathare Social Justice Centre (Mathare), the Network of African National Human Rights Institutions (NANHRI), and Laboratório de Análise da Violência (LAV) of the State University of Rio de Janeiro, which is attached as **appendix 1** and our assessment of the NPS against the East African Common Standards of Policing attached as **appendix 2**.

2. Summary of recommendations

Recommendation 1: The legal and regulatory framework for the use of force should be consolidated into a single legislative instrument to offer a comprehensive legal framework for the use of force that complies with regional and international law.

Recommendation 2: The National Police Service (NPS) should expedite the development of regulations aimed at fostering cooperation with IPOA. NPS officials should be sensitised about the work and mandate of IPOA to strengthen the visibility of IPOA and respect for its mandate amongst NPS officers.

Recommendation 3: As a matter of urgency, a process for mandatory reporting by NPS to IPOA of all deaths in police custody and as a result of police action should be clarified, and sanctions

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imposed for failure to report.

Recommendation 4: In the immediate term, while the process outlined in Recommendations 3 and 4 is being developed:

- Efforts should be made to continue to verify the degree of coverage of NPS reporting of relevance cases by carrying out an analysis of media reporting of police use of force, and cross-referencing the resulting information with the cases submitted by NPS to IPOA;
- The process of collaboration between IPOA, Mathare Social Justice Centre (Mathare), the Kenya National Commission for Human Rights (KNCHR), Independent Medico Legal Unit (IMLU) and other possible interested partners continue in order to share information on cases, and support compatibility across the various organisational databases; and
- Support to research and analysis of deaths as a result of police custody or police action that identifies trends and patterns to inform preventive and proactive processes.

Recommendation 5: Training on the use of force for NPS officers should be both theoretical and practical, using realistic scenarios in both instances. This can be provided through case studies that deal with common situations in which the use of force may be applied by police. The design of the training should encourage the application of theoretical frameworks for rights-based approaches to the use of force through practical application and useable in classroom situations and field-style training.

Recommendation 6: Training for NPS officers should be reviewed continuously to incorporate lessons learned during operations and to ensure that the curriculum reflects international and regional law. The review must be extended to include high risk environments, not necessarily associated directly with the use of force, but where appropriate practices can provide critical preventive value such as in investigative interviews.

3. Sources of APCOF's recommendations

APCOF's recommendations draw on the findings of two recent studies. Each is discussed in turn below.

3.1. *The Use of Lethal Force by Police in Kenya (2021)*

The primary source for APCOF's recommendations is *The Use of Lethal Force in Kenya (2021)*, published jointly by APCOF, IPOA, KNCHR, Mathare, NANHRI and LAV. The study brings together, for the first time, the databases of four organisations – IPOA, KNCHR, IMLU and Mathare – to present the most comprehensive and verifiable data set on incidents of police use of lethal force in Kenya for 2021. The study is attached as **appendix 1**.

The data is analysed against indices to measure the frequency of the use of force and the abuse of force, which are used to compare patterns across several Latin American countries and South Africa.

The results of the Kenyan study reveal disturbing patterns. The proportion of all homicides (murders) resulting from police shootings is 5.5% in Kenya, a value about 3 times higher than that of South Africa. Another index computes the ratio between civilians killed and civilians wounded in interventions by public security agents (also called the lethality index (A-3)). This is perhaps the

clearest test of abuse of lethal force. It also addresses the principle of proportionality. The International Committee of the Red Cross states that ‘the ratio of dead to survivors in modern conflicts tends to be about 1:4’ (Giannou & Balden, 2010). The civilian lethality index yields an extreme value for Kenya at 3.9 deaths for every injury in police use of lethal force, which is indeed the highest figure amongst all countries included in this comparison, including Brazil, Mexico and El Salvador, Latin American countries known for their pattern of excessive use of force. The report proposes that it might be necessary to investigate whether cases of injuries in police interventions are more under-reported than cases of deaths. If this is not the case, then the existing figure of 3.9 would be revealing a pattern of extreme abuse that would require urgent and strong measures to counteract.

