

**A CRITIQUE OF POLICE OVERSIGHT MECHANISMS IN KENYA WITH
REGARD TO EXTRAJUDICIAL KILLINGS**

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DECLARATION

I, JOY WANJIKU NJOROGI, 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 or referred to are accordingly acknowledged.

Signed:

Date:

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

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ABSTRACT

In 2016, there were 152 complaints made relating to police shootings and deaths. This is a problem insofar as there are two bodies that are tasked with police oversight in Kenya. This study was aimed at finding out why this is the case. This is because with two oversight bodies and a robust legal framework, it would be expected that the number of extrajudicial killings should have reduced. This study will also look at whether there are any weaknesses with the current oversight system in comparison with the previous system in order to establish what needs to be improved.

This study has been conducted through the literature review of legislation in Kenya that provides for police oversight as well as reports which show what has been happening on the ground. It has established that there are various challenges posed to police oversight over extrajudicial killings. These are the failure of accountability, investigation and proper law enforcement; the widespread nature of extrajudicial killings and police involvement in the extrajudicial killings; inadequate mandate and resources and improper co-ordination of internal and external oversight mechanisms. This has led to the oversight mechanisms being inadequate despite the existence of an extensive legal regime.

This study proposes that IAU be given a clear mandate as well as IPOA being given prosecutorial powers in order for these mechanisms to adequately discharge of their mandate and ensure that the number of extrajudicial killings in the country reduce.

LIST OF ABBREVIATIONS

DPP	Director of Public Prosecutions
IAU	Internal Affairs Unit
IPOA	Independent Policing Oversight Unit
NPS	National Police Service

LIST OF LEGAL INSTRUMENTS

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

Code of Conduct for Law Enforcement Officials, UN A/RES/34/169 Annex 5 February 1980.

Constitution of Kenya (2010).

ECOSOC Resolution 1989/61, Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials, 24 May 1989.

General Comment No.3 on the ACHPR: The Right to Life (Article 4), 2015.

Independent Policing Oversight Authority Act (Act No. 35 of 2011).

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

National Police Service Act (Act No. 11A of 2011).

Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, ACmHPR 40th Ordinary Session, 2006.

The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Office of the United Nations High Commissioner for Human Rights, 2017.

The Statute Law (Miscellaneous Amendments) Bill (2015).

The Statute Law (Miscellaneous Amendments) Bill (2016).

CHAPTER 1: INTRODUCTION

1.1 Background

Before 2010, the police force in Kenya had a structure that had two main arms, the Kenya Police Service and the Administrative Police Service. The two units continued to be directly under the control of the President.¹ At that point in time, it is clear that there was no police oversight mechanism provided for in the law. On 8th May 2009, President Kibaki announced the appointment of a National Task Force on Police Reform and set out its terms of reference in The Kenya Gazette No. 4790 of 8th May, 2009.² This included special focus being given to recommendations on, among other things, the restructuring of the Police Force and the establishment of the Independent Police Oversight Authority.³

The Constitution of Kenya of 2010 gave life to the recommendations that were given by the National Task Force on Police Reform. It brought about a single command structure, under the Inspector-General of Police. Two institutions which were tasked with police oversight were established, one, the Independent Policing Oversight Authority (IPOA or, ‘Authority’) which was established under the Independent Policing Oversight Authority Act and two, the Internal Affairs Unit (IAU) which was established pursuant to Section 87 of the National Police Service Act. The mandate of the IAU includes, but is not limited to, receiving and investigating complaints against the police. The Unit shall investigate misconduct and hear complaints from members of the Service or members of the public; at the direction of a senior officer; on its own initiative; or on the direction of the Inspector-General; or at the request of the Independent Police Oversight Authority.⁴ The Act also provides that any use of force or firearms leading to death, it ought to be reported by the officer in charge or another direct superior of the person who caused the death, to the Authority who shall investigate the case.⁵

Article 244 of the Constitution of Kenya, 2010 requires the police to strive for the highest standards of professionalism and discipline among its members and prevent corruption and

¹ Amnesty International, *Police reform in Kenya: ‘A drop in the ocean’*, 2013, 17.

² National Task Force on Police Reform, *Report of the national task force on police reforms* (hereafter the *Ransley Task Force Report*), 2009, 3.

³ *Ransley Task Force Report*, 80.

⁴ Section 87(4), *National Police Service Act* (Act No. 11A of 2011).

⁵ Sixth Schedule, *National Police Service Act* (Act No. 11A of 2011).

promote and practice transparency and accountability while carrying out their duties.⁶ This shows that the accountability of the police is a constitutional requirement and since the Constitution is the supreme law of the land, police accountability has to be ensured. IPOA was established to provide for civilian oversight of the work of the police, with some of its objectives being to give effect to Article 244 and to ensure independent oversight of the handling of complaints by the Service.⁷

Moreover, the Constitution of Kenya of 2010 brought about a robust human rights framework which applies to all law and binds all state organs and persons.⁸ This includes the right to life which should not intentionally be taken from any person except to the extent authorised by the Constitution or other written law.⁹ Any killing that falls outside what is allowed by the law would be classified as an extrajudicial killing. This human rights framework bestows upon the state the obligation to protect its citizens in situations where their rights are violated and to allow them to enforce their rights. All these provisions show why police accountability and oversight is necessary in Kenya. There is a broad legal framework that makes oversight possible.

The investigation of extrajudicial killings would fall within the mandate of the Authority, as well as that of the Internal Affairs Unit. Failures in the criminal justice system, and in internal and external police accountability mechanisms, encourage the commission of unlawful killings by police.¹⁰ In Kenya, extrajudicial executions and other grave human rights abuses by members of a state's police force have been an issue of concern following a visit by the Special Rapporteur.¹¹

A report by the Independent Medico-Legal Unit documented thirty-four cases of extrajudicial killings in 2014 and twenty-seven in 2015.¹² These numbers are high, despite the slight

⁶ Article 244, *Constitution of Kenya* (2010).

⁷ Section 5, *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁸ Article 20(1), *Constitution of Kenya* (2010).

⁹ Article 26(3), *Constitution of Kenya* (2010).

¹⁰ *Report of the special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, 26 May 2009, UN Doc A/HRC/11/2/Add.6, para. 22.

¹¹ *Report of the special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, 28 May 2010, UN Doc A/HRC/14/24/Add.8, para. 7.

¹² Independent Medico-Legal Unit, *Report on deaths from police bullets from January to December 2015*, 2015, 6.

decrease in those two years. More recently, there was the death of Willie Kimani. He disappeared after lodging a complaint against a police officer on behalf of a client, who was also killed, along with their driver. The Law Society of Kenya called on all lawyers to boycott courts with nationwide protests have been organised.¹³ It is this public outcry that can be seen to have led to the investigation of the same, with the police officers who are suspected to have killed the three individuals being taken to Court, not the use of the oversight mechanisms which have been set up to deal with holding the police accountable for such cases.

Furthermore, in the Revised Police Reforms Program Document (2015-2018), it is stated that at that point, a total of 3246 complaints against police actions were received during the review period, of which 147 investigation cases were finalized out of which 14 of these were submitted to the Office of the Director of Public Prosecutions and 4 recommended for prosecution.¹⁴ This shows that there are very few matters that end up being finalized, in as much as there have been complaints that have been investigated.

1.2 Statement of Problem

The problem is that even with the existence of both internal and external oversight mechanisms, extrajudicial killings in Kenya are rampant. This would in turn mean that the oversight mechanisms provided for by the law are not adequately addressing their mandate as the police are not being held accountable for extrajudicial killings: that they are not effective.

Important obstacles to external mechanism effectiveness often arise after it has completed its investigation.¹⁵ Even where their investigations found strong evidence of police wrongdoing, that is as far as their powers go, as they can only give recommendations to the Director of Public Prosecutions (DPP) to prosecute a matter. The ability to fully investigate and report on incidents and complaints, even with complete independence, means little if the authority lacks the capacity to ensure that the police, prosecutors and/or executive act on the basis of their

¹³ 'Kenyan police in court over lawyer Willie Kimani's death' BBC News, 4 July 2016 — <<http://www.bbc.com/news/world-africa-36703271>> on 18 December 2017.

