



Comment to Somalia's Parliamentary Committee on Human Rights, Women, and Humanitarian Affairs on Draft National Human Rights Commission Legislation

Summary

Somalia's provisional constitution provides for the establishment of a national human rights commission.¹ A draft law is currently before parliament. Given the devastating human rights abuses throughout the 20-year civil war and limited rights monitoring and reporting, the establishment of a robust and independent commission is an important opportunity for the new government to demonstrate a concrete commitment to break with the past and ensure the rights of all Somalis are a priority. The first step will be strong implementing legislation that ensures the personnel, processes, and powers of the commission are clearly defined and free from political interference.

In February 2013 the minister of justice presented a first draft law to parliament that was later amended and an updated draft was presented in May 2013. It is scheduled for a second reading before it will be presented to the Parliamentary Committee on Human Rights, Women, and Humanitarian Affairs, which has the power to recommend changes. This paper analyses the May 2013 draft, as seen by Human Rights Watch, assesses its compliance with international standards on national human rights institutions, and makes recommendations for further revisions.²

There is no single formula for creating a robust, independent human rights commission, but the United Nations Principles relating to the Status of National Institutions, known as the Paris Principles, are internationally recognized standards on the establishment and functioning of national human rights institutions, and should serve as a guide for the

¹ Federal Republic of Somalia: Provisional Constitution, adopted August 1, 2012, as of September 19, 2012 (Provisional Constitution hereafter), art. 111(b), http://www.constitutionnet.org/files/adopted_constitution_eng_final_for_printing_19sept12_-_1.pdf (accessed May 20, 2013).

² This is not an exhaustive assessment but focusses on some of the areas of utmost concern.

drafters of the legislation in Somalia.³ On a practical level, Human Rights Watch research throughout Africa has shown that the legal mandate and accompanying powers of a commission are essential factors.⁴

The current draft law contains some positive provisions, including granting the commission the mandate to monitor and investigate human rights abuse.⁵ The draft also provides some clarification on the tenure of commissioners which is an important guarantee of independence, giving commissioners greater room to work on sensitive issues with less concern for reprisals.⁶

However, many of the key provisions are either superficial or omitted from the current draft. A weak implementing law risks crippling the commission from the start and should be urgently addressed.

Before the draft is presented for a vote, the Parliamentary Committee on Human Rights, Women, and Humanitarian Affairs should significantly strengthen key provisions to ensure that the new commission has a broad, clear mandate and the powers to carry out its work effectively. In particular, the committee should amend the draft to:

- Further define the selection and nomination process of commissioners; the process should be transparent and consultative, involve civil society, and limit government involvement;
- Ensure that the selection criteria for candidates outlined in the law encourages diversity among commissioners and ensure that a commissioner's human rights record is sufficiently considered;

³ United Nations Principles relating to the Status of National Institutions ("Paris Principles"), Annex to Resolution 1992/54 on National Institutions for the Promotion and Protection of Human Rights, adopted by consensus by the UN Commission on Human Rights, March 3, 1992, and endorsed by the UN General Assembly in resolution 48/134, December 20, 1993, <http://www.un.org/documents/ga/res/48/a48r134.htm>. Compliance with the Paris Principles is the central requirement of accreditation that underpins a national human rights institution's access to the United Nations Human Rights Council and other UN bodies.

⁴ Human Rights Watch, *Protectors or Pretenders: Government Human Rights Commissions in Africa*, January 1, 2001, <http://www.hrw.org/reports/2001/01/01/protectors-or-pretenders>.

⁵ Draft Human Rights Law, on file with Human Rights Watch, art. 10(3). Assessments are based on an English translation of the original draft, which is in Somali.

⁶ Draft Human Rights Law, art. 12(1).

- Establish that the commission has the power to independently initiate investigations, to have unfettered access to locations, including all detention facilities, and has sufficient enforcement capacity.

The establishment of a human rights commission will not by itself contribute to an improvement in the human rights situation, and should not be seen as a replacement to internal oversight mechanisms within the state security forces, a fair and competent justice system, and rights monitoring by civil society. Some national human rights commissions have faced criticism as being “window-dressing” or public relations tools for governments that are fundamentally uninterested in protecting human rights.⁷ Ultimately, the establishment of a strong Somali commission can and should contribute to creating a culture of human rights promotion, awareness and protection, and challenging the entrenched history of impunity.