There is clearly a significant challenge regarding the use of force in Kenya. Excessive and arbitrary use of force by the NPS impacts on a broad range of fundamental human rights, and can have severe consequences for community relations. In *Policy and Practices to Minimise Police Use of Force Internationally* (2022), Curtice draws on evidence from a natural experiment in Uganda to demonstrate that public perceptions of police become more negative following police repression.¹ APCOF has focused this submission on the issue, in the hope that our contribution will strengthen the work of the National Task Force and its findings on how use of force by law enforcement officials in Kenya can be improved to comply with domestic, regional and international law and standards.

3.2. Common Standards for Policing in East Africa: Kenya (2022)

The second source for APCOF’s recommendations is our publication, *Common Standards for Policing in Eastern Africa: Kenya*, which assessed the extent to which the NPS is meeting its human rights obligations, particularly those set out in the East African Community (EAC) and East African Police Chiefs Cooperation Organisation (EAPCCO) Common Standards for Policing in East Africa.

As the National Taskforce may be aware, in 2010, the EAC and EAPCCO adopted the Common Standards. This normative instrument, which is based on existing regional and international human rights commitments made by EAC Member States, establishes an agreed, common framework for policing in the East African region. The Common Standards were followed with the adoption in 2020 of an agreed set of indicators to measure implementation measures in Member States. Using those indicators, APCOF has conducted assessment studies in respect of Kenya, Uganda and South Sudan. On 15 March 2022, the Kenyan assessment report was validated by research partners, Police Reforms Working Group (PRWG-K) and the NPS.

The report makes 16 recommendations to complement existing reform-oriented interventions to support rights-compliant policing in Kenya. This includes recommendations aimed at strengthening:

- i. Cooperation between IPOA and the NPS.
- ii. NPS training, including on the use of force.
- iii. Procedural safeguards during arrest and custody.
- iv. Maintenance of detention facilities.

¹ National Academies of Science, Engineering and Medicine, *Policies and Practices to Minimise Police Use of Force Internationally*, National Academies Press, 2022, Washington D.C., available at <https://nap.nationalacademies.org/read/26582/chapter/6> (accessed on 9 February 2023).

- v. Regulation of the use of force.
- vi. Oversight in places of detention.
- vii. Gender mainstreaming.
- viii. Public order management policy.
- ix. Crime prevention.
- x. Community policing.
- xi. NPS housing and allowances.
- xii. Perception surveys.
- xiii. Internal Affairs Unit capacity.
- xiv. Implementation of coronial and torture prevention legislation.
- xv. Mutual cooperation.

The full report which includes details on these recommendations, many of which will be relevant to the work of the National Taskforce, is attached as **appendix 2**.

4. Recommendation 1: Use of force legislation

Use of force by the NPS is regulated by the Sixth Schedule of the National Police Service Act 2011. APCOF submits that this schedule does not provide a comprehensive regulation for the use of force, and falls short of regional and international standards. In particular, we are concerned that it omits the general principles applicable to the use of force in all circumstances – namely, precaution, non-discrimination, necessity, proportionality, and accountability.

As detailed in APCOF's studies, this regulatory gap, coupled with limited specialised and continuous training on the use of force for NPS officials, has contributed to the concerning frequency with which arbitrary and excessive use of force is used, including in the management of public assemblies, and the comparatively high numbers of extrajudicial executions.

In *Policy and Practices to Minimise Police Use of Force Internationally* (2022), it is noted that while the existence of laws that place boundaries on acceptable uses of force may or may not affect those uses in practice, creating a transparent definition of when and how force should, and should not be used, is a necessary first step.²

This can be achieved through the adoption by parliament of a standalone law on the use of force. Guidance for a comprehensive legislative framework for the use of force exists in regional and international law, and normative instruments include, amongst others:

- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials;³
- UN Code of Conduct for Law Enforcement Officials;⁴
- General Comment No. 3 on the African Charter on Human and Peoples' Rights on the Right to Life (Article 4);⁵
- Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa;⁶
- Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa;⁷

² National Academies of Science, Engineering and Medicine, *Policies and Practices to Minimise Police Use of Force Internationally*, National Academies Press, 2022, Washington D.C., available at <https://nap.nationalacademies.org/read/26582/chapter/6> (accessed on 9 February 2023).