¹⁴ Ministry of Interior and Coordination of National Government, *Revised police reforms program document (2015-2018)*, August 2015, 11.

¹⁵ *Report of the special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, 28 May 2010, UN Doc A/HRC/14/24/Add.8, para. 42.

findings.¹⁶ This brings up the aspect of the oversight body having prosecutorial powers in order to effectively discharge its mandate in relation to extrajudicial killings.

1.3 Justification of the Study

This study is justified by the fact that there has been little or no change in the occurrence of extrajudicial killings since the IAU and IPOA were established. This means that the Kenyan system should be changed in order to ensure that the mandate of the existent oversight bodies is discharged well, leading to a decrease in the number of extrajudicial killings, as there would be a high standard of police accountability. With the oversight mechanisms playing a complementary role to the existent criminal justice system, in this case, in order to bring suspects of extrajudicial killings to be held liable for their acts, there should also be a reflection of the same in the number of cases that are reported. The process should not end at the oversight agencies giving the DPP a recommendation to further the investigation of such matters because the power of the DPP is a discretionary power.

1.4 Statement of Research Objective(s)

The specific objectives of this research are:

1. To analyse the system of investigation of extrajudicial killings prior and subsequent to the police reform.
2. To show the international and domestic standards that are required for police accountability.
3. To determine whether or not there are any weaknesses and improvements in the investigation of extrajudicial killings with a new system having been put in place.
4. To show the importance of a well-established civilian oversight system in the investigation of extrajudicial killings.
5. To suggest ways of improving police investigative systems with regard to extrajudicial killings to ensure effectiveness.

¹⁶ *Report of the special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 28 May 2010, UN Doc A/HRC/14/24/Add.8, para. 42.*

1.5 Research Questions

The paper will examine the following research questions:

1. Does the failure of accountability, investigation and proper law enforcement lead to extrajudicial killings?
2. Does the widespread nature of extrajudicial killings and the involvement of the police in investigation hinder the investigative process?
3. Does the mandate given to and mechanisms used by the Independent Policing Oversight Authority adequately address extrajudicial killings?
4. Would enhanced co-ordination of internal and external oversight mechanisms help in improving investigation of extrajudicial killings?

1.6 Hypothesis

This research is conducted on the premise that the legal framework and the institutions that are tasked with oversight over the police are weak and the current police oversight system needs to be improved in order to adequately address valid complaints over extrajudicial killings.

It relies on the presumption that the complaints that are made to the Independent Policing Oversight Authority are genuine.

1.7 Research Design and Methodology

This study will be conducted through qualitative desktop research. This will involve looking at reports and studies that have been done regarding the issue of extrajudicial killings as well as police oversight in Kenya. The research rely on the data that has been provided by IPOA instead of conducting field research to get raw data on the number of extrajudicial killings that have been perpetrated.

1.8 Limitations

In looking at the history and investigation of extrajudicial killings before 2010, this study will be limited to events between 2007 and 2010. Another limitation is that there are no decided cases in Kenya dealing with the issue of extrajudicial killings.

1.9 Chapter Breakdown

This research paper will consist of six chapters.

Chapter 1: Introduction

This will be the introduction to the study which will provide an overview of the entire paper. It will include the background and justification of the study, the statement of the problem, research questions and objectives of the study.

Chapter 2: Theoretical Framework

This will look at the theoretical framework, expounding on the theories that form the basis of this study. The study is founded on two theories, the social contract theory and the deterrence theory.

Chapter 3: Legal Framework in Kenya Governing Police Oversight

This will be an analysis of the existing legal framework for police oversight, both constitutional and statutory, also looking at the institutions that are established by the law to facilitate police oversight. The laws that are looked at are the Constitution of Kenya, 2010, the National Police Service Act and the Independent Policing Oversight Authority Act.

Chapter 4: History of Extrajudicial Killings and their Investigation in Kenya

This will cover the history of extrajudicial killings, in relation to their oversight before the police reforms as well as analysing the fact of extrajudicial killings after the 2009 police reforms and the promulgation of the Constitution of Kenya 2010.

Chapter 5: Analysis of Findings

This will be an analysis of the findings of the previous chapter to show the challenges that have been faced in the oversight of police, particularly in relation to extrajudicial killings. It will be important so as to show why Kenya needs to improve its oversight mechanisms which will in turn aid in the reduction of the number of extrajudicial killings.

Chapter 6: Conclusion and Recommendations

This will give a conclusion on the issue of police oversight over extrajudicial killings as well as recommendations to improve the established oversight mechanisms same with regard to the investigation of extrajudicial killings.

CHAPTER 2: THEORETICAL FRAMEWORK

2.1 Introduction

This chapter will focus on the theoretical framework that forms the basis of this study. This study is founded on two theories, the social contract theory and the deterrence theory. I will also look at the normative human rights framework, both internationally and regionally.

2.2 Social Contract Theory

The social contract theory has various proponents, the main ones being Thomas Hobbes, John Locke and Jean-Jacques Rousseau. For Thomas Hobbes, the social contract is a phenomenon whereby, given that men are naturally self-interested, yet they are rational, they will choose to submit to the authority of a Sovereign in order to be able to live in a civil society, which is conducive to their own interests.¹⁷ According to him, before the social contract, man lived in a state of nature which was one of fear and selfishness. In other words, life in the state of nature was solitary, poor, nasty, brutish and short.¹⁸ In order for him to secure self-protection and preservation, as well as avoiding misery and pain, man entered into a contract.¹⁹ As a result of this contract, the mightiest authority is to protect and preserve their lives and property.²⁰

For John Locke, he used the claim that men are naturally free and equal as part of the justification for understanding legitimate political government as the result of a social contract where people in the state of nature conditionally transfer some of their rights to the government in order to better ensure the stable, comfortable enjoyment of their lives, liberty, and property.²¹ In his idea of the social contract, the state of nature was not as miserable as the one expressed by Thomas Hobbes. His description of the state of nature is free of Hobbes' 'force and fraud', with men instead living together according to reason but lacking a guiding authority to

¹⁷ Friend C 'Social contract theory' Internet Encyclopaedia of Philosophy, —<<http://www.iep.utm.edu/soc-cont/#SH2a>> on 2 September 2017.

¹⁸ Hobbes T, *Leviathan*, 2nd ed, Dent, London, 1937, 83.

¹⁹ Laskar M, 'Summary of social contract theory by Hobbes, Locke and Rousseau' (hereafter 'Summary of the social contract by Hobbes, Locke and Rousseau') Published LLM Thesis, Symbiosis Law School, Pune, 2013, 1.

²⁰ Laskar M, 'Summary of social contract theory by Hobbes, Locke and Rousseau', 2.

²¹ Tuckness A 'Locke's political philosophy' Stanford Encyclopaedia of Philosophy, 11 May 2016 — <<https://plato.stanford.edu/entries/locke-political/>> on 2 September 2017.

follow.²² Under the social contract, man surrendered some of his rights, which were the rights to preserve/maintain order and enforce the law of nature.²³

Lastly, for Rousseau, the social contract arises whereby individuals give up some of their rights to the general will. According to Rousseau, the original freedom, happiness, equality and liberty which existed in primitive societies prior to the social contract was lost in the modern civilisation. The state was a new form of social organization that was formed to assure and guarantee rights, liberties freedom and equality.²⁴

The applicability of this theory to this study would be based on the fact that the police, being state actors, by committing extrajudicial killings are violating the social contract. The police are agents of the government, which would then mean that they are bound by the social contract that the citizens entered into with the government. Citizens have given up their rights to the state for collective security. Moreover, the power that the police have is held in public trust. Carrying out an extrajudicial killing and not being held accountable for it would be a grave violation of this public trust. It can be argued that one of the reasons for the existence of the oversight bodies is to ensure that the social contract is not violated.

