



Strathmore

UNIVERSITY

**LIMITING THE RIGHT TO LIFE: ASSESSING THE USE OF FIREARMS
IN DISPERSAL OF CROWDS IN KENYA**

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DECLARATION

I, DAVIS KIPRONO KOSGEL, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Mr. Josephat Kilonzo

LIST OF ABBREVIATIONS

ACHPR	- African Charter of Human and People's Rights
ACmHPR	- African Commission on Human and People's Rights
ECmHR	- European Commission on Human Rights
ECtHR	- European Court of Human Rights
KNCHR	- Kenya National Commission of Human Rights
LRM	- Less Restrictive Means
OCS	- Officer in Charge of the Station
CCPR	- UN Human Rights Committee
UDHR	- Universal Declaration of Human Rights

LIST OF CASES

Boniface Mwangi v Inspector General of Police & 5 others (2017) Eklr

Faurisson v France, CCPR Comm. No. 550/1993 (8 November 1996)

Ferdinand Waititu & 4 others v Attorney General & 12 others (2016) eKLR

Gulec v Turkey (1998) European Court of Human Rights

Haki Na Sheria Initiative v Inspector General of Police & 3 others (2020) eKLR

Hussein Khalid & 6 others v Attorney General and 2 others (2017) eKLR

Hussein Khalid and 16 others v Attorney General & 2 others (2019) eKLR

I.P. Veronica Gitahi & another v Republic (2017) eKLR

Jaqueline Okuta & another v Attorney General & 2 others (2017) eKLR

Kenya Human Rights Commission v Communications Authority of Kenya & 4 others (2018) eKLR.

Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others (2020) eKLR

Mlungwana and others v The state and another (2018) Constitutional Court of South Africa

Mtana Lewa v Kahindi Ngala Mwangandi (2015) eKLR

Mule v Republic (1983) eKLR

Ngunjiri Wambugu v Inspector General of Police & 2 others (2019) eKLR

Noah Kazingachire, John Chitsenga, Elias Chemvura and Batania Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe, ACmHPR Comm. 295/04, (2012).

R v Chief constable of Devon and Cornwall, Ex parte Central Electricity Generating board (1982) QB 458.

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Republic v Kipsigei Cosmas Sigei & another (2009) eKLR

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Tolley v Republic (1983) eKLR

Valentin Evrezov v Belarus, CCPR Comm No. 1988/2010 (15 July 2015)

Wilson Olal & 5 others v Attorney General & 2 others (2017) eKLR

LIST OF LEGAL INSTRUMENTS

1. *African Charter on Human and People's Rights* (1981)
2. *Basic principles on the use of force and firearms by law enforcement officials*, 7 September 1990
3. *Code of conduct for law enforcement officials* (1979).
4. *Constitution of Kenya* (2010)

5. *International Covenant on Civil and Political Rights*, 16 December 1966
6. *National Police Service Act* (Act no. 11A of 2011).
7. *Penal code* (code 81 of 1948)
8. *Policing of Assemblies in Africa: Guidelines for the policing of Assemblies by law enforcement officials in Africa*, 4 March 2017.
9. *Public Order Act* (Act No 26 of 1950)
10. *United Nations Human Rights Guidelines on Less Lethal Weapons in Law Enforcement*, 25 October 2019
11. *Universal Declaration of Human Rights* (1948)

ABSTRACT

The main objective of this research project was to establish whether the use of firearms to disperse crowds as provided by Kenyan law, specifically sections of the Public Order Act and the Penal Code, is a justified limitation on the right to life in Kenya. The methodology applied to achieve this objective was a desktop analysis of relevant primary and secondary sources including statutes, journal articles and case law. Firstly, it was established that such use of firearms to disperse crowds, through the lens of international use of force standards, is a violation of the right to life. Secondly it was established that such use of firearms, through the lens of the doctrine of proportionality in the limitation of rights, is an unjustified limitation on the right to life. As regards recommendations, the study proposes significant amendments to the impugned Kenyan laws, which amendments are aimed at prohibiting or otherwise making the use of firearms simply to disperse assemblies, unlawful. Further the study recommends that police in Kenya be trained on human rights standards as well as international standards on the use of force, to improve their attitude, tactics and skills in different situations and especially in policing assemblies. Lastly the study recommends that the government takes proactive steps to equip the police with proper equipment for policing assemblies.

CHAPTER 1: INTRODUCTION

1.1 Background

Under the Constitution of Kenya 2010, the police are required to respect, uphold and protect human rights in the exercise of their duties.¹ Under international law as well, the police as state agents are required to comply with human rights standards.² In the use of force particularly, the police are required to exercise restraint and to only employ force proportionate to the seriousness of the offence and the legitimate objective to be achieved.³ Further they are to adhere to the human rights principle of proportionality requiring that the force they use should be legal, necessary and reasonable.⁴

Despite these human rights and use of force standards, Kenyans have become accustomed to scenes of police brutality. The police are known for their indifferent and oppressive nature and more so for their regular use of excessive force.⁵ The police are “seen as intimidating, violent, government-oriented, inhuman, ruthless and unreasonable with no respect for the rule of law”.⁶ Resulting from this view, the police have been labeled as having a culture of impunity.⁷ It has also been established that police officers generally see the use of force as an appropriate way to deal with protesters rather than employing a friendly courteous approach and thus have the propensity to lean on the culture of excessive use of force.⁸

Regarding the right to peaceful assembly⁹, the police are known for employing excessive force in the management of mass gathering and processions, and particularly in dispersing crowds.¹⁰

¹ Article 244 (c), *Constitution of Kenya* (2010).

² Article 2, *International Covenant on Civil and Political Rights*, 16 December 1966; Article 1, *African Charter on Human and Peoples’ Rights*, 27 June 1981; Article 2, *UN Code of conduct for law enforcement officials*, 17 December 1979.

³ Principle 5 (a), *Basic principles on the use of force and firearms by law enforcement officials*, 7 September 1990; section 2, *sixth schedule of the National Police Service Act* (Act no. 11A of 2011).

⁴ Cyr K, ‘Police use of force: Assessing Necessity and proportionality’, 53 (3) *Alberta law review*, 2016, 665.

⁵ Human Rights Watch, ‘Kenya: Police brutality during curfew’, 22 April 2020.

⁶ Onyango D & Otuya P, ‘Police perceptions, attitude and preparedness in managing public assemblies’, in Ruteere M, Mutahi P (eds), *Policing of Protests in Kenya*, Centre for human rights and policy studies, 2019, 15.

⁷ Human Rights Council, *Report of the special rapporteur on extrajudicial, summary or arbitrary executions Mr. Philip Alston*, 2009, 2; The Conversation, *Why violence is the hallmark of Kenyan policing. And what needs to change*, June 5 2020 <<https://theconversation.com/why-violence-is-a-hallmark-of-kenyan-policing-and-what-needs-to-change-139878>>

⁸ Onyango D & Otuya P, ‘Police perceptions, attitude and preparedness in managing public assemblies’, 14.

⁹ Article 37, *Constitution of Kenya* (2010).

¹⁰ Kenya national commission on human rights, *Commission of inquiry into the post-election violence (CIPEV/Waki report)*, 2008, 417.

They have been captured on camera clobbering rioters and protesters and even innocent civilians even after they have been suppressed and surrendered.¹¹ They have on many occasions also conducted house searches or punitive raids in pursuit of protesters whom they battered and severely injured.¹²

Against the Guidelines for the policing of Assemblies by law enforcement officials in Africa that provides that firearms are not an appropriate tool for the policing of assemblies¹³, the police have also used firearms to devastating effect in the dispersal of crowds. This use of firearms has resulted in severe injuries and deaths of assembly participants.¹⁴ Research by human rights organizations indicate that police appeared to have shot at protesters who though may have engaged in violence or other unlawful acts did not pose a direct threat to life.¹⁵ In other cases, the police recklessly fired into the air as well as randomly into crowds and residential areas hitting innocent bystanders and as a result many died or were severely injured.¹⁶ Despite the outcry from citizens, human and civil rights organizations, cases of police brutality and excessive use of force continue to persist.

1.2 Statement of the Problem

Every person in Kenya has a right to peaceful assembly.¹⁷ In the exercise of this right, the assembly of which he/she is part might turn violent or unlawful resulting in the need for its dispersal. Despite the necessity of the use of force by the police in dispersing such an assembly, the citizen is entitled to have his life preserved, unless he himself poses a great danger to the life

¹¹ Amnesty International & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 2017, 16.

¹² Amnesty International & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 2017, 16.

¹³ Guideline 21.2.4, *Policing of Assemblies in Africa: Guidelines for the policing of Assemblies by law enforcement officials in Africa*, 4 March 2017.

¹⁴ Independent medico-legal unit, *Guns: our security, our dilemma! Enhancing accountability for police use of firearms*, 2013, 1 – 4.

¹⁵ Amnesty International & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 2017, 15.

¹⁶ Human Rights Council, *Report of the special rapporteur on extrajudicial, summary or arbitrary executions Philip Alston*, 2009, 15; Amnesty International & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 2017, 16-17; Kenya national commission on human rights, *Commission of inquiry into the post-election violence (CIPEV/Waki report)*, 418; Kenya national commission on human rights, *Mirage at dusk: a human rights account of the 2017 general election, preliminary report*, 2017, 175 – 186.

¹⁷ Article 37, *Constitution of Kenya* (2010).

of another.¹⁸ On that condition, he should have a reasonable expectation that though he may be injured in the dispersal, he shall not lose his life. To meet this expectation, it is incumbent on the police to use equipment that is not likely to cause death in such dispersal. Thus, the use of equipment like firearms for example, which is noted as being inappropriate in policing assemblies and that they should never be used in crowd dispersal,¹⁹ should be avoided. This is because the use of firearms is categorized as an extreme measure with a high a risk of death.

However, Kenyan law allows for the use of firearms in dispersing crowds yet they are weapons that are likely to cause death.²⁰ In actual fact, the use of firearms in dispersing crowds in Kenya has led to the loss of many lives. This is despite the presence of other means of effectively dispersing crowds without the risk of losing lives. The presence of these laws allowing for the use of firearms in the dispersal of crowds therefore means that the right to life may be limited when crowds are being dispersed.

This study proposes to deeply investigate whether such use of firearms is a justified limitation on the right to life.

1.3 Justification of the Study

The loss of lives during mass gatherings and processions in Kenya as a result of police action is unfortunate. This study is an attempt to contribute to the knowledge relating to the protection of the fundamental right to life during such assemblies. While it is settled that the use of excessive force by the police in policing assemblies is a violation of a number of human rights, this study seeks to establish whether the use of firearms in the dispersal of crowds is a justified and proportionate limitation to the right of life.

The contribution from this study will be essential in forging the creation of reforms for better policing of assemblies in Kenya. Additionally, this knowledge may aid the shaping of the current police culture of impunity to a more human rights observant culture. Furthermore, this study will

¹⁸ Article 26, *Constitution of Kenya* (2010); Principle 9, *Basic principles on the use of force and firearms by law enforcement officials*.

¹⁹ Guideline 21.2.4, *African Commission on Human and Peoples' Rights - Policing Assemblies in Africa: Guidelines for the policing of assemblies by law enforcement officials in Africa*.

²⁰ Section 5(8), *Public Order Act*, (Act No 26 of 1950) as read with section 82, *Penal code* (code 81 of 1948) and section 7 (4) & 14, *Public Order Act* (Act No 26 of 1950).

be of immense help to participants of mass gatherings and processions as it will increase their understanding of the incidental rights to their right to peaceful assembly.

1.5 Research Objectives

The main objective of this research is to establish whether the use of firearms in the dispersal of crowds is a justified limitation on the right to life. To realize this objective the following sub-objectives will be taken into account.

Objectives

- i) To establish circumstances in which the police can lawfully disperse a crowd.
- ii) To establish whether the use of firearms by police in Kenya is compliant with the municipal and international law standards relating to the use of firearms generally, and in dispersal of crowds specifically.
- iii) To establish whether the use of firearms for crowd dispersal in Kenya is a proportionate limitation on the right to life under the proportionality test in human rights law.

1.6 Research Questions

1. What are the circumstances in which the police can lawfully disperse a crowd in Kenya?
2. Whether the use of firearms by police in Kenya complies with the municipal and international laws relating to the use of firearms generally and, in dispersal of crowds specifically.
3. Whether the use of firearms for crowd dispersal is a proportionate limitation on the right to life under the proportionality test in human rights law.

1.7 Hypothesis

The use of firearms for crowd dispersal is a disproportionate limitation of the right to life under the doctrine of proportionality in human rights law.

1.8 Research Methodology

This study will use doctrinal methodology. The doctrinal approach will involve the review of relevant primary and secondary sources. These include statutes, journal articles, books, case law, reports and online internet resources.

1.9 Theoretical Framework

Lockean social contract and natural rights theory

The state has an obligation to protect the lives of its citizens both negatively by preventing its agents from arbitrary killings, and positively by protecting individuals from illegal acts of other private individuals that could lead to the loss of life. This obligation resonates well with the Lockean theory of natural rights and the social contract. Natural rights are the moral ideas that are derived from natural law which flows from the nature of men.²¹ These rights include those that are inalienable like the right to life, liberty, property, self-preservation and the pursuit of happiness. The theory of natural rights was advanced by many a scholar including Thomas Hobbes, John Locke and Thomas Paine.

John Locke in particular introduced the idea of natural rights in relation to a 'state of nature'. For him all men are endowed with natural rights prior to and independent of the existence of a government; they are free, equal and independent.²² In this state of nature in which individuals fended for themselves and looked after their own interest, they had the right to life, health, property and liberty.²³

Locke asserts that because of the state of nature in which individuals are equal such that no one has more power over the other, the law of nature obliges everyone not to harm the life, health, liberty or possessions of others.²⁴ Thus Locke states that a state of liberty is not a state of license; though man may have an uncontrollable liberty in the 'state of nature', he does not have the license to dispose off of others as he pleases.²⁵

Locke adds that due to the imperfection of the protection of individual rights in the 'state of nature' by the individuals themselves,²⁶ individuals come together to form an organized society

²¹ James D, *Natural law and natural rights* on 16 June 2020 <http://hamiltoncopatriots-in.org/Natural_Law_and_Natural_Rights.pdf> on 16 June 2020.

²² Herbert GB, 'John Locke: Natural rights and Natural duties', 4 *Jahrbuch fur Recht und Ethik*, 2014, 595.

²³ Herbert GB, 'John Locke: Natural rights and Natural duties', 595.

²⁴ Vizard P, 'Antecedents of the idea of human rights: a survey of perspectives', *Human development report background paper*, 2000, 8.

²⁵ Heyman SJ, 'The light of nature: John Locke, Natural rights, and the origins of American religious liberty', 101 (3) *Marquette law review*, 2018, 728.