Provisions of Concern

The Paris Principles, the UN handbook,⁸ and research carried out by Human Rights Watch identify key provisions within implementing legislation of national human rights institutions that can affect a commission’s independence, public confidence in the commission, as well as the effectiveness of its work. These include:

1. Selection, nomination, and removal process of commissioners;
2. Composition of the commission;
3. Mandate of the commission;
4. Powers of the commission; and
5. Funding.

The following section assesses how the draft law addresses these questions and suggests appropriate revisions.

⁷ Draft Human Rights Law, art. 12(1).

⁸ The UN Office of the High Commissioner for Human Rights (OHCHR) produced a handbook to help operationalize the Paris Principles; on some issues the handbook in fact takes issues further than the Paris Principles themselves. See OHCHR, “National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights” (“UN Handbook”), 1995, HR/P/PT4, <http://www.refworld.org/docid/4ae9acb7289.html> (accessed 20 May 2013).

1. Selection, Appointment, and Removal of Commissioners

The draft law stipulates that the Minister of Justice will be in charge of preparing the list of nominees, that the cabinet will vet this list, and that nominated commissioners will need to be approved by parliament.⁹ Final appointment will be made by the president. The draft also lists factors that can result in dismissal of commissioners.¹⁰

While the selection, nomination, and confirmation of commissioners process itself is not defined by the Paris Principles, the UN Handbook, which was designed to help operationalize the principles, underscores the importance of defining selection and appointment processes in the implementing legislation.¹¹ The UN Handbook also underlines the importance of specifying the individual or body that has the power to remove a commissioner, and recommends this power being vested in parliament or an equivalent high-level body, as a means of protecting the independence of the national commission.¹²

Recommended Changes

The draft law should detail how commissioners will be selected and nominated to ensure a wide array of qualified nominees with relevant experience and to minimize government interference with the pool of candidates, particularly from the executive.¹³ A public call for nominees followed by a transparent and consultative appointment process established in law is critical. In several African countries, including Burundi, Kenya, and Tanzania, a call for applications was publicized in national newspapers.¹⁴ The process of selection and nomination of the commissioner and deputy commissioners also should be set out in law.

⁹ Draft Human Rights Law, art.8.

¹⁰ Draft Human Rights Law, art. 9.

¹¹ UN Handbook, para. 78. The UN Handbook states that the terms of appointment should include definition of “method of appointment, criteria for appointment such as nationality, profession and qualifications, duration of appointment, whether members can be reappointed, who may dismiss members and for what reasons, privileges and immunities.”

¹² UN Handbook, para. 80.

¹³ International Council on Human Rights, Policy, Performance and Legitimacy: National Human Rights Institutions, 2000, http://www.ichrp.org/files/reports/17/102_report_en.pdf (accessed May 20, 2013), p. 112.

¹⁴ The 2011 law setting up the Kenyan National Commission on Human Rights stipulates that a call for applications should be advertised within at least two newspapers of national circulation. In Burundi, the National Assembly also publicized a call for candidatures in one national newspaper, although this was not spelt out in the commission’s mandate.

Civil society has an important role to play in vetting candidates' knowledge and background. The draft should include procedures to ensure civil society involvement.¹⁵ In Tanzania, for example, civil society was included in the committee set up to vet candidates; the names of the candidates selected by the committee were subsequently advertised in the media to allow public input which was then channeled to a final selection committee.¹⁶

Finally, the draft should vest power of oversight over removals of a commissioner in the parliament.

2. Composition of the Commission

Among the conditions for membership to the commission currently listed in the draft are a person's nationality, level of education, human rights expertise, absence of a criminal record for serious abuses, and integrity.¹⁷

The Paris Principles emphasize that the composition of a commission should represent the array of actors involved in human rights work in a country, and should include members of nongovernmental organizations working on human rights, trade unions, as well as representatives of different religious thought, professional organizations, and academics.¹⁸ Membership criteria should also reflect the diversity of the country, including gender, ethnic, and regional diversity in order to gain public confidence.¹⁹ This is especially important in Somalia where years of conflict have created enormous mistrust and animosity between and among communities and where certain groups within the population have been disproportionately affected by the conflict.