2.3 Deterrence Theory

The deterrence theory is a theory of punishment whereby one is punished in order to deter themselves and other members of society committing the same crime. It lends itself to the prevention and control of a person's actions and behaviors through fear and threat that there will be consequences for the person's undesired or unlawful conduct.²⁵

For Thomas Hobbes, this is in relation to the social contract theory. By giving up some rights, individuals are making themselves part of the social contract. There are two important aspects of the contract, the rules by which each person must abide and the punishments for violating

²² Mouritz T, 'Comparing the social contracts of Hobbes and Locke' Volume 1 *The West Australian Jurist*, 2010, 126.

²³ 'Summary of social contract theory by Hobbes, Locke and Rousseau', 4.

²⁴ 'Summary of social contract theory by Hobbes, Locke and Rousseau', 5.

²⁵ Barela P, 'Understanding the effects of body worn cameras on police interactions with the public: Impact on number of assaults on officers and use of force complaints against officers' Published LLM Thesis, University of Colorado, Colorado Springs, 2017, 16.

those rules.²⁶ There is a difference between the effects of the threat of punishment, which is general deterrence, and the effect of the imposition of punishment, which is special deterrence.²⁷ Oversight would serve as a general deterrent, in that the threat of punishment which could be imposed if an officer is found guilty of committing an extrajudicial killing would stop them from doing it. Oversight would also act as a special deterrent in a case where a police officer is found guilty of perpetrating an extrajudicial killing. Once an officer is imprisoned for an extrajudicial killing, in the event that they are released, that imprisonment would deter them from committing another extrajudicial killing.

In this case, the police perpetuating extrajudicial killings is a violation of the rules set when citizens and the state entered into the social contract and the oversight bodies are supposed to start the journey to the punishment for such actions. Such punishment or the threat of the same would deter the perpetrator of the extrajudicial killing as well as other police officers from such misconduct.

For the deterrence theory, the existence of a legal framework that prescribes the steps to be taken after such an action and the consequences of the violation of what is required of the police should dissuade them from misconduct, in this case, extrajudicial killings. Moreover, the existence of a properly functional oversight body would further the aim of deterring police officers from such conduct.

2.4 The Normative Human Rights Framework

2.4.1 International Instruments

There exists a human rights framework that sets standards which would then guide police accountability and oversight, whether it is through internal mechanisms or external ones, such as civilian oversight. The framework is in the form of the rights that are ought to be protected by the state as well as standards that have been set by international organizations for law enforcement, including those for the use of firearms.

²⁶ Marshall C, 'Deterrence theory' *Encyclopedia of Crime and Punishment*, 2002, 512 —<
<http://faculty.washington.edu/matsueda/courses/371/Readings/Deterrence.pdf>> on 2 September 2017.

²⁷ The Academy for Justice, *Reforming criminal justice Volume 4: Punishment, incarceration and release*, 2017, 19.

The International Covenant on Civil and Political Rights provides that State Parties shall ensure that any person whose rights or freedoms granted by the Covenant have been violated has effective remedy. This is notwithstanding the fact that the violation has been committed by persons acting in an official capacity. State Parties ought to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and develop the possibilities of judicial remedy, and that the competent authorities shall enforce such remedies when granted.²⁸ Extrajudicial killings are a violation of the right to life and the state, regardless of the fact that they are committed by its agents, ought to protect its citizens.

The UN Code of Conduct for Law Enforcement Officials is an important set of principles for accountable policing. It not only sets out general standards of behaviour for police officials but also specifies in Article 8 that any violation of the Code shall be reported to the superior authorities and, if necessary, to other appropriate authorities or organs vested with reviewing or remedial power.²⁹ Article 3 also stipulates that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. The use of firearms is considered to be an extreme measure, with every effort being made to exclude their use.³⁰ In the General Assembly Resolution adopting the Code of Conduct, it is acknowledged that every law enforcement agency should be representative of and responsive and accountable to the community as a whole.³¹ It is clear that any use of force that exceeds the limits set out in the Code of Conduct would be unlawful and therefore, the officer ought to be held liable for the same.

Moreover, in the Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials, it is stated that an effective mechanism should be created to ensure internal discipline, external control and supervision of law enforcement officials. This

²⁸ Article 2, *International covenant on civil and political rights*, 16 December 1966, 999 UNTS 171.

²⁹ UNGA, *Code of conduct for law enforcement officials*, UN A/RES/34/169 Annex 5 February 1980.

³⁰ UNGA, *Code of conduct for law enforcement officials*.

³¹ UNGA, *Code of conduct for law enforcement officials*.

mechanism should be authorised to receive complaints from the public with the existence of such provisions being made known to the public.³²

The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials establish rules for the reporting and review of incidents when death or serious injury occurs as a result of the use of force and firearms, and whenever a firearm is used in the course of duty.³³ Principle 6 states that where injury or death is caused by the use of force and firearms by law enforcement officials, they ought to report the incident promptly to their superiors.³⁴ Principle 22 provides that governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In case of death or serious injury, a detailed report has to be sent to the competent authorities responsible for administrative review and judicial control.³⁵

Principle 23 adds that persons affected by the use of force and firearms, or their legal representatives, shall have access to an independent process, including a judicial process.³⁶ Principle 24 provides that in case there has been an unlawful use of a firearm, the government and law enforcement agencies should ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.³⁷ These principles provide a framework that the authority which is reviewing the use of firearms, be it the judiciary or an oversight body, should follow.

The 2016 Minnesota Protocol on Investigation of Potentially Unlawful Death came into force in 2017 replacing Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. It states that protection of the right to life means

³² *ECOSOC Resolution 1989/61, Guidelines for the effective implementation of the code of conduct for law enforcement officials*, 24 May 1989.

³³ Amnesty International, *Police Oversight*, 2015, 9.

³⁴ *Basic principles on the use of force and firearms by law enforcement officials* (hereafter the *Basic principles on the use of force and firearms by law enforcement officials*), Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

³⁵ *Basic principles on the use of force and firearms by law enforcement officials*, 27 August to 7 September 1990.

³⁶ *Basic principles on the use of force and firearms by law enforcement officials*, 27 August to 7 September 1990.

³⁷ *Basic principles on the use of force and firearms by law enforcement officials*, 27 August to 7 September 1990.

preventing the arbitrary deprivation of life, including through an appropriate framework of laws, regulations, precautions and procedures. It also requires accountability for the arbitrary deprivation of life whenever it occurs.³⁸ It adds that the duty to investigate any potentially unlawful death includes all cases where the State has caused a death or where it is alleged or suspected that the State caused a death (for example, where law enforcement officers used force that may have contributed to the death).³⁹

The Protocol also gives elements of the duty to investigate which based on international law are that investigations should be prompt; effective and thorough; independent and impartial; and transparent. Being prompt means that the investigation should be conducted as soon as possible from the time of occurrence of the death and proceed without unreasonable delay.⁴⁰ As for the requirement for the investigation to be effective and thorough, investigations ought to seek to identify not only direct perpetrators but also all others who were responsible for the death an example being officials in the chain of command who were complicit in the death. Being effective and thorough entails the capability of the investigations to ensure accountability for unlawful death and where it is justified, prosecution and punishment of those responsible for those killings thus preventing future unlawful death. It would also entail the investigation being carried out in a manner that is in accordance with good practice.⁴¹

The investigative mechanism entrusted to conduct the investigation must be adequately empowered to do so. Minimum standards for such a mechanism include having the legal power to compel witnesses and require the production of evidence, having sufficient financial and human resources, which would qualified investigators and relevant experts. Any investigative mechanism must also be able to ensure the safety and security of witnesses, including, where necessary, through an effective witness protection programme.⁴²

³⁸ *The Minnesota protocol on the investigation of potentially unlawful death (2016): The revised United Nations manual on the effective prevention and investigation of extra-legal, arbitrary and summary executions* (hereafter *The Minnesota protocol on the investigation of potentially unlawful death*), Office of the United Nations High Commissioner for Human Rights, 2017, 3.