²⁶ Heyman SJ, 'The light of nature: John Locke, Natural rights, and the origins of American religious liberty', 732
Locke recognizes the defects of individual protection of rights: though the law of nature be plain and intelligible to all rational creatures, it is not clearly defined and established as to effectively constrain those who are inclined to violate it out of ignorance or self-interest; secondly, in a state of nature there is no impartial judge to resolve disputes

for the effective protection and promotion of their rights through a social contract.²⁷ In this contract, the individuals consent to give up their right to interpret and execute natural law to the public judgment of the community or government.²⁸ Locke continues to state that the power of such a government is not absolute but limited. It is contingent upon that government's respect for the individual rights of the people; because the consenting individuals have no arbitrary power over their own lives, they cannot bestow such powers on others including their rulers.²⁹ In this regard Locke asserts, "no rational creature can be supposed to change his condition with an intention to be worse...[the power of government] can never be supposed to extend further than the common good, but is obliged to secure everyone's property".³⁰ Therefore the government is required to use its power to protect the natural rights of citizens including their right to life.

In this research, the hypothesis is that the use of firearms for crowd dispersal is a disproportionate limitation on the right to life, and as such a violation of the right to life. The right to life under the Lockean social contract theory, as explained above, is a natural right that the government is supposed to protect. It cannot use its power as derived from the social contract to violate the right to life of its citizens. In this regard Kleinig asserts that if the police are to be considered as legitimate social guarantors (by virtue of their being agents of the state) of our natural right to life, then their power to "use force can be seen not only as derivative of that right, but also as limited by the scope of that right".³¹ Thus, the police acting as government agents have to use their extended government power in ways that observe the natural rights of the citizens, in this case the right to life.

This study seeks to establish whether the use of firearms in dispersing crowds by agents of the government, the police, is in keeping with the requirement under Locke's theory, that the government uses its power to protect and not to violate the right to life of its citizens.

under this law; and finally, individuals may lack sufficient power to enforce this law and bring the offenders to justice.

²⁷ Vizard P, 'Antecedents of the idea of human rights: a survey of perspectives', 8.

²⁸ Vizard P, 'Antecedents of the idea of human rights: a survey of perspectives', 8; Heyman SJ, 'The light of nature: John Locke, Natural rights, and the origins of American religious liberty', 734.

²⁹ Heyman SJ, 'The light of nature: John Locke, Natural rights, and the origins of American religious liberty', 734.

³⁰ Heyman SJ, 'The light of nature: John Locke, Natural rights, and the origins of American religious liberty', 734.

³¹ Kleinig J, 'Legitimate and illegitimate uses of police force', 33 (2) *Criminal justice ethics*, 2014, 83.

1.10 Literature Review

This topic concerns the protection of the right to life. The right is a fundamental right protected by various national and international laws.³² It is not merely fundamental; it was considered by the drafters of the ICCPR to be the most fundamental of all rights.³³ It is the source of all other fundamental rights.³⁴ Pavel states that the right to life is chiefly concerned with preventing arbitrary deprivation of life³⁵, since the right is itself not absolute but necessarily limited.³⁶

A review of the literature relating to the topic shows that most studies relate to arbitrary deprivation of life, the requirements for the limitation of rights and the restrictions on the use of force by the police. According to Williams, arbitrary deprivation means not only 'illegally' in the sense that the deprivation did not follow the due process of the law, but also 'unjustly' connoting that the deprivation cannot be justified by a compelling state interest.³⁷ Therefore, the deprivation of life must be 'substantively just and comply with the principles of necessity and proportionality'.³⁸

Where state authorities are involved in deprivation of life, prohibition of arbitrary deprivation is mainly concerned with controlling and limiting the circumstances in which lethal force may be used. Fan states that where human rights generally - like the right to life - are limited and where the use of force is applied by state agents in doing so, the preeminent human rights doctrine of proportionality is employed as a touchstone.³⁹ According to Schweizer, the doctrine of proportionality at its core requires that the action taken by the state authorities and which curtails

³² Article 26, *Constitution of Kenya* (2010); Article 7, *ICCPR*; Article 3, *Universal Declaration of Human Rights*, 10 December 1948; Article 4, *ACHPR*.

³³ Bossuyt M, 'Guide to the 'Travaux Préparatoires' of the International covenant on Civil and Political Rights', *Martinus Nijhoff publishers*, 1987, 115.

³⁴ Pavel N, 'The right to life as a supreme value and guaranteeing the right to life', 4 (2) *Contemporary readings in law and social justice*, 2012, 972.

³⁵ ACT Human Rights Commission, *The right to life*, 2 - <<https://hrc.act.gov.au/wp-content/uploads/2015/03/Right-to-life-281011.pdf>>

³⁶ Pavel N, 'The right to life as a supreme value and guaranteeing the right to life', 973.

³⁷ Williams A, 'Police officers, I.Q, and the deprivation of rights', 61 (2) *Howard law journal*, 2018, 440.

³⁸ ACT Human Rights Commission, *The right to life*, 'The right to life', 3.

³⁹ Fan J, 'Rethinking the method and function of proportionality test in the European Court of Human Rights', 15 (1) *Journal of human rights*, 2016, 48; Cyr K, 'Police use of force: Assessing necessity and proportionality', 663.

a fundamental right be suitable for achieving a legitimate public interest. It must also be necessary in the sense that there is no less restrictive alternative that achieves the same purpose.⁴⁰

Andelkovic on his part states that apart from the legitimacy, suitability (adequacy) and necessity requirements in the proportionality test, the limitation of a right must also be proportional.⁴¹ For him, this proportionality means that the achievement of a certain aim, must be important enough to justify the damage which will be caused to the individual right. He is careful to note that the limitation must first pass the legitimacy test.⁴²

Former UN special rapporteur on extrajudicial, summary and arbitrary execution Mr Philip Alston stated that human rights standards on the use of force flowed from the understanding that “the irreversibility of death justifies stringent safeguards for the right to life”.⁴³ Alston states that the UN Code of Conduct on the Use of Firearms entails the requirements of proportionality and necessity in the use force.⁴⁴ He also states that should the use of force become necessary, the level of force should be escalated as gradually as possible.⁴⁵

Regarding the use of firearms, Punch states that firearms are crude and unforgiving instruments which can in some circumstances be used inappropriately to kill.⁴⁶ He continues to state that though it may almost seem superfluous, firearms are predominantly *designed to kill* and thus they are inherently dangerous and always potentially fatal.⁴⁷

Lowy and Sampson argue that the right to life subsumes a right not to be shot.⁴⁸ They emphatically state that ‘the risks created by firearms are unique among constitutional rights in as

⁴⁰ Schweizer M, ‘Nudging and the principle of proportionality: obliged to nudge?’, 2.

⁴¹ Andelkovic, ‘The elements of proportionality as a principle of human rights limitations’, 15 (3) *Law and Politics*, 2017, 235.

⁴² Andelkovic, ‘The elements of proportionality as a principle of human rights limitations’, 237.

⁴³ Human Rights Council, *Interim report of the Special rapporteur on the worldwide situation in regard to extrajudicial, summary and arbitrary executions*, A/61/150, 2006, 36.

⁴⁴ Article 3, *Code of conduct for law enforcement officials* (1979).

⁴⁵ Human Rights Council, *Interim report of the Special rapporteur on the worldwide situation in regard to extrajudicial, summary and arbitrary executions*, 41.

⁴⁶ Punch M, ‘Police use of firearms: Deadly guns, scenarios and ‘mistakes’ in Punch (eds) *Shoot to kill*, Bristol university press, Bristol, 2011, 73.

⁴⁷ Punch M, ‘Police use of firearms: Deadly guns, scenarios and ‘mistakes’, 73.

⁴⁸ Lowy J & Sampson K, ‘The right not to be shot: public safety, private guns, and the constellation of constitutional liberties’, 14 (1) *Georgetown journal of law and policy*, 2016, 190.

much as firearms pose a risk of imminent lethality'.⁴⁹ Like Alston, they reiterate that a person wrongly killed cannot be compensated by resurrection and as such use of firearms requires highly stringent terms.⁵⁰

Crawshaw states that the standard expressed in principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, on the use of firearms, is based strictly on the notion of the defence of a person's life. That the use of firearms is contingent only upon the person concerned presenting an imminent or 'grave threat to life'.⁵¹ He also states that, in dispersing violent assemblies, there may be extreme cases where it is genuinely believed that the actions of a large proportion of people forming an assembly pose an imminent threat to life, therefore allowing for the use of firearms.⁵² He is careful to note however, that in such an assembly, it is probable that individuals "who are not themselves presenting an imminent or grave threat to life, and who, because of the circumstances cannot be distinguished from those posing the threat", would be killed or injured if firearms were to be used for dispersal.⁵³

This study is an attempt to interrogate the proportionality of the *use of firearms in crowd dispersal in Kenya* and such to determine whether such use of firearms is a justified limitation on the right to life.

1.11 Limitation of the Study

This study is an assessment of the use of firearms by the police in the dispersal of crowds specifically, and not generally in the course of police duties.

Thus, this study will limit itself to an assessment of the use of firearms in the dispersal of crowds in Kenya.

⁴⁹ Lowy J & Sampson K, 'The right not to be shot: public safety, private guns, and the constellation of constitutional liberties', 195.

⁵⁰ Lowy J & Sampson K, 'The right not to be shot: public safety, private guns, and the constellation of constitutional liberties', 196.

⁵¹ Crawshaw R, 'International standards on the right to life and the use of force by police', 3 (4) *The international journal of human rights*, 1999, 84.

⁵² Crawshaw R, 'International standards on the right to life and the use of force by police', 86.

⁵³ Crawshaw R, 'International standards on the right to life and the use of force by police', 86.

1.12 Chapter Breakdown

- Chapter 1: Introduction and Background; Statement of the problem; Justification of the study; Objectives; Research question; Research Hypotheses; Research methodology; Theoretical framework; and Literature review.
- Chapter 2: An interrogation of the lawful circumstances in which the police can disperse crowds. This chapter responds to the first research question on what are the circumstances in which the police can lawfully disperse a crowd in Kenya.
-
- Chapter 3: An interrogation of municipal and international law on the use of firearms in policing assemblies, and the compliance to these laws by police in Kenya. This chapter responds to the second research question on whether the police in Kenya comply with the municipal and international laws relating to the use of firearms generally and, in dispersal of crowds specifically.
- Chapter 4: An interrogation into whether the use of firearms in policing assemblies in Kenya is a proportionate limitation on the right to life under the doctrine of proportionality in international human rights law. This chapter responds to the third research question on whether the use of firearms for crowd dispersal is a proportionate limitation on the right to life under the doctrine of proportionality in international human rights law.
- Chapter 5: Findings, Conclusions and Recommendations of the study.

CHAPTER 2: AN INTERROGATION OF THE LAWFUL CIRCUMSTANCES IN WHICH THE POLICE CAN DISPERSE ASSEMBLIES

2.1 Introduction

Under the Constitution the citizens of Kenya have a right, peaceably and unarmed, to assemble, demonstrate and picket.⁵⁴ International treaties also provide for this right.⁵⁵ The African Charter and the ICCPR qualify the right noting that it may only be restricted by restrictions imposed in conformity with the law and which are necessary in the interests of national security or public safety, public order, public health, morals or the protection of the rights and freedoms of others.⁵⁶ This qualification confirms that the right is not absolute and may be limited. In *Boniface Mwangi v Inspector General of Police & 5 others*, the High Court affirmed this position by stating that the limitations on the right to freedom of assembly must be compliant with Article 24 of the Constitution.⁵⁷ The United Nations Human Rights Committee while stating that the right imposes on states the obligation to respect and protect the right by allowing peaceful assemblies to take place without unwarranted interference,⁵⁸ notes that the imposition of any restrictions should be guided by the objective of facilitating the right, rather than seeking unnecessary and disproportionate limitations to it.⁵⁹ This indicates that the right may indeed be limited by a number of means one of which is dispersal of assemblies.⁶⁰

2.2 The Power to Disperse

Because the right to freedom of assembly is not absolute, the police service is empowered to stop the continuation of an assembly where there are legitimate reasons for doing so. These reasons arise in circumstances for which the law provides the police would be in order in dispersing a crowd. And since dispersing an assembly runs the risk of violating the rights to freedom of

⁵⁴ Article 37, *Constitution of Kenya* (2010).

⁵⁵ Article 20, *UDHR*; Article 11, *ACHPR* (1981); Article 21, *ICCPR*.

⁵⁶ Article 11, *ACHPR*; Article 21, *ICCPR*. This list of legitimate grounds is noted by the HRC as being exhaustive in *Human Rights Committee General Comment No. 37 on the right to peaceful assembly (Article 21)*, 17 September 2020, 7, para 41.

⁵⁷ *Boniface Mwangi v Inspector General of Police & 5 others* (2017) eKLR

⁵⁸ *CCPR General Comment No. 37 on the right to peaceful assembly (Article 21)*, 17 September 2020, 7, para 41.

⁵⁹ *CCPR General Comment 37*, 7, para 36.

⁶⁰ Siegert K, 'The police and the human right to peaceful assembly', in Alleweldt R & Fickenscher G (eds) *The police and international human rights*, Springer international publishing, 2018, 225.

expression and peaceful assembly, as well as the risk of escalating tensions between the participants and the police, it should be resorted to only when the circumstances make it strictly unavoidable.⁶¹ Dispersal of assemblies should be a measure of last resort.⁶² The following are the circumstances:

a. Failure to Give Notice

Under the Public Order Act, persons intending to hold a public meeting or procession are required to notify the regulating officer (Officer in charge of the station – OCS)⁶³ of such intent at least 3 days but not more than 14 days before the proposed date of the meeting or procession.⁶⁴ The National Security Advisory Committee has recently required strict compliance with this provision following the rising political tensions in the country among the different political factions.⁶⁵ Where it is not possible to hold the proposed meeting or procession because the regulating officer has already received notice of another public meeting or procession on the same date, time and venue of the proposed meeting or procession, the regulating officer is required to notify the organizer.⁶⁶ The notification provision is not however, a request for permission or authorization but rather only a notice of intent,⁶⁷ so that barring any prior notice made to the regulating officer, the proposed assembly shall proceed as intended.

Where there is failure to give notice by the organizer, the OCS or any police officer above the rank of inspector may stop or prevent the holding of such meeting or procession, and for this purpose, they may issue orders for the dispersal of the crowd in the meeting or procession.⁶⁸

⁶¹ Mungai M, ‘Maneuvering through legal ambiguity: Dispersing of unlawful protests in Kenya’, in Ruteere M, Mathi P (eds), *Policing protests in Kenya*, Centre for human rights and policy studies, 2019, 47; IPOA, KNCHR, UN Human rights office of the High Commissioner, ‘The right to freedom of peaceful assembly: A checklist for the Kenyan police and the public’, 2017, 12.

⁶² Guideline 22.1, *Policing Assemblies in Africa: Guidelines for the policing of assemblies by law enforcement officials in Africa*.

⁶³ Section (2), *Public Order Act* (Act no 26 of 1950); *Ferdinand Waititu & 4 others v Attorney Genral & 12 others* (2016) eKLR, para 35.

⁶⁴ Section 5 (1) (2), *Public Order Act* (Act no 26 of 1950).