³ <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement>

⁴ <https://www.ohchr.org/en/instruments-mechanisms/instruments/code-conduct-law-enforcement-officials>

⁵ https://www.achpr.org/public/Document/file/English/general_comment_no_3_english.pdf

⁶ <https://www.achpr.org/legalinstruments/detail?id=65>

- Model Police Law for Africa;⁸
- Common Standards for Policing in East Africa;⁹ and
- EAEPCCO Standard Operating Procedure on the Use of Force.¹⁰

These standards provide a framework for a clear definition of acceptable and professional use of force, and the provision of training to law enforcement officials, including on the differentiated use of force and firearms. They also provide context-specific norms on the use of force in a range of common policing scenarios, including during arrest, detention, and public order management.

We submit that the National Taskforce give consideration to recommendations that the legal and regulatory framework for the use of force be consolidated through a single piece of legislation. In South Africa, APCOF, together with the Institute for International and Comparative Law in Africa at the University of Pretoria have developed a Model Bill on the Use of Force by Law Enforcement Officials. This is attached as **appendix 3** and may provide the National Task Force with a which a useful template for a comprehensive use of force law that complies with international and regional standards.

Recommendation 1: The legal and regulatory framework for the use of force should be consolidated into a single legislative instrument to offer a comprehensive legal framework for the use of force that complies with regional and international law.

5. Recommendations 2, 3 and 4: Relationship between IPOA and NPS

Investigation and prosecution of excessive and unlawful use of force is an effective mechanism of managing police conduct. While IPOA has the mandate to undertake this work, APCOF's studies have identified challenges inherent in the cooperation by NPS with IPOA and its accountability processes which is undermining the effectiveness of this mandate. It is imperative, therefore, that the NPS expedite the development of regulations aimed at fostering cooperation with IPOA. Part of the challenge also lies in the lack of awareness by NPS officers of the IPOA mandate and powers. Urgent measures should be taken to raise the visibility of IPOA amongst NPS personnel.

Recommendation 2: The National Police Service (NPS) should expedite the development of regulations aimed at fostering cooperation with IPOA. NPS officials should be sensitised about the work and mandate of IPOA to strengthen the visibility of IPOA and respect for its mandate amongst NPS officers.

A critical implication of the lack of cooperation between the NPS and IPOA is the commensurate lack of flow of information from the NPS to IPOA, which impedes the collection of data and means that IPOA is not able to exercise its full investigative mandate, or provide other relevant actors with accurate information to design preventive interventions.

In *Policy and Practices to Minimise Police Use of Force Internationally* (2022),¹¹ it was clearly noted that the determination of policies and practices aimed to minimise excessive force by the

⁷ https://www.achpr.org/public/Document/file/Any/guidelines_on_arrest_police_custody_detention.pdf

⁸ <https://apcof.org/wp-content/uploads/model-police-law-for-africa-eng-fr.pdf>

⁹ <https://apcof.org/wp-content/uploads/common-standard-for-policing-in-east-africa-indicators-and-measures.pdf>

¹⁰ See appendix in <http://apcof.org/wp-content/uploads/2016/05/APCOF-Training-TRAINERS-2015-LARGE-FORMAT-WEB1.pdf>

police cannot be made in the absence of robust data. Strengthening the oversight of systems for reporting of incidents by NPS to IPOA is crucial to ensure that the IPOA database represents a accurate picture of the challenges, and ensure that all deaths as a result of police action are investigated independently, recognising that in the absence of such investigations, the deaths are *de facto* classified as extrajudicial killings.

Recommendation 3: As a matter of urgency, a process for mandatory reporting by NPS to IPOA of all deaths in police custody and as a result of police action should be clarified, and sanctions imposed for failure to report.