³⁹ *The Minnesota protocol on the investigation of potentially unlawful death (2016)*, 5.

⁴⁰ *The Minnesota protocol on the investigation of potentially unlawful death (2016)*, 7.

⁴¹ *The Minnesota protocol on the investigation of potentially unlawful death (2016)*, 7.

⁴² *The Minnesota protocol on the investigation of potentially unlawful death (2016)*, 8.

For independence and impartiality, investigators and investigative mechanisms must be, and must be seen to be, independent of any undue influence. They must be independent institutionally and formally, as well as in practice and perception, at all stages. Lastly, for transparency, States should, at a minimum, be transparent about the existence of an investigation, the procedures to be followed in an investigation, and an investigation's findings, including their factual and legal basis.⁴³

2.4.2 Regional Instruments

In General Comment No. 3 on the African Charter on Human and Peoples' Rights on the right to life (Article 4), the African Commission on Human and Peoples' Rights states that the failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right.⁴⁴ It also adds that accountability requires investigation and, where appropriate criminal prosecution.⁴⁵

In the Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, the African Commission on Human and Peoples' Rights urges State Parties to the African Charter, in Article 3, to establish independent civilian policing oversight mechanisms which shall include civilian participation.⁴⁶

⁴³ *The Minnesota protocol on the investigation of potentially unlawful death* (2016), 8.

⁴⁴ *General Comment No.3 on the ACHPR: The right to life (Article 4)*, 2015, 10.

⁴⁵ *General comment 3 on the ACHPR*, 11.

⁴⁶ *Resolution on police reform, accountability and civilian police oversight in Africa*, ACmHPR 40th Ordinary Session, 2006.

CHAPTER 3: LEGAL FRAMEWORK IN KENYA GOVERNING

POLICE OVERSIGHT

3.1 Introduction

In as much as there is an international and regional framework for police oversight, it is important to look at the Kenyan framework to establish whether such provisions have been covered in our legislation. These include laws relating to police accountability, oversight and the use of firearms as well as the human rights framework.

3.2 Constitutional Framework

The Constitution of Kenya of 2010 is a manifestation of the social contract between the people of Kenya and the government. Article 1 (1) states that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.⁴⁷ Article 1 (2) adds that the people may exercise their sovereign power either directly or through their democratically elected representatives.⁴⁸ One of the basic tenets of the social contract is that citizens give up some of their rights to the state in order to have other rights protected by the State. Article 1 is a manifestation of the existence of a social contract between the citizens and the government of Kenya. There exists an extensive rights regime under Chapter 4 of the Constitution. Article 20 (1) states that the Bill of Rights applies to all law and binds all State organs and all persons.⁴⁹ The right to life is among these rights with Article 26 (3) stating that a person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.⁵⁰

All these provisions show the integral nature of the right to life in a society and that the police would be required to respect it. Extrajudicial killings committed by the police are therefore a grave violation of this right, especially because the police are agents of the state, and the state has a responsibility to protect its citizens' rights, meaning that the state would not be absolved from liability. In as much as the state is required to ensure that police officers adhere to the

⁴⁷ Article 1(1), *Constitution of Kenya* (2010).

⁴⁸ Article 1(2), *Constitution of Kenya* (2010).

⁴⁹ Article 20(1), *Constitution of Kenya* (2010).

⁵⁰ Article 26(3), *Constitution of Kenya* (2010).

legal requirements that have been set for their conduct, in the event that the police act in a manner contrary to them, the state still has a responsibility to hold them accountable for their actions. The responsibility of the state is envisioned under Article 21 (1) which provides that the state and every state organ have a fundamental duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.⁵¹

The Constitution establishes the National Police Service (NPS) as a national security organ under Article 239 and 243. Under Article 238 (2), one of the principles of national security is that it should be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms.⁵² Article 244 of the Constitution of Kenya, 2010 requires the police to strive for the highest standards of professionalism and discipline among its members as well as to prevent corruption and promote and practise transparency and accountability while carrying out their duties.⁵³ They are also required to comply with constitutional standards of human rights and fundamental freedoms.⁵⁴

It should be noted that although the Constitution states all this, Article 239 (5) states that national security organs are subordinate to civilian authority.⁵⁵ This is an important provision as it gives legitimacy to the establishment of a civilian oversight body for the police. It shows that despite the fact that as there is a robust human rights framework as well as principles and objects guiding the police, they cannot operate in a vacuum.

There are other institutions which are established under the Constitution which due to their mandate, can exercise oversight over the police. Such an institution is the Kenya National Commission on Human Rights which is established pursuant to Article 59 (4) of the Constitution of Kenya. Among its functions, the most relevant to police oversight is that it is to promote the protection and observance of human rights in public and private institutions as well as monitoring, investigating and reporting on the observance of human rights in all spheres in the Republic, including observance by the national security organs.⁵⁶ The

⁵¹ Article 25(1), *Constitution of Kenya* (2010).

⁵² Article 238(2), *Constitution of Kenya* (2010).

⁵³ Article 244, *Constitution of Kenya* (2010).

⁵⁴ Article 244(c), *Constitution of Kenya* (2010).

⁵⁵ Article 239(5), *Constitution of Kenya* (2010).

⁵⁶ Article 59(2), *Constitution of Kenya* (2010).

Commission can also receive and investigate complaints about alleged abuses of human rights.⁵⁷ It is an independent commission.⁵⁸ The link between the functions of this Commission and police oversight mechanisms over extrajudicial killings arises from the fact that they are a violation of the right to life.

3.3 The Statutory Framework

Section 41 of the National Police Service Act provides for the establishment of County Policing Authorities for each county. Some of the functions of these authorities include ensuring police accountability to the public and ensuring compliance with national policing standards.⁵⁹ This ensures that although the Police Service is a national security organ, there is an additional level at which they can be held accountable for their actions, which is the county level. These authorities report to the Inspector-General, Cabinet Secretary, County Assembly and Governor of the respective county.⁶⁰

Section 87 of the National Police Service Act establishes the IAU which is supposed to receive and investigate complaints against the police. The Unit has the power to investigate complaints from members of the Service or those of the public; at the direction of a senior officer; on its own initiative; on the direction of the Inspector General or; at the request of IPOA.⁶¹ The only independence that can be inferred from the rest of the Service is from the fact that the Unit is to be located in separate offices from the rest of the Service.⁶² However, physical independence is not enough. There is also the fact that the Unit should not be subject to the control, direction or command of the Kenya Police, Administration Police or the Directorate.⁶³ However, the law does not guarantee such operational independence. It states that the IAU should report directly to the Assistant Inspector-General who will subsequently report to the Inspector-General.⁶⁴ Additionally, in as much as the law provides that the unit should be located in separate offices

⁵⁷ Article 59(2), *Constitution of Kenya* (2010).

⁵⁸ Article 59(5)(c), *Constitution of Kenya* (2010).

⁵⁹ Section 41, *National Police Service Act* (Act No. 11A of 2011).

⁶⁰ Section 41(10), *National Police Service Act* (Act No. 11A of 2011).

⁶¹ Section 87(4), *National Police Service Act* (Act No. 11A of 2011).

⁶² Section 87(7), *National Police Service Act* (Act No. 11A of 2011).

⁶³ Section 87(11), *National Police Service Act* (Act No. 11A of 2011).

⁶⁴ Section 87(9), *National Police Service Act* (Act No. 11A of 2011).

from the rest of the Service, their offices are currently at Jogoo House, which is where the offices of the Inspector-General and headquarters of the Administration Police are found.