⁶⁵ *The National Security Advisory committee of Kenya statement*, 7 October 2020, 3. -

<<https://www.theelephant.info/documents/the-national-security-advisory-committee-of-kenya-statement-7th-october-2020/>> on 7 October 2020.

⁶⁶ Section 5 (4), *Public Order Act* (Act no 26 of 1950).

⁶⁷ Organization for Security and Co-operation in Europe (OSCE) Office for democratic institutions and human rights (ODHIR), *Guidelines on the freedom of peaceful assembly*, 2nd ed, 2010, 18; IPOA, KNCHR, UN Human rights office of the High Commissioner, *The right to freedom of peaceful assembly: A checklist for the Kenyan police and the public*, 6.

⁶⁸ Section 5 (8) (a), *Public Order Act* (Act no 26 of 1950).

The ‘Spontaneous Peaceful Assembly’ Exception

International law recognizes that there may be instances where spontaneous assemblies arise typically as a direct response to current events; say for example in anticipation of decisions made by courts or state authorities,⁶⁹ or as a response to reported instances of corruption.⁷⁰ Such spontaneous assemblies whether coordinated or not are protected under Article 21 of the ICCPR and the Banjul Charter.⁷¹ The Human Rights Committee notes that provided that the conduct of the participants in such an assembly is peaceful, the fact that domestic legal requirements such as notification have not been met does not, on its own, place the participants of such an assembly outside the scope of the protection of Article 21.⁷² Lack of notification then cannot solely form the basis of a decision to disperse an assembly.⁷³

What then does the notification requirement aim to achieve?

Under the Public Order Act, the first aim of notification is to prevent a clash of assemblies where a prior notification of another public meeting or procession to be held on the same date, venue and time as the current proposed meeting or procession, has already been made.⁷⁴ In this regard the notification requirement indeed advances the right to peaceful assembly by ensuring that groups of assemblies realize the purposes for which they assembled without undue interference. It appears then that where two public assemblies, one that had issued a notification and one that had not, clash on the same date, venue and time, the police would be warranted to disperse the latter if they do not allow the former to carry on peacefully and uninterrupted.⁷⁵

⁶⁹ Ombuor R, ‘Kenya Supreme Court upholds election rerun, sparking celebrations, protests’ Washington Post, 20 November 2017 - <https://www.washingtonpost.com/world/kenya-supreme-court-upholds-election-rerun-sparking-protests-celebrations/2017/11/20/f906e310-cdd2-11e7-9d3a-bcbe2af58c3a_story.html> on 20 November 2017.

⁷⁰ Odula T, ‘Kenyan police teargas anti-corruption protesters in Nairobi’ The Washington Post, 21 August 2020 - <https://www.washingtonpost.com/world/africa/kenyan-police-teargas-anti-corruption-protesters-in-nairobi/2020/08/21/bb4cd452-e3ab-11ea-82d8-5e55d47e90ca_story.html> on 21 August 2020.

⁷¹ CCPR General Comment 37, 3, para 14.

⁷² CCPR General Comment 37, 3, para 16.

⁷³ Guideline 9.2, *Policing Assemblies in Africa: Guidelines for the policing of assemblies by law enforcement officials in Africa*.

⁷⁴ Section 5 (4), *Public Order Act* (Act no 26 of 1950); *Boniface Mwangi v Inspector General of Police & 5 others* (2017) eKLR, para 34.

⁷⁵ CCPR General Comment 37, 3, para 16.

The Act also requires notification for purposes of organization during the assembly. It requires that the notification bears the name and address of the organizer⁷⁶ and that such organizer or their authorized agent shall be present throughout the assembly to assist the police in the maintenance of peace and order.⁷⁷ The notification also serves to allow the authorities to plan and make the necessary preparations to facilitate the assembly and to protect public order and safety and the rights and freedoms of others.⁷⁸ The Court of Appeal in *Hussein Khalid v the AG* noted as much in stating that the requirement is a reasonable measure for the police to ensure that the meeting or procession is conducted in a peaceful manner and that the right of both those involved and those not involved are respected.⁷⁹

b. When the Assembly Turns Violent

The Public Order Act allows the OCS or any police officer above the rank of inspector to stop or prevent, including by an order of dispersal, the holding of an assembly where having regard for the rights and interests of the participants, there is clear, present or imminent danger of a breach of peace or public order.⁸⁰ In the penal code, a police officer may make a proclamation for dispersal⁸¹ where the participants assemble with intent to commit an offence or conduct themselves in such a manner as to cause reasonable fear that they will commit a breach of peace or actually commit a breach of peace.⁸²

Kenyan courts have not defined what constitutes a breach of peace in the modern context of freedom of assembly.⁸³ For instance, the Court of Appeal in *Hussein Khalid* upheld the definitions of a breach of peace proffered in *Mule v Republic (1983)* and *Tolley v Republic (1983)* which cannot practically be applied in assembly contexts. In *Mule* the court held that a breach of peace entails a breach of “the right of wananchi to go about their daily activities without interference”.⁸⁴ Similarly in *Tolley* the court upheld Lord Denning’s position in *R v*

⁷⁶ Section 5 (3), *Public Order Act* (Act no 26 of 1950).

⁷⁷ Section 5 (7), *Public Order Act* (Act no 26 of 1950).

⁷⁸ OSCE ODHIR, *Guidelines on the freedom of peaceful assembly*, 18; *CCPR General Comment 37*, 3, para 14.

⁷⁹ *Hussein Khalid & 6 others v Attorney General and 2 others* (2017) eKLR

⁸⁰ Section 5 (7), *Public Order Act* (Act no 26 of 1950); Guideline 10.1, *Policing Assemblies in Africa: Guidelines for the policing of assemblies by law enforcement officials in Africa*.

⁸¹ Section 81 (1), *Penal code* (Chapter 63 of the Laws of Kenya) Revised 2018 edition.

⁸² Section 78, *Penal code* (Chapter 63 of the Laws of Kenya) Revised 2018 edition.

⁸³ Mungai M, ‘Maneuvering through legal ambiguity: Dispersing of unlawful protests in Kenya’, 49.

⁸⁴ *Mule v Republic* (1983) eKLR

*Chief constable of Devon and Cornwall*⁸⁵ where he stated that “there is a breach of peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it”.⁸⁶ Recently, the Supreme Court in *Hussein Khalid* where the petitioners challenged the constitutionality of section 78 and 94⁸⁷ of the penal code for vagueness of the term “breach of peace”, went as far as declining to outline the elements that constitute the offence of ‘offensive conduct conducive of breach of peace’ advising the petitioners to raise their issues against those sections in the trial court.⁸⁸ Thus a definition of ‘breach of peace’ within the progressive spirit of the 2010 Constitution is yet to be provided by Kenyan courts.

Conduct that would merit dispersal has nevertheless been provided by the Human Rights Committee through General Comment 37 which gives an authoritative legal interpretation of Article 21.⁸⁹ Such conduct entails a breach of peace or public order by way of *violence* by the *collective* of the participants.

i. Violence

The Human Rights Committee notes that there is no clear line between peaceful and non-peaceful assemblies but that there is a presumption in favour of considering assemblies to be peaceful.⁹⁰ Non-peaceful assemblies are those characterized by either actual violence or imminent violence. Actual violence entails the use of physical force by the participants against others, that is likely to result in injury, death or serious damage to property.⁹¹ Imminent violence entails the participants having violent intentions and planning to act on them.⁹² In both types of violence, the violence must emanate from the participants; it must not be from the authorities, or

⁸⁵ *R v Chief constable of Devon and Cornwall, Ex parte Central Electricity Generating board* (1982) QB 458.

⁸⁶ *Tolley v Republic* (1983) eKLR

⁸⁷ The section creates the offence of ‘offensive conduct conducive to breaches of peace’.

⁸⁸ *Hussein Khalid and 16 others v Attorney General & 2 others* (2019) eKLR

⁸⁹ Hamilton M, ‘The right of peaceful assembly: The meaning and scope of ‘assembly’ in international human rights law’, 69 (3) *International and comparative law quarterly*, 2020, 522.

⁹⁰ *CCPR General Comment 37*, 3, para 17.

⁹¹ *CCPR General Comment 37*, 3, para 15; Guideline 22.5, *Policing Assemblies in Africa: Guidelines for the policing of assemblies by law enforcement officials in Africa*; Human Rights Council, *Joint report of the special rapporteur on the rights to peaceful assembly and of association and the special rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, A/HRC/31/66, 4 February 2016, para 61.

⁹² *CCPR General Comment 37*, 4, para 19; *Wilson Olal & 5 others v Attorney General & 2 others* (2017) eKLR. The court state:

“And it is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection.”

by agents provocateurs acting on their behalf, or from members of the public aimed at the assembly, or by participants of counter assemblies.⁹³ The courts in *Ngunjiri Wambugu v Inspector General of Police* and *Ferdinand Waititu v Attorney General* alluded to these types of violence in the following words:⁹⁴

“If they consist of violence to or intimidation of the public then the assembly or demonstration ought to be stopped...Weapons as well as defensive or protective contraptions, which breed or stimulate aggression, ought not to be in possession of the demonstrators and picketers”

Violence is also contra-distinguished from temporary disruption. Temporary disruption of daily activities like disruption to vehicular or pedestrian movement and other similar inconveniences do not amount to violence,⁹⁵ and as such does not call into question the protection that assemblies enjoy.⁹⁶ Therefore mere temporary disruption of daily activities does not amount to breach of peace or public order that allows the police to disperse an assembly. However where the disruption or inconvenience is ‘serious and sustained’, such as where a major highway is blocked for days or where the emergency entrance to a hospital is blocked, dispersal may be justified.⁹⁷

Violence does not also include conduct that may annoy or offend persons who hold different views from that of the participants.⁹⁸

ii. Violence As a Collective

The right to peaceful assembly is an individual right that is exercised collectively and thus has an inherent associative element.⁹⁹ Thus the kind of violence that renders the whole assembly non-

⁹³ CCPR General Comment 37, 4, para 18.

⁹⁴ *Ngunjiri Wambugu v Inspector General of Police & 2 others* (2019) eKLR; *Ferdinand Waititu & 4 others v Attorney General & 12 others* (2016) eKLR

⁹⁵ OSCE office for democratic institutions and human rights (ODHIR), ‘Guidelines on the freedom of peaceful assembly’, 15; CCPR General Comment 37, 3, para 15.

⁹⁶ CCPR General Comment 37, 3, para 17.

⁹⁷ Human Rights Council, *Joint report of the special rapporteur on the rights to peaceful assembly and of association and the special rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, 62.

⁹⁸ Siegert K, ‘The police and the human right to peaceful assembly’, 221.

⁹⁹ CCPR General Comment 37, 2, para 4.

peaceful is one characterized by ‘widespread and serious’ violence.¹⁰⁰ Therefore isolated acts of violence by some participants do not render the assembly non-peaceful.¹⁰¹ In this regard the court in *Wilson Olal & 5 others v Attorney General & 2 others* cited and upheld the position of the European Court of Human Rights stating that:¹⁰²

“An individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behavior”

Where ‘widespread and serious’ violence is present the right to peaceful assembly of the participants in the assembly can be limited, and the police have the power to disperse the assembly. Under the ICCPR, states are in this regard prohibited from making blanket restrictions on assemblies¹⁰³ and the police are required to try and identify and isolate violent individuals from the main assembly, before resorting to dispersal.¹⁰⁴

2.3 Police Discretion in Dispersing Assemblies

The police have power to disperse assemblies in the circumstances discussed above. However this power is exercised with the discretion of the OCS or the commanding officer above the rank of inspector present at the public assembly.¹⁰⁵ This discretion is not applied as to whether the assembly is authorized or unauthorized, but rather mainly as to whether it is peaceful or non-peaceful¹⁰⁶ based on whether there is violence by the collective of the participants.

¹⁰⁰ Guideline 22.5, *Policing Assemblies in Africa: Guidelines for the policing of assemblies by law enforcement officials in Africa*; CCPR General Comment 37, 3, para 15; Human Rights Council, *Joint report of the special rapporteur on the rights to peaceful assembly and of association and the special rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, 61.

¹⁰¹ CCPR General Comment 37, 3, 4, para 17, 19.

¹⁰² *Wilson Olal & 5 others v Attorney General & 2 others* (2017) eKLR.

¹⁰³ CCPR General Comment 37, 7, para 38.

¹⁰⁴ IPOA, KNCHR, UN Human rights office of the High Commissioner, *The right to freedom of peaceful assembly: A checklist for the Kenyan police and the public*, 13; Human Rights Council, *Joint report of the special rapporteur on the rights to peaceful assembly and of association and the special rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, 61.

¹⁰⁵ Section 5 (8), *Public Order Act* (Act no 26 of 1950); Mungai M, ‘Maneuvering through legal ambiguity: Dispersing of unlawful protests in Kenya’, 44.

¹⁰⁶ Academy briefing no. 5, ‘Facilitating peaceful protests’, Geneva academy of international humanitarian law and human rights, 2014, 19.

2.4 The True Object of Dispersal of Assemblies

The foregoing circumstances indicate that the main aim of dispersal, itself being a limitation on right of peaceful assembly, is the maintenance of peace and specifically, public order. In this regard, the court in *Haki na sheria initiative v IG* noted that public order by its very definition ‘presupposes a state of security, peace and stability that is free from criminal activities and violence’.¹⁰⁷ In addition, in reference to section 78 of the penal code on dispersal, the High Court in *Hussein Khalid* stated that its object is to promote and maintain peace and order,¹⁰⁸ while the court in *Wilson Olal* stated that it is aimed at preventing public disorder and to protect public safety.¹⁰⁹ Moreover, regarding the Public Order Act, the court in *Ferdinand Waititu* held that the presence of police to enforce part III of the Act that includes section 5(8) on dispersal is a small price to pay to ensure that a public assembly is peaceful.¹¹⁰

2.5 Conclusion

It has been established that the police can disperse an assembly where there is a clash of two or more assemblies, one of which had issued a notification and the other had not; the police can disperse the one that had not issued a notification. It has also been established that the police can also disperse an assembly where there is widespread and serious violence by the participants of the assembly. Further it has been established that these circumstances reveal that the overarching concern with crowd dispersal is the object of maintaining or attaining public order. This object of public order is of particular relevance to this study as it will be used to determine, in chapter 5, whether the use of firearms in dispersal of crowds is a proportionate means to achieve it.

¹⁰⁷ *Haki Na Sheria Initiative v Inspector General of Police & 3 others* (2020) eKLR, para 39.

¹⁰⁸ *Hussein Khalid & 16 others v Attorney General & 2 others* (2017) eKLR, para 70.

¹⁰⁹ *Wilson Olal & 5 others v Attorney General & 2 others* (2017) eKLR.

¹¹⁰ *Ferdinand Waititu & 4 others v Attorney Genral & 12 others* (2016) eKLR, para 35.