Recommended Changes

The selection criteria included in the draft law should be strengthened so that individuals with an array of backgrounds are among the nine commission members, including

¹⁵ Human Rights Watch, *Protectors or Pretenders*, p. 17; Paris Principles, principle 3(a).

¹⁶ See reference to Commission for Human Rights and Good Governance (Appointment Procedure for Commissioners) Regulations, 2001 (Government Notice No. 89 of 11 May 2001) in Peter, Chris Maina, "Human Rights Commissions in Africa – Lessons and challenges," July, 2009, http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/11_Peter.pdf (accessed May, 20, 2013).

¹⁷ Draft Human Rights Law, art. 7.

¹⁸ Paris Principles, principle 4(a-e).

¹⁹ See Human Rights Watch, *Protectors or Pretenders*, p. 17; International Council on Human Rights, Policy, Performance and Legitimacy, p. 112.

representation of women and vulnerable groups, and reflect ethnic and regional diversity. For instance, the Kenyan National Human Rights Commission Act of 2011 calls for gender equity, regional and ethnic balance, and due regard to the principle of equal opportunities for persons with disabilities.²⁰

Given the dire state of the judicial system in Somalia, a criminal record, or lack thereof, is not in itself a guarantee of an individual's record. The selection process should therefore include civil society, and even public vetting of an individual's merits and records; as described above this has happened in other countries before, notably in Tanzania.

3. Mandate of the Commission

The national human rights commission is created under the provisional constitution, which gives it a strong legal foundation.²¹ The draft currently makes multiple generic references to human rights, but not to international human rights law specifically. The draft states that the commission has the responsibility to investigate abuses, regardless of the alleged perpetrator.

The Paris Principles provide that national institutions should be given “as broad a mandate as possible.”²² The UN Handbook explains that grounding an institution in international human rights instruments to which the state is party places it in a better position to “oversee domestic implementation of those standards [and] to identify gaps in protective legislation.”²³ The promotion of legal reform to ensure conformity with international human rights standards is in fact one of the responsibilities of human rights commissions outlined in the Paris Principles.²⁴

The UN Handbook also underlines the importance of allowing a commission to publicize its findings—both as a means of establishing the credibility of the complaints mechanisms of a commission and for informing the public.²⁵

²⁰ Kenya National Commission on Human Rights Act, 2011, <http://cickenya.org/index.php/legislation/acts/item/221-kenya-national-commission-human-rights-act> (accessed May 21, 2013), art. 13.

²¹ Provisional Constitution, art.111B.

²² Paris Principles, principle 4.

²³ UN Handbook, para. 87.

²⁴ Paris Principles, principle 3.a.i.

²⁵ UN Handbook, paras. 280 and 281.

Recommended Changes

The draft law should give the commission jurisdiction over violations of international human rights law, including economic and social rights, international humanitarian law, and the international human rights instruments to which Somalia is party.²⁶ Specific reference to the promotion and protection of the rights of groups that have been particularly vulnerable to abuse during Somalia's conflict, particularly women, children, and the displaced, should also be included in the draft law. Several other human rights commissions in Africa are authorized to investigate abuses against vulnerable groups; in Malawi, the commission is mandated to promote the human rights of vulnerable groups such as children, illiterate persons, persons with disabilities, and the elderly.²⁷

Given the emphasis in both the provisional constitution and the Somali government's justice reform plan on the reform and enactment of laws,²⁸ the draft law should include the review of legislation and promotion of legal reforms among the commission's responsibilities to ensure that existing and new Somali legislation and regulations comply with international human rights standards.²⁹

Finally, making the work of the commission public is an essential factor in helping to build public confidence; ensuring that the commission is given both the power and responsibility to report publicly on its findings, and not just to government or international institutions, is therefore vital and should be added to the provisions defining its responsibilities.

4. Powers of the Commission

The draft empowers the commission to summon any party and ask for information, documents, and other material during investigations.³⁰ It allows it to take up human rights issues voluntarily; this provision is key as the power to independently initiate investigations, or take up a human rights matter at the request of "any petitioner," helps

²⁶ The Human Rights Commission in Ghana has a particularly broad mandate, which includes jurisdiction over injustice, corruption, abuse of power by a serving public officer, actions by private individuals and institutions that violate constitutional rights, among others. See Commission of Human Rights Act, 1993, Act 456 (Ghana), July 6, 1993, <http://www.refworld.org/docid/44bf7f804.html> (accessed 20 May 2013), section 7.