In relation to the use of force and firearms, the Sixth Schedule of the National Police Service Act stipulates conditions for their use. Paragraph 5 of Part A of the Sixth Schedule provides that any use of force that leads to death, serious injury and other grave consequences shall be reported immediately by the officer in charge or another direct superior of the person who caused the death or injury, to IPOA who shall investigate the case. Failure to report such conduct is considered a disciplinary offence.⁶⁵ Paragraph 5 of Part B of the Sixth Schedule states that any use of firearms that leads to death, serious injury and other grave consequences shall be reported by the officer in charge or another direct superior of the person who caused the death or injury, to IPOA who shall investigate the case.⁶⁶ Paragraph 1 of Part C of the Sixth Schedule gives superior officers the duty to prevent unlawful use of force and firearms, and in case such unlawful use occurs, they ought to report it to IPOA as well as the Inspector General.⁶⁷

In addition to the IAU, IPOA, established under the Independent Policing Oversight Authority Act and is aimed at holding the police accountable to the public in the performance of their functions by providing for civilian oversight.⁶⁸ This gives effect to Article 239 (5) on the subordinate nature of national security organs, in this case, the NPS, to civilian authority. The Authority is also supposed to give effect to Article 244 of the Constitution of Kenya, in that the police should strive for professionalism and discipline as well as promotion and practicing transparency and accountability.⁶⁹ In addition, the Authority is also supposed to ensure independent oversight of the handling of complaints by the Service.⁷⁰

How then would extrajudicial killings fall within the realm of complaints that IPOA can handle? Section 2 states that misconduct means any action, or failure or refusal to act, which although it may not necessarily constitute a contravention of law, does not meet the

⁶⁵ Sixth Schedule, *National Police Service Act* (Act No. 11A of 2011).

⁶⁶ Sixth Schedule, *National Police Service Act* (Act No. 11A of 2011).

⁶⁷ Sixth Schedule, *National Police Service Act* (Act No. 11A of 2011).

⁶⁸ Section 5(a), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁶⁹ Section 5(b), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁷⁰ Section 5(c), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

requirements or norms of policing contained in any regulation or official document, charter, standing orders or policy providing for rules on the use or abuse of power or rules and regulations on the use of equipment, applicable to members of the Service.⁷¹

This definition is applicable to extrajudicial killings due the fact that they go against the constitutional requirements for policing and the requirements for use of firearms in which will have been provided for in the National Police Service Act. Extrajudicial killings are a contravention of the law and they constitute a criminal offence as opposed to being viewed as mere misconduct. Section 4 of the Independent Policing Oversight Authority Act provides that the Authority established is independent, not being subject to any person, office or authority.⁷² The importance of this independence will be seen in Chapter 4.

It is also important to look at the functions and powers of the Authority in order to see what they can and cannot do. The functions are provided for in Section 6 of the Independent Policing Oversight Authority Act. One of the functions includes investigation of any complaints related to criminal offences committed by any member of the service whether on its own motion or on receipt of a complaint, and making recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief.⁷³

The Authority also receives and investigates complaints by members of the Service.⁷⁴ This is important because a complaint about an extrajudicial killing can come either from a member of society or from a police officer who is aware about commission of the same. For police, it would also be important because they would not have to worry about the consequences that they could suffer in case they report an incident to their superiors.

They should also investigate and monitor policing operations which would affect members of the public.⁷⁵ Lastly, they are tasked with monitoring, reviewing and auditing investigations and actions taken by the IAU of the Service in response to complaints against the police and keep

⁷¹ Section 2, *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁷² Section 4, *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁷³ Section 6(a), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁷⁴ Section 6(b), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁷⁵ Section 6(c), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

a record of all such complaints regardless of where they have been first reported and what action has been taken.⁷⁶

While the authority has all these functions, are their powers sufficient enough for them to exercise their mandate? Section 7 of the Act provides for the powers of the Authority. One of the powers is investigation of the Service on its own motion or on receipt of complaints from members of the public, and for this purpose, it can gather any information that it considers necessary by such lawful means as it may deem appropriate.⁷⁷

Some of the ways the Authority is allowed to gather information include investigating any death that has occurred or is suspected to have occurred as a result of police action; recommending to the DPP the prosecution of a person for any offence; requisition of information from the Service; search and seizure as well as interviewing and taking statements from individuals under oath of affirmation.⁷⁸

The Authority also has the power to take over ongoing internal investigations into misconduct or failure to comply with any law if such investigations are inordinately delayed or manifestly unreasonable.⁷⁹ This power is also provided for in Section 87 (5) of the National Police Service Act. This power is important because there are possibilities that the IAU is not adequately discharging its mandate which can result in officers not being held liable for their actions.

The Authority does not have any prosecutorial powers upon the completion of an investigation. Section 29 provides for the steps after investigations. One of these steps include recommending the prosecution of a member of the Service to the DPP where the inquiry, in their opinion, discloses a criminal act by that member.⁸⁰ The other steps are that where an inquiry discloses negligence in the performance of duty by a member of the Service, the Authority could recommend that disciplinary action be taken against that member.⁸¹ The Authority could also recommend that a complainant take any other course of action suitable in the circumstances.⁸²

⁷⁶ Section 6(d), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁷⁷ Section 7(1)(a), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁷⁸ Section 7(1)(a), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁷⁹ Section 7 (1)(b), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁸⁰ Section 29(1)(a), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁸¹ Section 29(1)(b), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

⁸² Section 29(1)(d), *Independent Policing Oversight Authority Act* (Act No. 35 of 2011).

This will be important in order to establish whether the Authority would require prosecutorial powers in order to effectively discharge their mandate while exercising oversight over the police on issues of extrajudicial killings.

3.4 Conclusion

There is a robust legal framework which provides for and necessitates police oversight over extrajudicial killings. These range from a vast human rights framework to the establishment of institutions that are supposed to exercise oversight over the Service at different levels. Kenya therefore adopts a model where there is both internal and external oversight of the NPS. These institutions ought to ensure that the police are held accountable for their actions, although whether or not this is the case will be looked at in the next chapter.

CHAPTER 4: HISTORY OF EXTRAJUDICIAL KILLINGS AND THEIR INVESTIGATION IN KENYA

4.1 Introduction

Prior to police reform, there were no oversight institutions that dealt with the Police Force. With the police reforms, various institutions have been established and even with such institutions, extrajudicial killings are still ongoing, with the police rarely being held liable for their actions. This chapter will look at the situation pre and post police reforms, assessing whether there are factors that could be affecting the investigation of extrajudicial killings in Kenya.

4.2 Before Police Reform (Between 2007 and 2010)

Before the promulgation of the Constitution of Kenya 2010, the police service was divided into two: the Kenya Police Force established under the Police Act and the Administration Police Force which was established under the Administration Police Act.⁸³ Under both legislations, there was no established oversight body, whether external or internal. The fact that the police force functioned as two units gave the executive arm of government a chance to exercise political control over the police force which operated as a department under the Office of the President. While the general mandates of the regular and administration police officers were identical, they differed in their core purpose – the former was primarily designed for crime prevention and detection, while the latter mainly focused on securing government officials and assets.⁸⁴ The report also points out that the impunity for human rights violations committed by the police continued because of the lack of accountability faced by officers for acts in violation of the law.⁸⁵ The fact that the police would not be prosecuted for their actions was also a challenge for accountability.

The disputed 2007 General Election led to post-election violence. This resulted in a lot of deaths, 405 of which were as a result of gunshot wounds, representing 37.5% of the total

⁸³ Amnesty International, *Police reform in Kenya: 'A drop in the ocean'*, 2013, 17.

⁸⁴ Amnesty International, *Police reform in Kenya: 'A drop in the ocean'*, 2013, 17.