CHAPTER 3: AN INTERROGATION OF THE MUNICIPAL AND INTERNATIONAL LAWS ON THE USE OF FORCE AND FIREARMS IN POLICING ASSEMBLIES

3.1 Introduction

The right to life includes a prohibition on the arbitrary deprivation of life.¹¹¹ It has been established and widely stated that deaths arising out of either the unlawful use of force or excessive (unjustified) use of force by agents of the state, constitute arbitrary deprivation of life.¹¹² It follows then that prohibition of arbitrary deprivation of life is chiefly concerned with limiting the circumstances in which lethal force may be used by agents of the state. Thus the circumstances under which state authorities may employ use of force is of utmost importance in determining a state's respect for the right to life. Therefore even in dispersal of assemblies, the police are required to use force that is lawful and justified lest it amounts to, where such force leads to death, arbitrary deprivation of life. For force, including that which is used to disperse crowds, to be lawful and justified it has to adhere to national and international standards on the use of force.

There are a number of national and international instruments which define the appropriate standards on the use of force generally and in policing assemblies specifically, by law enforcement officials. These laws to varying extents outline when force should or should not be used by the police. They also attempt to lay out principles which law enforcement officials should adhere to, in making their decisions as to whether they should employ the use of force. There is also other use of force requirements specific to policing assemblies and these give guidelines on the appropriate measures of force that can be applied in the context of public gatherings.

¹¹¹ Article 6, *International Covenant on Civil and Political rights*.

¹¹² Williams A, 'Police officers, I.Q, and the deprivation of rights', 440; Crawshaw R, 'International standards on the right to life and the use of force by police', 69.

3.2 General Use of Force

3.2.1 International Law

International use of force norms are preeminently captured in two instruments: The 1979 United Nations Code of Conduct for Law Enforcement Officials and the 1990 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Although in general these instruments have no formal definitive legal status among UN member states and some of their provisions are clearly guidelines rather than legal dictates, their core provisions on the use of force assume the status of customary international law.¹¹³ Former UN special rapporteurs on extrajudicial, summary or arbitrary executions concluded thus that the substance of Article 3 of the Code of Conduct and Principle 9 of the Basic Principles, discussed later in this section, reflect binding international law.¹¹⁴

Article 3 of the 1979 United Nations Code of Conduct for Law Enforcement Officials mandates law enforcement officials to use force when strictly necessary and to the extent required for the performance of their duty.¹¹⁵ The commentary to that provision provides that such use of force should be reasonably necessary under the prevailing circumstances for the prevention of crime or in effecting the lawful arrest of offenders or suspected offenders.¹¹⁶ The commentary also provides that this provision should be interpreted with respect to the principles of proportionality and that the use of force should not be disproportionate to the legitimate objective to be achieved.¹¹⁷

On the use of firearms, the code considers the use of firearms as an extreme measure and that every effort should be made to exclude it. It also states that firearms may only be used when

¹¹³ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/61/311, 5 September 2006, 12, para 35.

¹¹⁴ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/61/311, 5 September 2006, 12, para 35; Former special rapporteur Christof Heyns during the final round of the 12th Nelson Mandela world human rights moot competition, with reference to the reliance on the Basic Principles, stated that binding treaties like the ICCPR are not flexible and cannot keep up with the changing world and neither were they designed to, and as such we cannot simply rely only on them. < <https://www.youtube.com/watch?v=0laAsvMcUeU> > at 1:44:24.

¹¹⁵ Article 3, *Code of conduct for law enforcement officials*.

¹¹⁶ Commentary (a), Article 3, *Code of conduct for law enforcement officials*.

¹¹⁷ Commentary (b), Article 3, *Code of conduct for law enforcement officials*.

suspected offenders offer armed resistance or otherwise jeopardize the lives of others and less restrictive measures are insufficient to restrain or apprehend them.¹¹⁸

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials on the other hand provides that force and firearms should be resorted to only after applying, as far as possible, non-violent means, which turn out to be ineffective or without promise of achieving the intended results.¹¹⁹ Like the Code of Conduct, it also requires law enforcement officials to exercise restraint in the use of force and firearms and that such use should be proportional to the seriousness of the offence and the legitimate objective to be achieved.¹²⁰ It also mandates law enforcement officials to minimize damage and injury, and to respect and preserve human life.¹²¹

On the use of firearms, unlike the Code of conduct which makes allowance for their use when suspected offenders offer armed resistance, the Basic principles provides that intentional use of firearms may only be made when strictly unavoidable in order to protect life.¹²² It provides five typical circumstances in which the police would be in order in using firearms: in self-defence; in defence of others against the imminent threat of death or serious injury; to prevent the perpetration of a particularly serious crime involving a grave threat to life; to arrest a person presenting such a danger and resisting their authority; or to prevent his or her escape. However, less extreme means must first have proved insufficient to meet these objectives.¹²³ Before such use of firearms the police should first identify themselves and give a clear warning of their intent to use firearms.¹²⁴

3.2.2 National Law

The sixth schedule of the National Police Service Act is the preeminent national law on the use of force and firearms by the Kenyan police. It replicates the provisions of the UN Basic Principles that force may be employed only when non-violent means have already been used and they have been ineffective or without promise of achieving the intended result.¹²⁵ In the same line it requires: the police to use force that is proportional to the intended objective and to the

¹¹⁸ Commentary (c), Article 3, Code of conduct for law enforcement officials.

¹¹⁹ Principle 4, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹²⁰ Principle 5 (a), *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹²¹ Principle 5 (b), *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹²² Principle 9, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹²³ Principle 9, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹²⁴ Principle 10, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹²⁵ Section A1 of the Sixth schedule, *National Police Service Act* (Act no. 11A of 2011).

seriousness of the offence and the resistance offered by the offender; that such force be necessary; and that such use of force to be adherent to the provisions of law and standing orders.¹²⁶

As to the use of firearms, the schedule outlines five circumstances in which police may use firearms but even then only when less extreme means are inadequate. They are: in saving or protecting the life of the officer or other person; in self-defence or in defence of other person against imminent threat of life or serious injury; in the protection of life and property through justifiable use of force; in the prevention of a person charged with felony from escaping lawful custody; and preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.¹²⁷ In upholding the appellants' conviction on murder charges, the court in *IP Veronica Gitahi & another v Republic* reiterated these requirements on the use of firearms and held that the use of firearms by a police officer when conducting a night raid at a home where a family was living or was reasonably expected to be living, that led to the death of a 14 year-old girl was disproportionate use of force.¹²⁸

3.2.3 General Principles Governing the Use of Force

The above national and international laws collectively give rise to the general principles that govern the use of force by the police. These principles are: necessity, proportionality and precaution. The principles of necessity and proportionality set the limit on the amount of force that can be used by the police while precaution is mainly concerned with prior planning to minimize the eventual risks should the need to use force arise.

a. Necessity

The principle of necessity means that the force used must be necessary in the circumstances. In general the principle entails 3 elements. First, in order for the use of force to be considered necessary, non-violent means such as persuasion, negotiation and mediation must first have been applied so far as the circumstances permit.¹²⁹ In this way the police would be in keeping with the

¹²⁶ Section A2 of the Sixth schedule, *National Police Service Act* (Act no. 11A of 2011).

¹²⁷ Section B1 of the Sixth schedule, *National Police Service Act* (Act no. 11A of 2011).

¹²⁸ *I.P. Veronica Gitahi & another v Republic* (2017) eKLR

¹²⁹ Geneva academy, 'Use of force in law enforcement and the right to life: The role of the Human Rights Council', *Academy of international humanitarian law and human rights*, 2016, 7.

UN code of conduct that requires their use of force to be ‘exceptional’.¹³⁰ Cyr states that necessity requires that, before force is employed, a police officer should conduct a “subjective-objective test meeting the threshold of reasonable grounds to believe, that other intervention tactics have been tried and have failed” or are unlikely to succeed.¹³¹ The court in *Titus Barasa v Police Constable Simon Kinuthia* where the police in arresting the petitioner threatened to kill him, gave him jabs and blows and hit him by a baton, held that having peacefully surrendered the force meted on the petitioner was unnecessary.¹³² This may seem to imply only that use of force should be considered a measure of last resort. However, this component of necessity extends to situations where it would be impracticable to employ any other measure, that is, where there exists no other reasonable alternative measure of intervention.¹³³

Secondly, use of force whatever its nature or extent must be for a legitimate purpose. This means that even before a decision is made that force must be used, the object for which the force would be used must be a legitimate one. The Basic principles and the sixth schedule of the National Police Service Act are not precise as to what may be considered a legitimate purpose and only give mention to “the intended result”.¹³⁴ However, the Code of Conduct in its Article 3 commentary clarifies that a legitimate purpose would be “the prevention of crime” or “effecting or assisting the lawful arrest of offenders or suspected offenders”.

Thirdly, necessity requires that the extent of force applied must be no more than the minimum force needed. This means that the force applied must be in ‘keeping with the level of resistance offered’.¹³⁵ In effect this component of necessity connotes that should the use of force become necessary, the level of that force should be ‘escalated as gradually as possible’ so that, as stated by the Human Rights Committee in *Suarez de Guerrero v Colombia*, if there is a chance that the suspected offenders can surrender to arrest, then they should not be shot.¹³⁶ In that case the Committee stated that:

¹³⁰ Commentary (a), Article 3, *Code of conduct for law enforcement officials*.

¹³¹ Cyr K, ‘Police use of force: Assessing necessity and proportionality’, 666.

¹³² *Titus Barasa Makhanu v Police Constable Simon Kinuthia No. 83653 & 3 others* (2016) eKLR, para 29.

¹³³ Cyr K, ‘Police use of force: Assessing necessity and proportionality’, 666.

¹³⁴ Principle 4, *UN Basic principles on the use of force and firearms by law enforcement officials*; Section A1 of the Sixth schedule, *National Police Service Act* (Act no. 11A of 2011).

¹³⁵ Geneva academy, ‘Use of force in law enforcement and the right to life: The role of the Human Rights Council’, 8.

¹³⁶ *Suarez de Guerrero v Colombia*, CCPR Comm. No. 45/1979 (31 March 1982), para 13.2

“the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or their intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned.”

When lethal force such as firearms is in question, the principle of necessity is broken down into three components namely *qualitative necessity*, *quantitative necessity* and *temporal necessity*.¹³⁷ Qualitative necessity speaks to the sufficiency of the measure of force applied. Alston notes that “a measure’s sufficiency can hardly be determined in advance but is rather determined by the nature of resistance put up by the suspect”.¹³⁸ For a measure of force to be considered as qualitatively necessary, it must be unavoidable to achieve the intended objective.¹³⁹ This means that other less lethal measures must have been applied unsuccessfully. In the case of firearms for example, the Basic Principles provides that they may be used “only when less restrictive means are insufficient to achieve these objectives”.¹⁴⁰ In *Republic v Benjamin Kahindi & another*, where the three victims who had surrendered were shot dead by two police officers, the court held that such use of firearms was unnecessary to effect an arrest and convicted the accused officers on murder charges.¹⁴¹

Quantitative necessity speaks to the amount of force applied, so that a measure of force is quantitatively necessary if it is not in excess of that which is required to achieve the intended objective;¹⁴² it must be no more than the minimum force needed. Finally, temporal necessity requires that the force that is used be ‘against a person who presents an immediate threat’.¹⁴³ Immediacy here connotes that the threat is imminent and may be actualized in a matter of

¹³⁷ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, A/HRC/26/36, 1 April 2014, 10, para 60.

¹³⁸ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/61/311, 5 September 2006, 14, para 41.

¹³⁹ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 1 April 2014, 10, para 60.

¹⁴⁰ Principle 9, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹⁴¹ *Republic v Benjamin Kahindi Changawa & another* (2018) eKLR

¹⁴² Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014, 10, Para 60.

¹⁴³ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014, 10, para 60.

seconds and not hours.¹⁴⁴ Temporal necessity is also extended to mean that when the need for use of the measure of force applied has passed or that the objective for which the force was applied has been achieved, such use of force should immediately cease.¹⁴⁵

In the context of policing assemblies, it may well be the case that in legitimately dispersing crowds, the police may become overwhelmed because less lethal weapons like teargas have been used without much success. Hence the use of firearms as a measure of last resort may become necessary. Thus it may be possible for firearms to pass the necessity test, in the context of crowd dispersal.

b. Proportionality

The principle of proportionality imposes an absolute maximum on the permissible force that may be applied based on the threat posed by the suspect to others and the legitimate objective to be achieved.¹⁴⁶ The Basic Principles in this regard states that “whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall...act in proportion to the seriousness of the offence and the legitimate objective to be achieved”.¹⁴⁷ When the proportionality of the use of force in relation to the legitimate objective for which it is used is assessed, the principle requires that the escalation of force cease where the consequence of applying a greater level of force would outweigh the value of that objective.¹⁴⁸ Former special rapporteur Cristof Heyns explains that ‘if necessity is visualized as a ladder, proportionality is a scale that determines how high up the ladder of force’ the police can go.¹⁴⁹ A higher level of force than that maximum would be considered, as stated in Article 3 of the Code of Conduct, disproportionate to the legitimate objective to be achieved.¹⁵⁰

¹⁴⁴ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014, 10, para 59.

¹⁴⁵ Geneva academy, ‘Use of force in law enforcement and the right to life: The role of the Human Rights Council’, 8.

¹⁴⁶ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014, 10, para 66;

Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/61/311, 5 September 2006, 14, para 41.

¹⁴⁷ Principle 5 (a), *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹⁴⁸ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/61/311, 5 September 2006, 15, para 42.

¹⁴⁹ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014, 11, para 66.

¹⁵⁰ Commentary (b), Article 3, *Code of conduct for law enforcement officials*.

When the proportionality of the use of force in relation to the seriousness of the threat is considered, the principle imposes a ceiling the level at which the lives and well-being of others would justify applying force against a suspect – and beyond which force would not be justifiable.¹⁵¹ In this context of general use of force, the principle of proportionality applied is ordinary proportionality.

In the context of the use of potentially lethal force, the principle of proportionality takes on a different course and special considerations apply. In the first place, a distinction is made between intentional use of lethal force and intentional lethal use of force.¹⁵² On the one hand, regarding intentional use of lethal force (which primarily refers to firearms), where lethal force is used simply to achieve a certain legitimate objective, the Basic Principles set a higher threshold than for force in general, providing that;

“law enforcement officials shall not use firearms against persons except in self-defence or defence of others against imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape”¹⁵³

This means that the notion of proportionality here is that intentional use of lethal force may be applied only to avert a potentially lethal threat like death or a risk of a similarly serious nature like serious injury.¹⁵⁴ This was illustrated in the case of *Noah Kazingachire v Zimbabwe* where the police fired gunshots at Mr Noah Kazingachire’s car as he attempted to flee them thinking they were carjackers, leading to the death of his son who was in the car. The African commission held that since the lives of the police were not threatened in that situation, their use of firearms was unjustified and hence found that Kazingachire’s son’s life had been arbitrarily deprived.¹⁵⁵

On the second hand, when intentional lethal use of force is in question, where a decision like shoot to kill is considered, the use of such force can be proportional only when used ‘to protect

¹⁵¹ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/61/311, 5 September 2006, 15, para 42.