²⁷ See Human Rights Watch, *Protectors or Pretenders*, p. 206.

²⁸ Draft Somalia Justice Action Plan 2013-2015, on file with Human Rights Watch.

²⁹ Paris Principles, principle 3.a.i.

³⁰ Draft Human Rights Law, art. 10(13).

ensure that a commission can set its own agenda free from government or other influence. Many commissions in Africa are mandated to take up issues and make recommendations on request or on their own initiative.³¹ The provision regarding the power of the commission to refer cases to court is vague. It states that the commission can ensure “how to bring before the relevant court of law any persons accused of or suspected of commission of human rights violation.”³² Obstructing and sabotaging the activities of the commission are prohibited.³³ The draft law also provides that the commission has the powers to use security forces to assist in its investigations.³⁴

Human rights commissions cannot be a substitute for a well-functioning and fair criminal justice system. Commissions should facilitate criminal prosecutions for human rights violations, not be an additional step before the authorities take action. The Paris Principles provide that a national human rights institution should have the power to take up human rights situations on the proposal of its own members.³⁵ They underline that commissions with quasi-judicial competence should have the power to hear complaints and transmit them to any other competent authority and to make recommendations to the relevant authorities including proposing legal amendments or reforms, or proposing amendments to practices.³⁶ The principles also call for such commissions to have the powers to seek amicable settlements or present binding decisions,³⁷ although this should not interfere with possible criminal prosecutions.

The UN Handbook recommends that commissions should be empowered to impose legal or administrative sanctions when its powers and work are obstructed.³⁸

³¹ For example, the Ugandan Human Rights Commission is mandated to “investigate, at its own initiative on a complaint made by any person or group of persons against the violations of any human rights.” Uganda Human Rights Commission Act, 1997 (No. 4 of 1997), <http://opm.go.ug/assets/media/resources/400/UGANDA%20HUMAN%20RIGHTS%20COMMISSION%20ACT.pdf> (accessed May, 20, 2013), art. 7 (1).

³² Draft Human Rights Law, art. 10(6).

³³ *Ibid.*, art. 15(2).

³⁴ *Ibid.*, art. 10(14).

³⁵ Paris Principles, Methods of Operation (a).

³⁶ Paris Principles, Additional Principles concerning the status of commissions with quasi-judicial competence.

³⁷ *Ibid.*

³⁸ UN Handbook, para. 95.

Recommended Changes

The draft law should grant the commission unhindered access to all locations, and in particular access to all detention facilities, including unofficial detention sites, without prior notice. The draft should be clear that the commission has the power to investigate abuses against all state actors, including state institutions and all security forces.

The commission should have a strong protection mandate and the means to ensure that its recommendations are enforced; the provisions in the draft relating to the powers of the commission therefore need to be further clarified and reinforced. The draft law should specify that the commission has subpoena power. The commission should be given the authority to ensure that other state institutions with enforcement powers are doing their work, most notably the legislative, state security forces, and justice system. The law should therefore clearly spell out that the commission has the authority to refer complaints and cases onto relevant authorities, including to courts, particularly when initial recommendations or measures called for by the commission have not been complied with.³⁹ The commission should also have the power to order compensation. Finally, the commission should be empowered to impose fines or penalties when individuals obstruct their work.

5. Funding

The draft law gives the government the responsibility to allocate funds to the commission to enable it to function effectively.⁴⁰ The Paris Principles states that commissions should have sufficient funding to enable them to effectively function and be independent from government control.⁴¹

Recommended Changes

The draft law should therefore be amended to specify that the government will ensure that the commission receives the same funding as comparable government institutions, and that its budget will be determined by parliament, not by the executive.

³⁹ The Commission on Human Rights and Administrative Justice of Ghana for example is mandated to take appropriate action to call for the remedying, correction or reversal of a human rights abuse, including by bringing the proceedings before a competent court. See Commission of Human Rights Act, 1993, (Act 456), section 7(d).

⁴⁰ Draft Human Rights Law, art. 13.

⁴¹ Paris Principles, principle 5.