⁸⁵ Amnesty International, *Police reform in Kenya: 'A drop in the ocean'*, 2013, 18.

number of deaths that had occurred during this period.⁸⁶ The Commission of Inquiry on Post-Election Violence found that the police were responsible for all cases of shooting since no evidence to the contrary was ever shown. The Commission gave recommendations for the Police. These included a comprehensive reform of both the Kenya Police Service and the Administration Police Service as well as the establishment of an Independent Police Conduct Authority.⁸⁷ The killings that took place in the course of post-election violence fall under extrajudicial killings and the report shows that there were no oversight mechanisms that dealt with the police at that point in time. The report also recommended that the government should establish a special tribunal to investigate individuals suspected of such violence.⁸⁸ However, no local tribunal was established.

There was compelling evidence that the police responded, more often than not, with unlawful force, resulting in killing, rather than arresting suspects. Investigations by police were so deficient and compromised that claims by the police that all killings are lawful were inherently unreliable and unsustainable.⁸⁹ This study intends to show that the involvement of police in the killings, even with the legal obligation to report any death that results from the use of their firearms cannot be deemed to be an efficient mechanism, as the oversight authority would be highly reliant on the police themselves, who in turn would not be willing to incriminate themselves.

In the 2009 Report of the National Task Force on Police Reforms, it is pointed out that there was an internal complaints mechanism that had been provided for in the Kenya Police Standing Orders. This mechanism was supposed to deal with complaints from the public and those from police officers. However, complaints received had little, if any success. The Report points out a need for an internal enforcement mechanism to deal with complaints against the police.⁹⁰ The Report then deals with the issue of external accountability. It states that the police have powers, which if not held accountable for, would lead to abuse of their powers and pave way for police

⁸⁶ Commission of Inquiry into Post-Election Violence, *Report of the commission of inquiry into post-election violence* (hereafter *CIPEV Report*), 2008, 311.

⁸⁷ *CIPEV Report*, 478-479.

⁸⁸ *CIPEV Report*, 472.

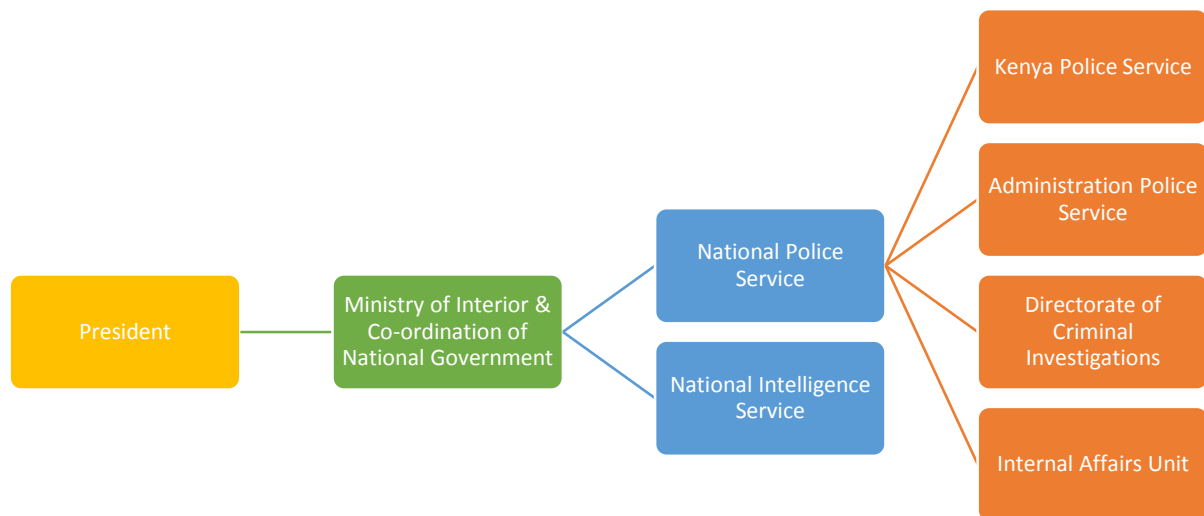
⁸⁹ *Report of the special rapporteur on extrajudicial, summary or arbitrary executions*, Philip Alston, 26 May 2009, UN Doc A/HRC/11/2/Add.6, para. 9.

⁹⁰ *Ransley Task Force Report*, 80.

misconduct.⁹¹ There was no institution, at that point, which had its mandate solely being police oversight.⁹² It was noted that one of the factors that necessitated the establishment of an external oversight body was the fact there had been complaints, which included, but were not limited to the use of excessive force including extrajudicial executions.⁹³

4.3 After Police Reforms (2010 to Present)

The Constitution of Kenya of 2010 necessitated police reforms. One of the changes that came with the police reforms was the restructuring of the Police Service and the establishment of an external oversight mechanism. This was made possible by the enactment of the statutes covered in Chapter 3 (the National Police Service Act and the Independent Policing Oversight Authority Act). The restructuring of the Police Service was a recommendation of both the Commission of Inquiry on Post-Election Violence and the National Task Force on Police Reforms. This restructuring brought the Kenya Police and Administration police under the command of the Inspector-General. An organogram of the current structure of the Service can be seen below.



⁹¹ *Ransley Task Force Report*, 81.

⁹² *Ransley Task Force Report*, 84.

⁹³ *Ransley Task Force Report*, 88.

With the IAU being an internal oversight mechanism, it is hard to determine whether they are independent of any influence from the Police Service. It is different to the earlier complaints desks in that it is established clearly as a separate unit in the legislation, with separate and stronger powers and functions.⁹⁴ The only independence that we are aware of is the fact that their offices ought to be separate from the rest of the service.⁹⁵ There have been no reports issued by the IAU which makes it difficult to know the number of complaints they have received as well as the investigations they have conducted. As mentioned in Chapter 3, the IAU reports to the Assistant Inspector-General who subsequently reports to the Inspector General.⁹⁶

The IAU has taken too long to be operationalized and this has placed a huge responsibility on IPOA, which currently handles a large number of cases that would have otherwise been handled with the Unit.⁹⁷ Incidents of deaths arising from police action or inaction have remained high among the complaints received by the Authority. The Authority has plans to gradually hand over other categories of complaints to IAU so as to fully concentrate its resources on the most serious categories of deaths and injuries caused by police action or inaction.⁹⁸ However, these categories have not been provided for. This is relevant to the study as it shows the necessity of coordination between the internal and external oversight bodies for there to be resolution of cases of extrajudicial killings, as the police would be held accountable, thus leading to reduction of the same.

Failure to gather evidence that would result in convictions is one of the factors that motivates security agencies, which include the police service, to resort to extrajudicial killings.⁹⁹ Although a number of individuals and organisations had complained about or reported cases of extra judicial executions to the relevant authorities, no serious investigations had never been conducted and no single police officer or security agent had been prosecuted for their role or

⁹⁴ Centre for Human Rights and Policy Studies (CHRIPS) and African Policing Civilian Oversight Forum (APCOF), *Local policing accountability in Kenya: Challenges and opportunities*, 2014, 9.

⁹⁵ Section 87(7), *National Police Service Act* (Act No. 11A of 2011).

⁹⁶ Section 87(9), *National Police Service Act* (Act No. 11A of 2011).

⁹⁷ Kenya National Commission on Human Rights and Centre for Human Rights and Peace (The University of Nairobi), *Audit of the status of police reforms in Kenya*, 2015, 33.

⁹⁸ Kenya National Commission on Human Rights and Centre for Human Rights and Peace (The University of Nairobi), *Audit of the status of police reforms in Kenya*, 2015, 33.

⁹⁹ Kenya National Commission on Human Rights, *Are we under siege? The state of security in Kenya*, 2014, 40.

involvement in extrajudicial executions as of 2014.¹⁰⁰ The extent to which the IAU had delivered on its mandate remained doubtful as the levels of internal accountability within the service were still very low.¹⁰¹ Both internal and external police accountability have not improved despite the existence of IPOA.¹⁰² With complaints of extrajudicial killings still being reported in the name of fighting criminality as well as human rights violations, this points to the fact that the Authority needs to do more to ensure that the culture of accountability is entrenched in policing.¹⁰³

A 2016 report titled ‘What Do We Tell The Families’ by Haki Africa, a Non-Governmental Organisation outlines 31 cases of extrajudicial killings, which were carried out by individuals recognisable as police or members of Kenyan security, or by unidentified, non-uniformed individuals.¹⁰⁴ It is also stated that where the killings were reportedly conducted by unidentified individuals, the possibility remains that they have been carried out by a proxy rather than police officers or government agents proper.¹⁰⁵ This reiterates the position that despite the existence of oversight mechanisms, extrajudicial killings are still ongoing, showing that there is a gap in how their mandate is being exercised.