¹⁵² Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/66/330, 30 August 2011, para 3.

¹⁵³ Principle 9, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹⁵⁴ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014, 12, para 69.

¹⁵⁵ *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batania Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, ACmHPR Comm. 295/04, (2012), 117.

life”.¹⁵⁶ The Basic Principles in this regard state that ‘in any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life’.¹⁵⁷ The African Commission’s general comment on the right to life is even more precise as regards proportionality as it states:¹⁵⁸

The intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary).

Thus the ‘protect life’ principle of proportionality means that a life may be taken intentionally only to save another life. This was illustrated in *John Chitsenga v Zimbabwe* where the police shot the victim, who was attempting to flee them, in the head at point blank range leading to his death. The African commission held that such use of firearms was excessive stating that life may be sacrificed only as a last resort in order to protect another life or lives.¹⁵⁹ Alston notes that the fundamental question is of ‘the proportionality between objectively anticipatable likelihood that the use of force will result in death and the comparable anticipatable likelihood that failing to incapacitate the individual would result in the deaths of others’.¹⁶⁰

The main difference in the proportionality principle in the two uses of lethal force therefore, is that the objective of the latter is solely to “protect life” while the objectives in the former are ‘to disrupt conduct that is likely, though less certain, to cost lives’.¹⁶¹

The principle of proportionality applies only after a measure of force has already passed the necessity test, so that a necessary measure may prove to be disproportionate, consequently rendering the measure unlawful.¹⁶² This is in accordance with Principle 5 of the Basic Principles which states that whenever the ‘lawful use of force and firearms is unavoidable’, law

¹⁵⁶ A shoot to kill measure is likely to be present where the victim is shot in the head or torso, and also where the victim is shot multiple times. See Kremnitzer M, Menashe D & Ghanayim K, ‘The use of lethal force by police’, 53 (1) *criminal law quarterly*, 2007, 68 - 69.

¹⁵⁷ Principle 9, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹⁵⁸ *ACmHPR General comment No. 3 on the right to life (Article 4)*, 18 November 2015, 10, para 27.

¹⁵⁹ *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batania Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, ACmHPR Comm. 295/04, (2012), 118 – 122.

¹⁶⁰ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/61/311, 5 September 2006, 16, para 44.

¹⁶¹ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/61/311, 5 September 2006, 16, para 44.

¹⁶² Geneva academy, ‘Use of force in law enforcement and the right to life: The role of the Human Rights Council’, 8.

enforcement officials are to act in proportion to the seriousness of the offence and the legitimate objective to be achieved. Thus disproportionate use of force, although necessary may never be justified and where all proportionate measures have been applied without success, “the suspect may be permitted to escape”.¹⁶³

In the context of dispersal of an assembly, the use of firearms falls within the ambit of intentional use of lethal weapons for the reason that the firearms are used merely to achieve the legitimate objective of dispersal. And since intentional use of lethal weapons is proportional only to the objective of disrupting conduct that is likely, though less certain, to cost lives, use of firearms merely for dispersal fails the test of proportionality. This is because the main objective of crowd dispersal, as established in the previous chapter, is to attain public order and not to disrupt conduct that is likely to cost lives. It follows that even when use of firearms is necessary for such dispersal, all other less lethal weapons having been used without success, such use of firearms remains disproportionate and hence unlawful. This was aptly captured in *Gulec v Turkey* where two persons had been killed by bullets fired by the Turkish security forces in efforts to disperse crowds following demonstrations that was marred by serious acts of violence. The European court of human rights held that the use of firearms to disperse violent demonstrations was disproportionate and found that the unavailability of less lethal means for crowd dispersal to be ‘incomprehensible and unacceptable’.¹⁶⁴

c. Precaution

The principle of precaution or prevention requires law enforcement officials to plan and to put in place all possible measures before-hand to minimize the risk of killing or injuring a member of the public or other law enforcement officials.¹⁶⁵ The Basic Principles establish that whenever lawful use of force and firearms is unavoidable, law enforcement officials are to ‘minimize damage and injury, and respect and preserve human life’.¹⁶⁶ In any case, as former special rapporteur Heyns has put it, even as is often when it is too late to save the situation, efforts

¹⁶³ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/61/311, 5 September 2006, 16, para 44.

¹⁶⁴ *Gulec v Turkey* (1998) European Court of Human Rights. The court held that use of lethal weapons was more so incomprehensible and unacceptable considering that the place where the demonstrations arose was in a region where there was a state of emergency and it could reasonably be expected that public disorder could occur.

¹⁶⁵ Geneva academy, ‘Use of force in law enforcement and the right to life: The role of the Human Rights Council’, 9.

¹⁶⁶ Principle 5 (b), *UN Basic principles on the use of force and firearms by law enforcement officials*.

should be made ‘to avoid situations where a decision on whether to pull the trigger arises’, or ‘to ensure that if that happens, the damage is contained as much as possible’.¹⁶⁷

Precaution extends to, in order to avoid or minimize the use of force or to protect against death or injury to persons, equipping law enforcement officials with non-lethal incapacitating weapons and self-defensive equipment such as shields and bullet-proof vests.¹⁶⁸ The African commission in this regard requires states to take all reasonable precautionary measures to prevent the use of excessive force by its police by providing appropriate equipment and training and ensuring careful planning of operations.¹⁶⁹

Thus when states fail to provide these types of equipment to law enforcement officials and as a predictable consequence excessive use of force is applied, the principle of precaution will not have been met and such use of force may be found to be unlawful.¹⁷⁰ This means that in the context of public assemblies where it is predictable that the need for dispersal may arise, states are obligated to provide non-lethal weapons to law enforcement officials that will be facilitating the assembly.

3.4 Use of Force in Public Assemblies

Apart from the general use of force regulations, use of force by the police in public assemblies is subjected to further rules. An analysis of these rules seems to suggest that in the context of public assemblies, force can be employed in three main circumstances but as a measure of last resort.¹⁷¹ These circumstances are: arresting violent participants, averting threats to life (protecting life) and in dispersal of crowds.

a. Arresting Violent Participants

In the previous chapter it was established that where the participants in the assembly engage in violent conduct, dispersal of the crowd is only warranted if such violence is widespread and is by the collective of the participants. Otherwise, the law enforcement officials are required first to

¹⁶⁷ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014, 11, para 63.

¹⁶⁸ Principle 2, *UN Basic principles on the use of force and firearms by law enforcement officials*; Human Rights Committee general comment no. 37 on Article 21 of the ICCPR – Right to peaceful assembly, para 81.

¹⁶⁹ *ACmHPR General comment No. 3 on the right to life (Article 4)*, 18 November 2015, 10, para 28.

¹⁷⁰ Geneva academy, ‘Use of force in law enforcement and the right to life: The role of the Human Rights Council’, 9.

¹⁷¹ Others circumstances are like: Stop and search based on reasonable suspicion of threat of a serious offence, containment or kitting where law enforcement officials encircle and close a section of the participants

identify, isolate and arrest the violent individuals and hence allow the assembly to continue.¹⁷² In doing this they are obliged to first use non-violent means and where it becomes absolutely necessary to use force, law enforcement officials are required to give warning of their intention to use force to effect the arrest ‘unless doing so would be manifestly ineffective’.¹⁷³ All through this process, the principles on the use of force discussed above apply.

b. Dispersal of Crowds

As discussed in the previous chapter, in order to protect the right to peaceful assembly, dispersal of crowds is considered a measure of last resort. When a law enforcement official in authority present in an assembly, finds it within their lawful margin of discretion that the assembly is non-peaceful, they may exercise their authority to issue orders of dispersal.¹⁷⁴

In issuing orders of dispersal, non-violent means are to be applied first and the participants given enough time to obey the orders.¹⁷⁵ In the penal code, orders of dispersal are made by way of a proclamation by or under the authorization of the officer in charge, in such form as he thinks fit, commanding the participants of the assembly to disperse peaceably.¹⁷⁶ If the non-violent means prove ineffective force may be applied as measure of last resort. According to the Basic Principles, if the assembly is unlawful but non-violent, law enforcement officials are required to avoid the use of force for dispersal. Where that is not practicable they are required to restrict such force to the minimum extent necessary.¹⁷⁷ In this regard the UN Human Rights Guidelines on Less Lethal Weapons in Law Enforcement states that less lethal weapons are to be used to disperse an assembly¹⁷⁸ and they should be considered a measure of last resort.¹⁷⁹ Where the participants are passively resisting the orders, force that is likely to cause more than negligible injury, including less-lethal weapons, should not be used.¹⁸⁰

¹⁷² IPOA, KNCHR, UN Human rights office of the High Commissioner, ‘The right to freedom of peaceful assembly: A checklist for the Kenyan police and the public’, 2017, 13.

¹⁷³ *CCPR General Comment 37*, 13, para 78.

¹⁷⁴ Section 5 (8), *Public Order Act* (Act 26 of 1950).

¹⁷⁵ *CCPR General Comment 37*, 15, para 87.

¹⁷⁶ Section 81 (1), *Penal Code* (Chapter 63 of the Laws of Kenya) Revised 2018 edition.

¹⁷⁷ Principle 13, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹⁷⁸ *United Nations Human Rights Guidelines on Less Lethal Weapons in Law Enforcement*, 25 October 2019, 23, para 6.3.4.

¹⁷⁹ *United Nations Human Rights Guidelines on Less Lethal Weapons in Law Enforcement*, 23, para 6.3.3.

¹⁸⁰ *CCPR General Comment 37*, 15, para 86; *United Nations Human Rights Guidelines on Less Lethal Weapons in Law Enforcement*, 23, para 2.10.

Regarding the use of firearms, Principle 14 of the Basic Principles provide that they may be used in the dispersal of *violent* assemblies but only when less dangerous means are not practicable and only to the minimum extent necessary.¹⁸¹ But it then goes ahead to state that such use must be adherent to the conditions in Principle 9 which provides that firearms may be used solely to avert threats to life or of serious injuries.¹⁸² The principle on its own does not reveal clearly whether or not firearms may be used simply to disperse an assembly. But the recently established *Guidelines on Less-Lethal Weapons*¹⁸³ which serves to supplement the Basic Principles,¹⁸⁴ provides that the use of firearms to disperse an assembly is always unlawful¹⁸⁵ and that less-lethal weapons are to be considered as measures of last resort.¹⁸⁶ The African Commission's *Guidelines for the Policing of Assemblies* is more categorical for it states that 'firearms are not an appropriate tactical tool for the policing of assemblies' and that they 'must never be used to disperse an assembly'.¹⁸⁷ It gets even more exact by stating that 'shots fired into the air or other warning shots should not be used in the context of an assembly operation'.¹⁸⁸

However Kenyan law allows for the use of firearms in crowd dispersal. The provisions of the Public Order Act on the use of force during dispersal, read all together, provide that firearms may be used in dispersal of crowds. Although section 5 (8) of the Act that provides for issuing of orders of dispersal does not indicate that force may be used to effect such dispersal, section 7 (4) provides that police officers may use force to prevent the continuance of race meetings, sporting events or other entertainment, and to disperse any gathering of persons thereat. Such force under section 14 (1) may include firearms where weapons less likely to cause death have previously been used without success.¹⁸⁹

¹⁸¹ Principle 14, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹⁸² Principle 14, *UN Basic principles on the use of force and firearms by law enforcement officials*.

¹⁸³ *United Nations Human Rights Guidelines on Less Lethal Weapons in Law Enforcement*, 25 October 2019.

¹⁸⁴ *United Nations Human Rights Guidelines on Less Lethal Weapons in Law Enforcement*, 2, para 1.4.

¹⁸⁵ *United Nations Human Rights Guidelines on Less Lethal Weapons in Law Enforcement*, 24, para 6.3.4.

¹⁸⁶ *United Nations Human Rights Guidelines on Less Lethal Weapons in Law Enforcement*, 23, para 6.3.3.

¹⁸⁷ Guideline 21.2.4, *Policing of Assemblies in Africa: Guidelines for the policing of Assemblies by law enforcement officials in Africa*.

¹⁸⁸ Guideline 21.2.3, *Policing of Assemblies in Africa: Guidelines for the policing of Assemblies by law enforcement officials in Africa*.

¹⁸⁹ The Geneva Academy of international humanitarian law and human rights has in reference to section 14(1) stated:

“A worrying number of states have passed laws that authorize the use of firearms to disperse crowds...Legislation in Kenya explicitly allows use of firearms to maintain public order but without adequate safeguards.”

In addition, the penal code provides that if upon the expiration of a reasonable time¹⁹⁰ after the proclamation to disperse has been made, participants continue to riotously assemble, police officers may do *all things necessary* for dispersing them.¹⁹¹ Further, if there is resistance to such efforts, the police may use *all such force* as is reasonably necessary to overcome such resistance, and shall not be liable in any criminal or civil proceeding where harm or death is caused consequently.¹⁹²

Kenyan courts have not pronounced themselves on the above provisions of the Public Order Act and the Penal code concerning the use of firearms to disperse crowds in a public assembly.¹⁹³ They have however, although not within the context of those provisions, touched on the indiscriminate discharge of firearms into crowds, and have held such actions to be unlawful. In *Republic v Kipsigei Cosmas Sigei & another* for instance, where the accused persons had shot in the air as well as on the ground leading to the death of a demonstrator, the court held that the firing on the grounds was dangerous and thus found the accused guilty of manslaughter.¹⁹⁴ It appears then that while indiscriminate shooting into the crowds is considered unlawful, shooting in the air is not prohibited or otherwise considered unlawful.

What then is Kenya's position on the use of firearms for crowd dispersal?

It has been argued, as previously stated, that the use of force rules in the UN Basic Principles and the Code of Conduct form part of customary international law. Customary international law embodies principles that have 'crystallized' over a period of time and which are binding on states.¹⁹⁵ As discussed above, international law as to the use of firearms in dispersing crowds differ with the impugned Kenyan national laws on public order, which allow for such use of firearms. Thus it may be argued as a result that the impugned sections are a violation of customary international law. Furthermore, since it has been established that use of firearms in

See Academy briefing no. 5, 'Facilitating peaceful protests', 21-22.

¹⁹⁰ In *Wilson Olal & 5 others v Attorney General & 2 others* (2017) eKLR it was stated that reasonable time refers to the amount of time that is fairly required to disperse conveniently under the circumstances.

¹⁹¹ Section 82, *Penal Code* (Chapter 63 of the Laws of Kenya) Revised 2018 edition.

¹⁹² Section 82, *Penal Code* (Chapter 63 of the Laws of Kenya) Revised 2018 edition.

¹⁹³ In *Wilson Olal & 5 others v Attorney General* the court stated that "The use of lethal force during protest is unacceptable in a democratic state like ours". But this was in reference to the unjustified use of teargas to disperse demonstrators.