APCOF recognises that the development of regulations aimed at fostering cooperation with IPOA, and strengthening oversight of systems for reporting incidents to IPOA, will take time to implement. As an urgent interim measure, we believe that the collaborative work to identify and analyse data on police use of force that began with *The Use of Lethal Force in Kenya (2021)* study be supported by the National Taskforce. This includes interventions aimed at identifying the extent to which NPS is submitting cases to IPOA through media monitoring, supporting the continued partnership on data sharing between IPOA, Mathare, KNCHR and IMLU, and conducting further research and analysis in this area.

Recommendation 4: In the immediate term, while the process outlined in Recommendations 3 and 4 are being developed:

- Efforts should be made to continue to verify the degree of coverage of NPS reporting of relevance cases by carrying out an analysis of media reporting of police use of force, and cross-referencing the resulting information with the cases submitted by NPS to IPOA;
- The process of collaboration between IPOA, Mathare Social Justice Centre (Mathare), the Kenya National Commission for Human Rights (KNCHR), Independent Medico Legal Unit (IMLU) and other possible interested partners continue in order to share information on cases, and support compatibility across the various organisational databases; and
- Support to research and analysis of deaths as a result of police custody or police action continue that identifies trends and patterns to inform preventive and proactive processes.

6. Recommendations 5 and 6: Training for NPS on the use of force

In 2020, the African Commission on Human and Peoples' Rights adopted a resolution to undertake a study on the use of force by law enforcement officials in Africa.¹² The study focuses on three themes: analysis of national frameworks governing the use of force; systems for oversight and accountability; and national training practices. The draft Study (attached as **appendix 4**), is currently in a public consultation process, and highlights a number of general issues regarding the provision of training to law enforcement officials. In light of these deficits, it recommends that training should include:

¹¹ National Academies of Science, Engineering and Medicine, *Policies and Practices to Minimise Police Use of Force Internationally*, National Academies Press, 2022, Washington D.C., available at <https://nap.nationalacademies.org/read/26582/chapter/6> (accessed on 9 February 2023).

¹² National Academies of Science, Engineering and Medicine, *Policies and Practices to Minimise Police Use of Force Internationally*, National Academies Press, 2022, Washington D.C., available at <https://nap.nationalacademies.org/read/26582/chapter/6> (accessed on 9 February 2023).

- The applicable human rights principles and standards, namely, precaution, non-discrimination, necessity, proportionality, and accountability.
- Means of avoiding the use of force, including through de-escalation techniques, mediation, and effective communication.
- Specific information on how less-lethal weapons may offer a safe and effective alternative to firearms, and which individuals and groups may be especially vulnerable to the use of certain less-lethal weapons.

While empirical evidence on the impact of training on police practice is limited, there is some evidence from the United States that police training may reduce the rate at which police use force in the field. There is also some evidence that de-escalation training may reduce use of force incidents.

APCOF urges the National Taskforce to include a review and revision of the NPS training curriculum on the use of force, and to ensure that the framework used to undertake that work aligns with current best practice in the area.

Recommendation 5: Training on the use of force for NPS officers should be both theoretical and practical, using realistic scenarios in both instances. This can be provided through case studies that deal with common situations in which the use of force may be applied by police. The design of the training should encourage the application of theoretical frameworks for rights-based approaches to the use of force through practical application and useable in classroom situations and field-style training.

Once established, the revised training curriculum should be subject to continuous revision to ensure it remains up to date with best practice, and draws on the lessons and experiences of NPS officials in the field.

Recommendation 6: Training for NPS officers should be reviewed continuously to incorporate lessons learned during operations and to ensure that the curriculum reflects international and regional law. The review must be extended to include high risk environments, not necessarily associated directly with the use of force, but where appropriate practices can provide critical preventive value such as in investigative interviews.

7. Conclusion

APCOF acknowledges that the mandate of the National Taskforce is broad, and its undertaking significant. We hope that the information and recommendations provided will be useful to the Taskforce's work, and we remain available to provide any further information or support.

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