The Independent Medico-Legal Unit (IMLU) has also published various reports detailing extrajudicial killings. In 2015, they documented 126 police killings, with 97 being summary executions, 20 being people who were killed to protect life and 7 resulting from unclear circumstances.¹⁰⁶ In 2016, there were 144 police killings, 122 being summary executions, 6 being killed to protect life and 16 resulting from unclear circumstances.¹⁰⁷ Between January and March 2017, there were 60 police killings, 33 being summary executions, 14 being killed to protect life and 13 resulting from unclear circumstances.¹⁰⁸ These killings having occurred after the establishment of the oversight mechanisms show that there has been no change in

¹⁰⁰ Kenya National Commission on Human Rights, *Are we under siege? The state of security in Kenya*, 2014, 40.

¹⁰¹ Kenya National Commission on Human Rights, *Are we under siege? The state of security in Kenya*, 2014, 71.

¹⁰² Kenya National Commission on Human Rights, *Are we under siege? The state of security in Kenya*, 2014, 82.

¹⁰³ Kenya National Commission on Human Rights, *Are we under siege? The state of security in Kenya*, 2014, 83.

¹⁰⁴ Haki Africa, *What do we tell the families?*, December 2016, 22.

¹⁰⁵ Haki Africa, *What do we tell the families?*, December 2016, 22.

¹⁰⁶ Independent Medico-Legal Unit, *Report on deaths from police bullets from January to December 2015*, 2015, 2.

¹⁰⁷ Independent Medico-Legal Unit, *Deaths from police bullets from January to December 2016*, 2016, 2.

¹⁰⁸ Independent Medico-Legal Unit, *Deaths by police officers from January to March 2017*, 2017, 1-2.

police conduct, with extrajudicial killings still being rampant and police not being held accountable.

IPOA Reports, which are published biannually, document the nature of complaints that the Authority receives during the given period. Between January and June 2013, there were 2 cases of unlawful killings which were being investigated.¹⁰⁹ Between July and December 2013, there were 22 cases which were investigated, 9 being complaints on unlawful killings.¹¹⁰ One of the challenges that was pointed out in that report was the fact that the Authority was experiencing and foresaw lack of cooperation from the police when it came to investigations. The report also stated that there had been difficulties in concluding some investigations due to interference of evidence by suspected police officers.¹¹¹

Between January and June 2014, there were 123 cases which were investigated, with 62 being deaths which arose from police action or inaction.¹¹² During this period, the Authority faced various challenges. These included budget constraints, failure of other institutions to cooperate, hampering of evidence and inadequate staffing.¹¹³ Between July and December 2014, there were 54 cases which were investigated, with 9 being cases of death which arose from police action or inaction.¹¹⁴ In relation to unlawful killings, the Authority faced several challenges including contamination of evidence, mishandling of exhibits, and inconclusive forensic evidence due to flawed recording, collection and preservation of such evidence. All these challenges led to suspects not being identified.¹¹⁵ Other challenges included under-funding, inadequate number of investigators and inadequate cooperation from some police commanders.¹¹⁶

Between January and June 2015, there were 83 cases which were investigated, with 26 cases being deaths which arose from police action or inaction.¹¹⁷ The challenges faced were similar

¹⁰⁹ Independent Policing Oversight Authority, *Performance report (January - June 2013)*, 2013, 5.

¹¹⁰ Independent Policing Oversight Authority, *Performance report for six months ended 31st December 2013 (July 2013 - Dec 2013)*, 2013, 12.

¹¹¹ Independent Policing Oversight Authority, *Performance report for six months ended 31st December 2013 (July 2013 - Dec 2013)*, 2013, 21.

¹¹² Independent Policing Oversight Authority, *Performance report (January 2014 - June 2014)*, 2014, 21.

¹¹³ Independent Policing Oversight Authority, *Performance report (January 2014 - June 2014)*, 2014, 38.

¹¹⁴ Independent Policing Oversight Authority, *Performance report (July - December 2014)*, 2014, 25.

¹¹⁵ Independent Policing Oversight Authority, *Performance report (July - December 2014)*, 2014, 26.

¹¹⁶ Independent Policing Oversight Authority, *Performance report (July - December 2014)*, 2014, 40.

¹¹⁷ Independent Policing Oversight Authority, *Performance report (January - June 2015)*, 2015, 25.

to those pointed out in previous years, including the lack of an independent ballistic or forensic services provider, which meant that the Authority had to rely on the Police Ballistics Laboratory.¹¹⁸ Between July and December 2015, the Authority did not give a breakdown of the nature of cases that they had investigated. However, it pointed out that it received 1,203 complaints, with 53 being complaints of police shootings.¹¹⁹ During this period, only 63 investigations were completed.¹²⁰ One of the challenges that was faced during this period was the delay of processing of complaints that were referred to the IAU.¹²¹

Between January and June 2016, the Authority received 1,326 complaints, with 117 being complaints of police shootings and deaths.¹²² Out of this number, only 94 cases were investigated.¹²³ One of the challenges that the Authority faced was that its services were inaccessible due to its centralized locality.¹²⁴ Between July and December 2016, 37 cases of death resulting from police actions or inactions were investigated.¹²⁵ Some of the challenges that the Authority faced were reduced cooperation from the National Police Service which hindered execution of the Authority's mandate as well as reduction of the government's budget allocation which constrained operations.¹²⁶

Another challenge that IPOA has faced, although it has not been documented in the reports, is that of parliamentary interference. In 2015, Parliament sought to amend the Independent Policing Oversight Authority Act in order to give the President power to remove the chairperson of the board whenever he deemed it necessary, without the procedure of receiving a recommendation from a tribunal before removing a member of the Authority.¹²⁷ In 2016, Parliament sought to amend the same Act to provide for confidentiality of documents or other information produced by serving or retired police officers summoned to appear before the Authority.¹²⁸

¹¹⁸ Independent Policing Oversight Authority, *Performance report (January - June 2015)*, 2015, 41.

¹¹⁹ Independent Policing Oversight Authority, *Performance report (July - December 2015)*, 2015, 21.

¹²⁰ Independent Policing Oversight Authority, *Performance report (July - December 2015)*, 2015, 25.

¹²¹ Independent Policing Oversight Authority, *Performance report (July - December 2015)*, 2015, 40.

¹²² Independent Policing Oversight Authority, *Performance report (January - June 2016)*, 2016, 18.

¹²³ Independent Policing Oversight Authority, *Performance report (January - June 2016)*, 2016, 22.

¹²⁴ Independent Policing Oversight Authority, *Performance report (January - June 2016)*, 2016, 39.

¹²⁵ Independent Policing Oversight Authority, *Performance report (July - December 2016)*, 2016, 22.

¹²⁶ Independent Policing Oversight Authority, *Performance report (July - December 2016)*, 2016, 45.

¹²⁷ *The Statute Law (Miscellaneous Amendments) Bill (2015)*.

¹²⁸ *The Statute Law (Miscellaneous Amendments) Bill (2016)*.