¹⁹⁴ *Republic v Kipsigei Cosmas Sigei & another* (2009) eKLR

¹⁹⁵ Oduor M, 'The status of international law in Kenya', *SSRN electronic journal*, 2013, 14.

dispersing assemblies fails the proportionality test, the impugned sections may be considered as violating international law.

c. Averting Threats to Life

Although the *Guidelines for the Policing of Assemblies* provides that firearms are not an appropriate tool for policing assemblies, there are situations that could arise where there is a legitimate threat to the life of a law enforcement official or other person during the assembly. Examples would be where say, a person in the assembly raises a machete in an effort to slay another person or, that a person wielding a knife attempts to stab another or, that a person possessing a firearm is threatening to use it. In such situations, law enforcement officials would be in perfect order under Principle 9 of the Basic Principles to use firearms against those armed individuals in order to protect life, or avert those threats to life. Accordingly, “firearms may be aimed only at persons presenting an imminent threat of causing death or serious injury”.¹⁹⁶ Thus, in the context of policing assemblies the use of firearms for any other objective including that of merely protecting property cannot be justified.¹⁹⁷

3.5 Have the police complied with these laws on the use of firearms in assemblies?

The police in Kenya have indeed complied with section 14(1) of the Public Order Act and section 82 of the Penal Code. They have used firearms in dispersing assemblies and sometimes to devastating effect where scores of people have been injured or killed.

In the Waki commission report which concerned the atrocities of the 2007 post-election violence, it is documented that police used firearms in dispersing crowds by shooting in the air and sometimes indiscriminately into the crowds.¹⁹⁸ In Nyanza the police used firearms in crowd dispersal, sometimes firing indiscriminately, leading to the killing of many protesters. In that former province alone, 82 people are stated as having died from bullet wounds.¹⁹⁹ Many of those who died had been shot from the back while attempting to disperse²⁰⁰ while others were killed by gunshot wounds in their own homes by stray bullets. In Kisumu a 45-year-old woman was shot

¹⁹⁶ Academy briefing no. 5; ‘Facilitating peaceful protests’, 21.

¹⁹⁷ Academy briefing no. 5; ‘Facilitating peaceful protests’, 21.

¹⁹⁸ KNCHR, *Report of the Commission of Inquiry into Post-Election violence (CIPEV/Waki report)*, 2008. 385.

¹⁹⁹ Human Rights Council, *Report of the special rapporteur on extrajudicial, summary or arbitrary executions Philip Alston, A/HRC/11/2/Add.6*, 26 May 2009, 26; The Waki report had earlier indicated that 50 people had died of gunshot wounds in Nyanza, 386.

²⁰⁰ KNCHR, *Report of the Commission of Inquiry into Post-Election violence (CIPEV/Waki report)*, 386.

and killed whilst in her own home while a Gregory Ngoche was hit by a stray bullet that caused him to obtain a permanent health condition.²⁰¹ Another, Alice Atieno was hit with a bullet at the back of her head as she was trying to rush her child inside the house after hearing police dispersing crowds nearby using gunfire and though she survived death, she obtained a permanent disability.²⁰² In the other former provinces as well, it is documented that many of those who were killed by the police died of gunshot wounds from the back.²⁰³

Although a huge number of those that died from bullet wounds were not killed in the context of dispersal, given that many were shot from the back and from stray bullets, and given that the post-election violence was marred by demonstration all across the country, it appears rather overtly that indeed many of these killings occurred in the context of crowd dispersal.

During the 2017 election period as well, the police used live ammunition to disperse crowds by shooting in the air and at other times indiscriminately into the crowd.²⁰⁴ A total of 23 people are reported to have been shot dead during that period.²⁰⁵ Not all of these deaths however, arose from the context of dispersal and it is stated that in some instances the police used the firearms in circumstances where their own lives and those of others faced imminent danger.²⁰⁶ But in most cases documented by Amnesty International and Human Rights Watch, firearms were used merely for crowd dispersal.²⁰⁷ In one instance, where a nine-year old school girl was killed, it is stated that policemen fired recklessly towards a residential building balcony where children were watching the demonstrations below and the girl was hit.²⁰⁸ In Rangwe, Homa Bay county, the

²⁰¹ KNCHR, *Report of the Commission of Inquiry into Post-Election violence (CIPEV/ Waki report)*, 386.

²⁰² KNCHR, *Report of the Commission of Inquiry into Post-Election violence (CIPEV/ Waki report)*, 386.

²⁰³ KNCHR, *Report of the Commission of Inquiry into Post-Election violence (CIPEV/ Waki report)*, 386 – 393.

These include Rift Valley, Coast and Nairobi provinces.

²⁰⁴ Amnesty international & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, October 2017, 14; KNCHR, *Still a mirage at dusk: A human rights account of the 2017 fresh presidential elections*, 19 November 2017, 28, 73. KNCHR, *A human rights monitoring report on the 2017 repeat presidential elections*, 20 December 2017, 67.

²⁰⁵ Amnesty international & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 14.

²⁰⁶ Amnesty international & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 15.

²⁰⁷ Amnesty international & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 15.

²⁰⁸ Amnesty international & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 16.

police who were trying to quell riots, shot dead a male civilian.²⁰⁹ In Kawangware, a 27-year-old man was shot in the back of the head as the police attempted to disperse violent crowds.²¹⁰ Bernard Okoth and Victor Obado were shot dead from the back as they tried to flee from security officers.²¹¹ Another, Paul Mungai was hit by a stray bullet that pierced through the tin wall of his shop and he succumbed from the injuries ensuing two days later.²¹² At City Cabanas Mombasa road, the police fired shots in a bid to disperse protesters and in the process a male victim was hit by a bullet and died on the spot.²¹³ In Elgeyo-Marakwet county, police officers while dispersing a crowd shot and killed a 15-year-old girl.²¹⁴ A lot more others were killed in similar circumstances where they posed no threat to other persons or the police officers.²¹⁵

3.6 Conclusion

From the foregoing it is evident that the use of firearms to disperse crowds in Kenya has had gruesome effects, confirming the assertion by the Guidelines for Policing Assemblies, that firearms are not an appropriate tool for policing assemblies and that they may never be used simply to disperse crowds.²¹⁶ It is harrowing that such an atrocity is enabled by laws that were designed to “maintain public order”, but have led to something worse than public disorder, death.

Since such use of firearms which neither passes the proportionality test of the use of force requirements nor comply with the guidelines on the use of force in policing assemblies, has led to the loss of lives in Kenya, it can safely be concluded that such use constitutes an arbitrary deprivation of life contrary to Article 26 of the Constitution of Kenya and Article 6(1) of the ICCPR.

²⁰⁹ KNCHR, Preliminary report of the Kenya National Commission on Human Rights, *Mirage at dusk: A human rights account of the 2017 general elections*, 2017, 178.

²¹⁰ KNCHR, Preliminary report of the Kenya National Commission on Human Rights, *Mirage at dusk: A human rights account of the 2017 general elections*, 183.

²¹¹ Amnesty international & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 16.

²¹² Amnesty international & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 17.

²¹³ KNCHR, *Still a mirage at dusk: A human rights account of the 2017 fresh presidential elections*, 2017, 75.

²¹⁴ KNCHR, Preliminary report of the Kenya National Commission on Human Rights, *Mirage at dusk: A human rights account of the 2017 general elections*, 184.

²¹⁵ Amnesty international & Human Rights Watch, *Kill those criminals: Security forces violations in Kenya's August 2017 elections*, 16 – 32; KNCHR, *Still a mirage at dusk: A human rights account of the 2017 fresh presidential elections*, 75-82.

²¹⁶ *Guideline 21.2.4, Policing of Assemblies in Africa: Guidelines for the policing of Assemblies by law enforcement officials in Africa.*

CHAPTER FOUR: AN INTERROGATION INTO WHETHER THE USE OF FIREARMS IN DISPERSING CROWDS IN KENYA IS A PROPORTIONATE LIMITATION ON THE RIGHT TO LIFE

4.1 Introduction

Although the right to life is arguably the most fundamental right, it is not one that may not be limited like the freedom from torture and cruel, inhuman and degrading treatment or the right to fair trial.²¹⁷ Thus, the right to life may be limited in certain circumstances. A limitation on the right to life however, has to be reasonable and justified. The limitation must not be arbitrary.²¹⁸ A limitation on the right to life is arbitrary if it is inconsistent with international and domestic law, or if it is unjustified in that it does not satisfy the elements of appropriateness, necessity and proportionality.²¹⁹ The Constitution indeed provides that a right shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society.²²⁰ It also states that any such limitation must take into account the nature of the right or fundamental freedom;²²¹ the importance of the purpose of the limitation;²²² the nature and extent of the limitation;²²³ the need to ensure that one's enjoyment of their rights does not prejudice other people's rights;²²⁴ and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.²²⁵ These considerations are embodied in the renowned doctrine of proportionality in the limitation of rights.

The use of firearms in dispersing crowds has been established to have led to the death of many people, including both participants of public assemblies and non-participants who were going about their business. It has also been established that such use of firearms is permitted by Kenyan law. The penal code even provides that when harm and death result from such force by the police, they shall not be liable in any ensuing criminal or civil proceedings.²²⁶ This provision

²¹⁷ Article 25, *Constitution of Kenya* (2010).

²¹⁸ Article 6 (1), *International Covenant on Civil and Political Rights*.

²¹⁹ *CCPR General Comment No. 36 on the right to life (Article 6)*, 3 September 2019, 2, para 12; *ACmHPR General comment No. 3 on the right to life (Article 4)*, 18 November 2015, 10, para 12. A limitation of life that does not satisfy the elements of justice and predictability or that is based on discriminatory grounds is also arbitrary.

²²⁰ Article 24 (1), *Constitution Kenya* (2010).

²²¹ Article 24 (1) (a), *Constitution Kenya* (2010).

²²² Article 24 (1) (b), *Constitution Kenya* (2010).

²²³ Article 24 (1) (c), *Constitution Kenya* (2010).

²²⁴ Article 24 (1) (d), *Constitution Kenya* (2010).

²²⁵ Article 24 (1) (e), *Constitution Kenya* (2010).

²²⁶ Section 82, *Penal code* (Chapter 63 of the laws of Kenya) Revised 2018 edition.

implicitly indicates that the lethal use of force such as firearms in dispersing crowds may be an acceptable limitation to the right to life. It hence becomes imperative for this study to embark on an analysis of the proportionality of such a limitation on the fundamental right to life.

4.2 The Doctrine of Proportionality

A number of human rights are not absolute meaning that they may be limited in certain restricted circumstances, and one such right is the right to life. The doctrine of proportionality is a human rights doctrine that sets conditions for which limitations on human rights that are not absolute must fulfill in order for them to be valid. It is essentially a requirement of justification.²²⁷ The doctrine is all the more important in this study since it is originally a German administrative law concept used in the context of limitation of police powers.²²⁸ The major elements of proportionality which form these conditions are four in number and they are: legitimacy, adequacy (suitability or rationality)²²⁹, necessity and proportionality in the narrow sense (*strictu sensu*). Cohen and Porat have asserted that the first two elements are efficiency tests that aim to ensure that “governmental action is efficient in terms of the constitutional burdens that it imposes”.²³⁰ If the right-limiting measure satisfies all the elements of the doctrine, the measure is held to be justified and not in violation of the right.²³¹ If the measure fails to satisfy any of the elements, it then amounts to a violation of the right.

a. Legitimacy

This element is akin to the requirement that a limitation of a human right must be justified.²³² Schweizer has stated that the element of legitimacy is applied where a legislative act is in question, as is the case here.²³³ The element begs the question “whether the measure in question serves a legitimate public interest” as only a legitimate public interest can justify a limitation of a fundamental right.²³⁴ Thus an aim is legitimate if it is backed by overriding reasons of public

²²⁷ Cohen-Eliya M & Porat I, ‘Proportionality and the culture of justification’, 59 (2) *The American journal of comparative law*, 2011, 466.

²²⁸ Anelkovic L, ‘The elements of proportionality as a principle of human rights limitations’, 15 (3) *Law and politics*, 2017, 236.

²²⁹ Cohen-Eliya M & Porat I, ‘Proportionality and the culture of justification’, 464.

²³⁰ Cohen-Eliya M & Porat I, ‘Proportionality and the culture of justification’, 464.

²³¹ Rivers J, ‘The presumption of proportionality’, 77 (3) *The modern law review*, 2014, 412.

²³² Article 24 (1), *Constitution of Kenya* (2010); Anelkovic L, ‘The elements of proportionality as a principle of human rights limitations’, 238.

²³³ Schweizer M, ‘Nudging and the principle of proportionality: Obligated to nudge’, 5.

²³⁴ Grimm D, ‘Proportionality in Canadian and German constitutional jurisprudence’, 57 (2) *The university of Toronto law journal*, 2007, 387.

interest.²³⁵ The legitimate public interest may or may not be provided in the Constitution and may be economic, social or cultural.²³⁶ Legitimate objectives may include the protection of minorities, minors, the environment, public health, public order or the advancement of gender equality among others.²³⁷ In *Wilson Olal & 5 others v Attorney General & 2 others*, in relation to the right to peaceably assemble, the court held that a limitation can only be acceptable if it pursues a legitimate aim which includes: the prevention of disorder or crime, the interest of national security or public safety, the protection of the rights and freedoms of others and the protection of health or morals.²³⁸

As established in the chapter two, the main objective of dispersal of assemblies is the attainment or maintenance of public order. This objective is undoubtedly one of public interest as, fundamentally, it enables the proper functioning of society.²³⁹ Indeed in *Wilson Olal* the court stated that no democracy can function if there is public disorder and anarchy and emphasized on the importance of a peaceful environment that allows citizens to enjoy their fundamental rights.²⁴⁰

b. Adequacy (Suitability)

The element of adequacy requires that there be a reasonable connection between the legitimate aim and the measure used to pursue that aim;²⁴¹ the measure designed to meet the legitimate objective must be rationally connected to that objective.²⁴² For a measure to be suitable it should, at least in principle, be possible that it furthers the stated legitimate aim.²⁴³ This means that it is not necessary that there should be certainty about the effectiveness of the measure, but only that there should be a certain level of probability that the aim can be achieved using that stated

²³⁵ *Mtana Lewa v Kahindi Ngala Mwangandi* (2015) eKLR.

The court of appeal while dismissing the challenge on the constitutionality of doctrine of adverse possession as an unjustifiable limitation on the right to property, held that the doctrine carried a *public interest* that an absentee landlord should not hang a sword over landless squatters when the commodity is so scarce. The court also listed other objectives including the argument that the *state as well as citizens* have a legitimate interest of ensuring that land ownership claims are lodged, heard and determined within reasonable time to ensure that justice is not delayed.

²³⁶ Schweizer M, 'Nudging and the principle of proportionality: Obligated to nudge', 11.

²³⁷ Schweizer M, 'Nudging and the principle of proportionality: Obligated to nudge', 11.

²³⁸ *Wilson Olal & 5 others v Attorney General & 2 others* (2017) eKLR.

²³⁹ Principle 22, *Siracusa principles on the limitation and derogation provisions in the ICCPR* (1985).

²⁴⁰ *Wilson Olal & 5 others v Attorney General & 2 others* (2017) eKLR.

²⁴¹ Andelkovic L, 'The elements of proportionality as a principle of human rights limitations', 239.

²⁴² Article 24(1)(e), *Constitution of Kenya* (2010); Burnton S, Proportionality, 16 (3) *Judicial review*, 2011, 179; *Jaqueline Okuta & another v Attorney General & 2 others* (2017) eKLR.

²⁴³ Schweizer M, 'Nudging and the principle of proportionality: Obligated to nudge', 15.

measure.²⁴⁴ The state is therefore not required to show that the measure demonstrably furthers the legitimate aim, but only the “abstract potential” that it may achieve it.²⁴⁵

An adequate measure was exemplified in *Faurisson v France* which concerned the limitation of the right to freedom of expression. Faurisson, a French author, through his articles contested the existence of gas chambers for extermination purposes in Nazi concentration camps.²⁴⁶ The French legislature thereafter passed the 1990 Gayssot Act which made it an offence “to contest the existence of the category of crimes against humanity as defined in the London charter of 8 August 1945”.²⁴⁷ Faurisson argued that the new law constituted a restriction to his freedom of expression. The Human Rights Committee held that since Faurisson’s statements were of a nature as to raise or strengthen anti-semitic feelings, the restriction was indeed designed to serve the struggle against racism and anti-semitism. As such the restriction was permissible under the ICCPR.²⁴⁸

In addition, in *Valentin Evrezov v Belarus*, Mr Evrezov’s request to hold a picket to protest the politically motivated imprisonment of a former presidential candidate, Aleksand Kozulin, was denied. The Human Rights Committee held that the restriction on the right to assembly was unjustified stating that Belarus national authorities had failed to demonstrate how prohibiting a picket held with the aim of protesting against imprisonment of a political figure would advance a legitimate objective like national security or public order.²⁴⁹

Schweizer notes that hardly any legislative measure ever fails the adequacy test and that appears to be the case with the use of firearms to disperse an assembly.²⁵⁰ This is because as Grossman and Christensen in their in-depth analysis of the studies and facts on the human psychology when under stress, note, when reacting to the sound of gunshots, “a majority of people will involuntarily experience the urge to put as much distance between the disturbance and

²⁴⁴ Andelkovic L, ‘The elements of proportionality as a principle of human rights limitations’, 239.

²⁴⁵ Schweizer M, ‘Nudging and the principle of proportionality: Obligated to nudge’, 15.

²⁴⁶ *Faurisson v France*, CCPR Comm. No. 550/1993 (8 November 1996), para 2.1.

²⁴⁷ *Faurisson v France*, CCPR, para 2.3.

²⁴⁸ *Faurisson v France*, CCPR, para 9.6.

²⁴⁹ *Valentin Evrezov v Belarus*, CCPR Comm No. 1988/2010 (15 July 2015), para 7.5.

²⁵⁰ Schweizer M, ‘Nudging and the principle of proportionality: Obligated to nudge’, 15.

themselves”.²⁵¹ Thus the use of firearms to disperse certainly has the potential of attaining public order as it can achieve dispersal.

c. Necessity

The element of necessity requires that there should be no other available measure that is equally suitable to further the legitimate aim but is less restrictive on the right in question.²⁵² In other words a measure is proportionate only if “there is no possibility of recourse to an alternative measure which would cause less damage to the fundamental right in issue, while fulfilling the same aim”.²⁵³ In this way the necessity test is usually defined as the “less-restrictive means” (LRM) test.²⁵⁴ The LRM test is backed by the Constitution which provides that in assessing limitation to fundamental rights and freedoms, presence of less restrictive means to achieve the intended purpose should be considered.²⁵⁵ Thus when there are several means that are equally effective in achieving a given objective but differ as to the extent they restrict a right, the state is required to choose the “least restrictive” or “mildest means”.²⁵⁶ If there is doubt as to which measure, between the proposed measure and an alternative less restrictive measure, is more effective, the latter should be chosen.²⁵⁷

Kenyan courts have indeed applied the LRM test to establish the proportionality of measures in limitation of human rights. In *Law Society of Kenya v Hillary Mutyambai & 4 others* for example, the Public Order (State Curfew) Order 2020 that was enacted following the reports of corona virus infections in Kenya, was challenged on the ground that it did not pass Article’s 24 proportionality test on the limitation of rights.²⁵⁸ It was acknowledged that it limited the rights to freedom of movement, freedom of association and the freedom to assembly.²⁵⁹ The petitioner

²⁵¹ Grossman D & Christensen LW, ‘On Combat: The psychology and physiology of deadly conflict in war and in peace’, PPCT Research publications, (2004) in Pennstate university PSYCH blog, *The sound of danger and the direction you run*, on < <https://sites.psu.edu/aspsy/2016/04/01/the-sound-of-danger-and-the-direction-you-run/>> on 16 December 2020.

²⁵² Schweizer M, ‘Nudging and the principle of proportionality: Obligated to nudge’, 16.

²⁵³ Andelkovic L, ‘The elements of proportionality as a principle of human rights limitations’, 239.

²⁵⁴ Fan J, ‘Rethinking the method and function of proportionality test in the European Court of Human Rights’, 51.

²⁵⁵ Article 24(1) (e), *Constitution of Kenya* (2010).

²⁵⁶ Brems E & Lavrysen L, ‘Don’t use a sledgehammer to crack a nut: Less restrictive means in the case law of the European Court of Human Rights’, 15 (1) *Human rights law review*, 2015, 142; Schweizer M, ‘Nudging and the principle of proportionality: Obligated to nudge’, 16.

²⁵⁷ Schweizer M, ‘Nudging and the principle of proportionality: Obligated to nudge’, 16.

²⁵⁸ *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others* (2020) eKLR.

²⁵⁹ *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others* (2020) eKLR, para 84.

argued that the state had the option of declaring a state of emergency under Article 8 of the Constitution which would be subject to legislative and judicial oversight.²⁶⁰ The court found that a state of emergency would not be a less restrictive means as a curfew order was also subject to judicial oversight and in any event limited rights in the same way that a state of emergency would.²⁶¹ In the end the court found the curfew order to be constitutional.

In the South African case of *Mlungwana v State*, the Constitutional court of South Africa found section 12(1) (a) of the Regulations of Gatherings Act that criminalized the failure to notify law enforcement of assemblies of more than 15 people, to be an unjustifiable limitation on the right to freedom of assembly. The court stated as one of its reasons that there were other less restrictive means to achieve the purpose of enabling the police to prepare for a gathering adequately, such as amendment of the provision so that notice is required only if police presence is required.²⁶²

The LRM test can be subdivided into three sub-questions: (1) Are there other suitable means available to achieve the same objective? (2) Are these means less restrictive of the right? (3) Are these means equally effective as the challenged means in achieving the same objective?²⁶³ If these questions are answered in the affirmative, then the challenged measure does not pass the LRM test and is hence disproportionate.²⁶⁴

Turning onto whether there are other suitable means to disperse crowds and achieve the aim of public order, it is well-known that other means such as the use of tear gas and water cannons can be used to achieve that objective.²⁶⁵ These means are less restrictive of the right to life than the use of firearms, because they are regarded as less lethal weapons while firearms are regarded as lethal weapons.²⁶⁶ Firearms are indeed acknowledged as being weapons likely to cause death.²⁶⁷

²⁶⁰ *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others* (2020) eKLR, para 14.

²⁶¹ *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others* (2020) eKLR, para 128.

²⁶² *Mlungwana and others v The state and another* (2018) Constitutional Court of South Africa.

²⁶³ Brems E & Lavrysen L, 'Don't use a sledgehammer to crack a nut: Less restrictive means in the case law of the European Court of Human Rights', 142.

²⁶⁴ Brems E & Lavrysen L, 'Don't use a sledgehammer to crack a nut: Less restrictive means in the case law of the European Court of Human Rights', 142.

²⁶⁵ Guideline 6.3.3, *United Nations Human Rights Guidelines on Less-Lethal Weapons in Law Enforcement*.

²⁶⁶ Guideline 6.3.3, *United Nations Human Rights Guidelines on Less-Lethal Weapons in Law Enforcement*.

²⁶⁷ Section 14(1) *Public Order Act* (Act 26 of 1950).

They are “inherently dangerous and always potentially fatal”.²⁶⁸ On the third sub-question, given the effects that these other less restrictive means have on people when applied on them, it can be concluded that they easily achieve the object of dispersal and subsequently public order.²⁶⁹ Furthermore, considering that these less lethal weapons are regularly used by the police to effect dispersal, especially teargas which is prominent in Kenya, it can be established that indeed these less lethal weapons are sufficient.²⁷⁰ And it is probable that some or all of these reasons informed the *Guidelines for policing assemblies in Africa* which provide that firearms are inappropriate for policing assemblies and that they may never be used simply for crowd dispersal.²⁷¹

Therefore the use of firearms to disperse crowds clearly does not meet the requirements of the element of necessity. As such even at this point, before proceeding to the element of proportionality *strictu sensu*, the use of firearms to disperse crowds can definitively be stated as a disproportionate means and thus a violation of the right to life.

d. Proportionality *Strictu Sensu*

Proportionality *strictu sensu* (in the narrow sense) is also referred to, in general terms, as balancing the competing rights and interests in a particular case,²⁷² which in this case is the right to life against the public interest of public order. Alexy notes that when we are talking of the elements of suitability and necessity, the proportionality analysis is aimed at optimization

²⁶⁸ Punch M, ‘Police use of firearms: Deadly guns, scenarios and ‘mistakes’’, 73.

²⁶⁹ Bettenhausen C, ‘Teargas and Pepper spray: What protesters need to know’, *c&en*, 18 June 2020 - <<https://cen.acs.org/policy/chemical-weapons/Tear-gas-and-pepper-spray-What-protesters-need-to-know/98/web/2020/06>> on 18 June 2020. – “Tear gas is a slang term that usually means CS in the law enforcement world but can also include OC and other chemicals...Exposure to OC “is basically as if your head is on fire, and you inhaled a hive of angry wasps,”...Another consequence Of Being exposed to OC is “you will wind up intensely sweating during the whole experience””.

²⁷⁰ ‘Police use tear gas to disperse opposition protests in Nairobi’, *CGTN Africa*, 26 September 2017 - <<https://www.youtube.com/watch?v=CEUWNjaYSn8>> on 26 September 2017; ‘Kenya: tear gas and water cannon vs protesters’, *africanews*, 18 May 2016 - <<https://www.youtube.com/watch?v=CufEpfLgbiA>> on 18 May 2016; ‘Police lob teargas to disperse anti-IEBC demonstrators’, *Kenya CitizenTV*, 16 May 2016 - <<https://www.youtube.com/watch?v=-mcZSFpIqAw>> on 16 May 2016; ‘Kenya police fire tear gas, arrest demonstrators at anti-brutality protest’, *Global News*, 7 July 2020 - <<https://www.youtube.com/watch?v=492JC5DSOhQ>> on 7 July 2020.

²⁷¹ Guideline 21.2.4, *Policing of Assemblies in Africa: Guidelines for the policing of Assemblies by law enforcement officials in Africa*.

²⁷² Andelkovic L, ‘The elements of proportionality as a principle of human rights limitations’, 241; Alexy R, ‘Constitutional rights and proportionality’, 22 *Revis journal for constitutional theory and philosophy of law*, 2014, 54.

relative to the factual possibilities – which consists of “avoiding avoidable costs”.²⁷³ He proceeds to state that when costs are unavoidable - when the interests collide - there arises an inescapable need for balancing.²⁷⁴ This balancing is the purview of proportionality *strictu sensu*. This balancing then, is optimization relative to the legal possibilities and not the factual possibilities.²⁷⁵

Optimization relative to the legal possibilities is achieved by complying with the ‘law of balancing’ which requires that “*the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other*”.²⁷⁶ In other words this element requires the assessment of the proportionality of the detriment incurred by the restriction of the right, to the benefit derived from the achievement of the objective; that is, “a comparative analysis of the intensity of the intervention with the goal achieved”.²⁷⁷ For the restriction to be proportionate, the benefit from realizing the intended objective must exceed the harm that is afflicted on the right²⁷⁸ or, the measure relative to the intended objective must not place an excessive burden on the individual.²⁷⁹ A measure will thus be disproportionate and hence a violation of a right, if the interference with the right weighs more heavily than the interests the measure seeks to achieve.²⁸⁰

Barak states that proportionality *strictu sensu* is a matter of comparing certain factors. On one side of the scale, the importance of the realization of the objective is measured in terms of its substance and urgency and the likelihood of realizing the objective.²⁸¹ On the other side of the scale, the importance of preventing the limitation of the right is measured in terms of the importance of the right itself, the extent of its limitation and the probability that the limitation

²⁷³ Alexy R, ‘Constitutional rights and proportionality’, 54. Alexy explains that the conception of optimization is only sensible when constitutional rights are taken as principles, which are not definitive commands, but rather are norms which realized ‘to the greatest extent possible given the legal and factual possibilities’.

²⁷⁴ Alexy R, ‘Constitutional rights and proportionality’, 54.

²⁷⁵ Alexy R, ‘Constitutional rights and proportionality’, 54.

²⁷⁶ Alexy R, ‘Constitutional rights and proportionality’, 54.

²⁷⁷ Trykhlil K, ‘The principle of proportionality in the jurisprudence of the European Court of Human Rights’, 4 *EU and comparative law issues and challenges series*, 2020, 138.

²⁷⁸ Cohen-Eilya M & Porat I, ‘American balancing and German proportionality: The historical origins’, 8 (2) *International journal of constitutional law*, 2010, 269.

²⁷⁹ Gunn JT, ‘Deconstructing proportionality in limitations analysis’, 19 (2) *Emory international law review*, 2005, 468; Brems E & Lavrysen L, ‘Don’t use a sledgehammer to crack a nut: Less restrictive means in the case law of the European Court of Human Rights’, 141.

²⁸⁰ Schweizer M, ‘Nudging and the principle of proportionality: Obligated to nudge’, 19.

²⁸¹ Barak A, ‘Proportionality and principled balancing’, 4 (2) *Law and ethics of human rights*, 2010, 9.

will actually materialize.²⁸² These factors are represented in the Constitution which provides that in limitation of constitutional rights, the nature of the right and the nature and extent of the limitation should be taken into account.²⁸³

If the use of firearms to disperse crowds were to pass the LRM test, it is these factors that would be used to assess whether it is proportional *strictu sensu*. Nevertheless it is highly unlikely that it would pass this last test. This is because firstly, the nature of the right to life is quite peculiar as it “constitutes a condition for the existence and exercising of other rights”. In addition, the right to life is extra special within the sphere of limitation of rights, since a person wrongly killed can neither get a chance to exercise the right again nor be compensated.²⁸⁴ As such it ought to be regarded as relatively important to any other competing right. And it is worth noting that it is because of these facts that international law on the use of force permit intentional lethal use of force only to protect life.²⁸⁵ These facts also speak to the ‘extent of limitation’ by indicating that the limitation of the right to life can only be absolute and never partial, in the sense that it goes to the core of the right itself.

Further the use of firearms is innately dangerous and always carries the risk of causing fatal harm. Punch states that although it may almost seem superfluous, it cannot be emphasized enough that firearms are weapons that are “predominantly designed to kill” and thus they are “inherently dangerous and always potentially fatal”.²⁸⁶ Lowy and Sampson in arguing that the right to life subsumes a right not to be shot²⁸⁷, have stated that ‘the risks created by firearms are unique among constitutional rights in as much as firearms pose a risk of imminent lethality’.²⁸⁸ This means that the use of firearms, even in dispersing crowds, carries a high probability that the limitation of the right to life will be materialized. This conclusion is made unquestionable considering the fact that such use of firearms as discussed in the previous chapter has led to the loss of lives of many Kenyans, many of whom were not even part of the crowds dispersed.

²⁸² Barak A, ‘Proportionality and principled balancing’, 9.

²⁸³ Article 24 (1) (a) & (c), *Constitution of Kenya* (2010).

²⁸⁴ Crawshaw R, ‘International standards on the right to life and the use of force by police’, 86.

²⁸⁵ *Interim report of the Special rapporteur on the worldwide situation in regard to extrajudicial, summary and arbitrary executions*, A/61/150, 2006, 36.

²⁸⁶ Punch M, ‘Police use of firearms: Deadly guns, scenarios and ‘mistakes’’, 73.

²⁸⁷ Lowy J & Sampson K, ‘The right not to be shot: public safety, private guns, and the constellation of constitutional liberties’, 190.

²⁸⁸ Lowy J & Sampson K, ‘The right not to be shot: public safety, private guns, and the constellation of constitutional liberties’, 191.

On the question of the importance of the realization of the objective of public order, a proper deep analysis is a redundant exercise having already established that the use of firearms to disperse crowds does not pass the LRM test. A basic analysis however, reveals that it is not sufficiently important. In *Kenya Human Rights Commission v Communication Authority of Kenya*, the court stated that the measure that forms the right's limitation must pursue "a legitimate objective of sufficient importance to warrant limiting" the right.²⁸⁹ The court went on to refer to the Canadian case *R v Oakes* where the court stated that the 'sufficient importance' standard must be high to ensure that "objectives which are trivial or discordant with the principles of a free and democratic society do not gain protection".²⁹⁰ The Canadian court stated therefore that, at a minimum, an objective should "relate to concerns which are pressing and substantial in a free and democratic society", for it to be sufficiently important.²⁹¹ In *Ngunjiri Wambugu v Inspector General of Police*, the court stated that an objective that seeks to advance rights enshrined in the Constitution may be sufficiently important.²⁹²

The objective of public order is no doubt substantial in a free and democratic society as it enables the proper functioning of society. As to whether it constitutes a pressing need relative to the need to prevent the limitation of the right to life, is a subjective issue²⁹³ in the sense that the intensity of public disorder caused by crowds varies.²⁹⁴ The need for public order, without more, does suffice to warrant the limitation of the right to life. Such need has to be accompanied by the need to protect life. Indeed in *Noah Kazingachire v Zimbabwe*, the African Commission stated that the sanctity of life requires that a person's life not be taken simply in the interest of the common good – it may, under certain limited circumstances, 'be taken as a last resort in order to protect another life or lives'.²⁹⁵ In addition, the Constitutional court of South Africa had the

²⁸⁹ *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

²⁹⁰ *R v Oakes* (1986) Supreme Court of Canada; Souliotis in this regard correctly points out that a legitimate objective must take account of and respect the democratic values of a society (e.g. non-discrimination and gender equality) see Souliotis P, 'Proportionality and the European convention on Human Rights: A critical view', 2015 on - < <https://www.grin.com/document/350408> > on 16 December 2020.

²⁹¹ *R v Oakes* (1986) Supreme Court of Canada.

²⁹² *Ngunjiri Wambugu v Inspector General of Police & 2 others* (2019) eKLR.

²⁹³ Andelkovic states that despite the variance of opinions on the method of balancing the competing interests, there is an inevitable conclusion that the final decision to uphold one of the interests is subjective in nature. See Andelkovic L, 'The elements of proportionality as a principle of human rights limitations', 242.

²⁹⁴ Crawshaw R, 'International standards on the right to life and use of force by police', 86.

²⁹⁵ *Kazingachire v Zimbabwe*, ACmHPR, 120.

following to say about the rights to life and dignity when balanced against other competing interests like the need for retributive justice:²⁹⁶

“The rights to life and dignity are the most important of all human rights, and the source of all personal rights....By committing ourselves to a society founded on the recognition of human rights we are required to value these rights above all others. And this must be demonstrated by the state in everything that it does, including the way it punishes criminals.”

Thus, the only seemingly plausible situation where the need for public order would be pressing enough to warrant limitation of the right to life is where there is widespread violence by the participants in the crowd that poses an imminent threat to the lives of other people. Crawshaw in this regard notes that there may be occasions where it is genuinely believed that the actions of a large percentage of people forming an assembly, pose an imminent threat to life.²⁹⁷ He however, notes that in such a situation there are chances that innocent participants in the assembly would be killed if firearms are used to disperse the crowds. He aptly states:

“On such an occasion it is probable that a number of individuals within the assembly, who are not themselves presenting an imminent or grave threat to life, and who, because of the circumstances cannot be distinguished from those who are posing the threat, would be killed or injured by firearms discharged to disperse the assembly.”²⁹⁸

Taking this into consideration, it can be reasonably acknowledged that there is no situation where the need for public order would be pressing enough to warrant the limiting of the right to life by use of firearms to disperse crowds. The risk created by firearms is simply untenable. In the end the interference with the right to life by the use of firearms in dispersing crowds weighs more heavily than the interest of achieving public order.

4.3 Conclusion

The foregoing proportionality test analysis establishes that the use of firearms as a measure to disperse crowds is disproportionate. The measure has been found not to meet the requirements of the necessity test since there other less restrictive and equally effective means to disperse crowds like the use of tear gas and water cannons. It has also been established that even assuming such

²⁹⁶ *The state v T Makwanyane and another* (1995), Constitutional court of South Africa.

²⁹⁷ Crawshaw R, ‘International standards on the right to life and use of force by police’, 86.

²⁹⁸ Crawshaw R, ‘International standards on the right to life and use of force by police’, 86.

use of firearms passed the necessity test, it would not pass the balancing test. It has indeed been established that the detriment inflicted by the restriction on the right to life by such use of firearms is heavier than the comparative objective/need of public order. As a result it has been concluded that the objective of public order is not sufficiently important to warrant the limitation of the right to life. Ultimately it is safe to say that such use of firearms is an unjustified limitation on the right to life and hence a violation of the right to life.²⁹⁹

²⁹⁹ *ACmHPR General comment 3, 9, para 8.*

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

After a deep analysis in pursuit of the sub-objectives of this study, a number of findings have been made. These findings have proven useful in fulfilling the main objective of this study which is to establish whether the use of firearms to disperse crowds is a justified. These findings lead to a conclusion that confirms the hypothesis of this research that such use of firearms is an unjustified and disproportionate limitation on the right to life.

The first finding was that police are allowed to disperse an assembly where it is non-peaceful in the sense that there is widespread and serious violence by the participants of an assembly. It was also established that the fact that the requirement of notification has not been complied with, does not, on its own, warrant the police to disperse an assembly. To warrant dispersal of an assembly, the non-notification has to be accompanied by some other compelling circumstance – such as the fact that there is a clash between an assembly that had issued a prior notification and another one that had not - on the same date, venue and time. The thread running through these circumstances was established to be the objective of public order; the object of dispersal of assemblies is public order.

The second finding was that the use of firearms to disperse crowds does not satisfy the proportionality requirement of the general principles on the use of force. It was established that though firearms may be necessary in order to effect dispersal, they are always disproportionate for that objective, hence unlawful. It was also established that this fact of disproportionality of the use of firearms to disperse crowds is reinforced by the provisions of the African Commission's *Guidelines for policing assemblies* and the United Nation's *Guidelines on less lethal weapons*. Both provide that firearms may never be used to disperse crowds. As a result it was further established that where such use of firearms leads to the loss of life, it constitutes arbitrary deprivation of life.

The third finding was that the use of firearms to disperse crowds fails the proportionality test of the limitation of rights, in as far as it limits the right to life. It was established that such use of firearms to achieve the legitimate aim of public order does not satisfy the necessity requirement in that there are less restrictive means to achieve the same objective. Further, it was established

that such use of firearms is not proportional in the narrow sense as the need to prevent the limitation of the right to life in the context of crowd dispersal, was found to be heavier than the comparative need for public order. Eventually it was established that the use of firearms to disperse crowds is a disproportionate limitation on the right to life.

Apart from affirming the hypothesis of this study that the use of firearms to disperse crowds is an unjustified limitation on the right to life, these findings have also revealed that such use of firearms amounts, where it leads to death, to arbitrary deprivation of life. This conclusion provides an opportunity to ponder on Kenya's commitment to safeguard the right to life of its citizens.

5.2 Recommendations

The findings of this study shed more light on the parameters of the use of force by law enforcement officials in the context of policing assemblies. More than that, they contribute to the knowledge within the wider framework of limitation of rights. Most importantly in the author's opinion, they provide the much needed knowledge on the protection of the fundamental right to life in the context of public gatherings. These findings shape the way for reforms for better policing of assemblies and given the fundamental importance of the right to life, they engender the need for immediate reforms to our laws and to police culture. The author lays the following recommendations that may be taken into account by the relevant stakeholders:

a. Amendment of Section 82 of the Penal Code

Section 82 of the penal code states that police officers "may do all things necessary for dispersing the persons so continuing assembled...and, if any person makes resistance, may use all such force as is reasonably necessary for overcoming such resistance, and shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person". The effect of this provision as discussed in this study is to allow use of firearms in dispersing crowds, which has been found to be an unjustified limitation of the right to life, and where it leads to death a violation of the right to life.

The author recommends that an amendment is made so that the provision reads: the police "shall use necessary and proportionate force for dispersing persons so continuing to assemble". Further an amendment should be made to incorporate in that provision a specific prohibition on the use

of firearms simply to disperse crowds. Finally the section of the provision that states that the police may not be held liable for harm or death resulting from such use of force should be struck off completely.

b. Amendment of Sections 5(8), 7 (4) and 14 (1) of the Public Order Act.

Section 5 (8) of the Act provides for police powers to issue orders for the dispersal of assemblies. It does not however, provide that the police may use force where the participants of an assembly refuse to comply with such an order. The author proposes an amendment to that section to include a clause to the effect that police may use such force as is necessary and proportionate to disperse an assembly after the participants fail to comply with the orders for dispersal within a reasonable period of time.

Section 7 (4) of the Act provides that the police may issue orders of dispersal and use such force as is necessary to disperse any gathering of persons at an entertainment or sport event. The section does not provide that such use of force must be proportionate. Therefore, the author proposes that an amendment is made to include proportionality in such use of force.

Section 14 (1) of the Act provides that “whenever in the Act it is provided that force may be used for any purpose ... firearms shall not be used unless weapons less likely to cause death have been used without achieving the purpose aforesaid”. The effect of this provision is to allow the use of firearms to disperse crowds, under sections 5(8) and 7 (4), where less lethal weapons have been used without success. The author proposes an amendment to section 14 (1) to add a clause that provides that firearms are not an appropriate tool for policing assemblies and that they may never be used simply to disperse and assembly.

c. Training of Police Officers on the Use of Force Rules in Policing Assemblies, and in Human Rights.

Policing and human rights are undoubtedly inextricably connected. Alleweldt and Fickensher state that while policing is indispensable in the effective protection of human rights, it is also involves risks to those very rights.³⁰⁰ Crawshaw on his part correctly notes that one of the main

³⁰⁰ Alleweldt R & Fickensher G, ‘Introduction: The police, a key actor in human rights protection’ in Alleweldt R, Fickensher G (eds), *The police and international human rights law*, Springer international publishing AG, 2018, 2.

purposes of human rights is to prevent the abuse of power by the state through its police.³⁰¹ He continues to state that the relationship between policing and human rights entails four concepts two of which are ‘respect’ and ‘protection’.³⁰² ‘Respect’ requires the lawful exercise of police powers since only such lawful exercise can be a legitimate limitation or interference with human rights.³⁰³ ‘Protection’ refers to protection by police officers of all human rights and specific human rights.³⁰⁴ All these go to show the magnitude of the relationship between human rights and policing. It is thus not only desirable but also paramount that the police understand their duty to respect and protect human rights while exercising the powers, especially that which relates to the use of force. This especially applies to the fundamental right to life which has been the main subject of this study.

Therefore it is important that police are thoroughly trained on their obligations with regard to the use of force and human rights.³⁰⁵ This training should focus on the development of police officers’ competencies at different levels i.e. knowledge, skills and attitudes.³⁰⁶ It should also aim to enhance the performance of police officers in certain activities such as policing assemblies.³⁰⁷ This training should be in compliance with the UN Declaration on Human Rights Education and Training.³⁰⁸ Such training will educate the police on the fundamental principles on the use of force as well as good and allowable policing tactics and strategies in different situations.³⁰⁹ This is especially so with regard to the tactics and strategies that can be applied in policing assemblies. With this kind of training the police will be in a better position to protect the human rights including the rights to life and peaceful assembly.

d. Compliance by the State with the Principle of Precaution.

The principle of precaution as relates to the use of force in policing assemblies requires states to equip police officers with sufficient non-lethal incapacitating weapons and self-defensive

³⁰¹ Crawshaw R, ‘Police and human rights: Fundamental questions’ in Alleweldt R, Fickensher G (eds), *The police and international human rights law*, Springer international publishing AG, 2018, 8.

³⁰² Crawshaw R, ‘Police and human rights: Fundamental questions’, 10.

³⁰³ Crawshaw R, ‘Police and human rights: Fundamental questions’, 10. Lawful exercise of force by the police is that which complies with the principles of legality, necessity and proportionality.

³⁰⁴ Crawshaw R, ‘Police and human rights: Fundamental questions’, 10.

³⁰⁵ Article 244 (d), *Constitution of Kenya* (2010).

³⁰⁶ Suntinger W, ‘Police training and international human rights standards’ in Alleweldt R, Fickensher G (eds), *The police and international human rights law*, Springer international publishing AG, 2018, 281.

³⁰⁷ Suntinger W, ‘Police training and international human rights’, 281.

³⁰⁸ *United Nations Declaration on human rights education and training*, 19 December 2011.

³⁰⁹ Kostic ND, ‘Human rights and police: the role of police training and education’, *Belgrade centre for security policy*, 2014, 67 & 69.

equipment.³¹⁰ In order for the police to effectively manage assemblies the state is obligated to adhere to this requirement of the principle of precaution. When equipped with these non-lethal weapons and self-defensive equipment the police will be in a much better position to comply with use of force rules and principles as well as their human rights obligations. These weapons and equipment will also allow the police to easily police assemblies without having to resort to firearms.

³¹⁰ Principle 2, *UN Basic principles on the use of force and firearms by law enforcement officials*; *CCPR General Comment 37*, 14, para 81.

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