There have been a number of extrajudicial killings which have caused public unrest. One of these killings is that of Aboud Rogo in 2012. Rogo, who was on sanctions lists by the United States and United Nation for allegedly supporting Somalia's Al-Qaeda-linked Shabaab militants, was killed when unidentified gunmen opened fire on his vehicle as he was driving with his wife and children, sparking furious protests.¹²⁹ In this case, IPOA stated that it was invited to participate in the investigations but did not meaningfully do so because it lacked internal investigative capacity and also did not have control over the whole investigation process.¹³⁰

A more recent case is that of Willie Kimani. He disappeared after lodging a complaint on behalf of a client, who was also killed, along with their driver. The Law Society of Kenya called on all lawyers to boycott courts with nationwide protests being organised.¹³¹ Hundreds of people marched to protest against their apparent extrajudicial killings with demonstrators carrying a mock coffin emblazoned with the words "stop extrajudicial killings". Others wore T-shirts bearing the slogan "stop police executions".¹³² It is this public outcry that can be seen to have led to the investigation of those killings.

4.4 Conclusion

Looking at these reports, it is evident that even with the existence of an internal oversight mechanism as well as an independent oversight body and various reports of extrajudicial killings, there has been no change in the occurrence of such killings and the police are not being held accountable for their conduct. These internal and external oversight bodies are not hampered by lack of law but by operational constraints. With the challenges that have been detailed by the Authority over the years, it is clear that things such as the fact that the police

¹²⁹ Kangethe K, 'Public inquest recommended in 2012 Rogo killing' Capital News, 26 August 2013, — <<https://www.capitalfm.co.ke/news/2013/08/public-inquest-recommended-in-2012-rogo-killing/>> on 18 December 2017.

¹³⁰ Independent Policing Oversight Authority, *Inaugural performance report (June to December 2012)*, 2012, 14.

¹³¹ 'Kenyan police in court over lawyer Willie Kimani's death' BBC News, 4 July 2016 — <<http://www.bbc.com/news/world-africa-36703271>> on 18 December 2017.

¹³² Burke J and Mutiga M, 'Kenyans protest over alleged extrajudicial killings of trio by police' The Guardian, 4 July 2016, — <<https://www.theguardian.com/world/2016/jul/04/kenya-protest-nairobi-alleged-extrajudicial-killings-willie-kimani>> on 18 December 2017.

are involved in such killings as well as lack of effective cooperation with the established internal oversight mechanism have hindered proper oversight over extrajudicial killings.

CHAPTER 5: ANALYSIS OF FINDINGS

5.1 Introduction

Having looked at international standards, domestic standards and the current situation on the oversight mechanisms on unlawful police action with regard to extrajudicial killings in Kenya, it is clear that there needs to be some change in the current system. This chapter analyses the findings in the previous chapters to show why Kenya needs to improve its oversight mechanisms in order to ensure a reduction in the number of extrajudicial killings.

5.2 Failure of accountability, investigation and proper law enforcement

Accountability can be defined as a system of internal and external checks and balances aimed at ensuring that police carry out their duties properly and are held responsible if they fail to do so.¹³³ That system ought to uphold police integrity and deter misconduct and to restore or enhance public confidence in policing. Police integrity refers to normative and other safeguards that keep police from misusing their powers and abusing their rights and privileges.¹³⁴ Accountable policing would mean that the police accept being questioned about their decisions and actions and accept the consequences of being found guilty of misconduct, including sanctions and having to compensate victims.¹³⁵

Law enforcement agencies should be subjected to appropriate control and oversight of their compliance with the legal and operational framework that governs their functioning and be held accountable for the fulfilment of their duties, including with regards to their use of force.¹³⁶ Effective accountability would require a proper complaints system that is easily accessible to the public and that can effectively investigate allegations and recommend disciplinary sanctions or refer cases for criminal prosecution.¹³⁷ It would involve identification

¹³³ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, iv.

¹³⁴ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, iv.

¹³⁵ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, 9.

¹³⁶ Office of the United Nations High Commissioner for Human Rights and United Nations Office on Drugs and Crime, *Resource book on the use of force and firearms in law enforcement*, 2017, 19.

¹³⁷ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, iv.

and punishment of those who have committed misconduct, and ensuring accountability after the act.¹³⁸ At present, there is a complaints system which is accessible to the public, with citizens being allowed to make complaints by going to IPOA's offices, online, by writing letters, through telephone calls. It is a mechanism that is also open to complaints from members of the Service.

Moreover, effective accountability would also involve guidance for the police on what to do and how they ought to do it.¹³⁹ This is generally referred to as accountability before the act.¹⁴⁰ This oversight role is the instruction, policy or legal requirement that is set before policing takes place.¹⁴¹ In relation to accountability before the act, there are no clear laws and policies on the use of force and firearms in Kenya. The instruments discussed in Chapter 2 are merely soft law, meaning they are not necessarily binding to the NPS even though they are legal standards. The National Police Service Act provides that the Cabinet Secretary is to make further regulations on the lawful use of force and use of firearms.¹⁴² To date, there are no such regulations. It is therefore difficult to ensure accountability before the act without a clear legal framework which ought to guide police actions. Furthermore, there is no publicly available code of conduct for the NPS that implements the legal standards that are stipulated in international law.

Despite the number of complaints that IPOA receives annually, there are very few cases that end up being prosecuted in court. This means that they are not punished for the commission of such crimes, therefore, they continue to carry out their duties without being in accordance with the law. In the Kenyan context, we have seen that there has been failure of accountability, both before and after the fact. Moreover, with the requirement that each county ought to have a County Policing Authority, this could also help with ensuring accountability of the police to the members of the public at a decentralized level of government. More than six years since

¹³⁸ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, 10.

¹³⁹ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, 10.

¹⁴⁰ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, 10.

¹⁴¹ African Policing Civilian Oversight Forum, *Building capacity in the civilian oversight of African policing*, 2013, 9.

¹⁴² Sixth Schedule, *National Police Service Act* (Act No. 11A of 2011).

the commencement date of the National Police Service Act, these Authorities are yet to be operationalised.¹⁴³

In relation to investigation, this would not only involve the oversight bodies but also the criminal justice system. The elements of the duty to investigate are that the investigation ought to be prompt; effective and thorough; independent and impartial; and transparent.¹⁴⁴ As seen in the previous chapter, the investigations conducted by IPOA do not satisfy all of these elements, leading to inadequate investigation. The fact that there is a backlog in the complaints being investigated means that investigations are not prompt even after receipt of the complaints by IPOA. There are very few extrajudicial killings which have led to public uproar, such as that of Willie Kimani. However, even in this case, the investigative process has not been completed to date and the police officers responsible for his death have not been held liable to date as the proceedings are still ongoing. The law does not set out timelines for the amount of time that should be taken to conduct investigations. This could also be a contributing factor to the investigations not being prompt.

The investigations conducted by IPOA fail to meet the element that investigations should be effective and thorough. This is because the investigations have not yet, so far, ensured accountability for the extrajudicial killings that have been committed. The investigations have not led to prevention of such killings from occurring. In fact, the number of killings have been increasing in some years. Ideally, if the oversight mechanisms were efficient, police officers would be deterred from committing extrajudicial killings, leading to a reduction in the number of deaths.

Lastly, there is the issue of proper law enforcement. The mere fact that extrajudicial killings are being carried out by the police, and they still continue to happen shows that there is systemic failure. For proper law enforcement to exist, there are various things that would have to exist in addition to oversight mechanisms. There would need to be a clear set of rules and guidelines that the police ought to follow and that they can be held accountable for if they do

¹⁴³ Ombati C and Obala R, 'Governors demand operationalisation of county policing authority as police bosses "resist"' Standard Digital, 2 January 2018 —<<https://www.standardmedia.co.ke/article/2001264810/governors-demand-operationalisation-of-county-policing-authority-as-police-bosses-resist>> on 18 December 2017.

¹⁴⁴ *The Minnesota protocol on the investigation of potentially unlawful death* (2016), 5.

not. Presently, there are no set standards in Kenyan law that would guide police on the use of the firearms. It would be very easy for the police to justify their use of firearms as being within the grounds set out in the Sixth Schedule of the National Police Service Act, an example being that the use of firearms was as a measure of self-defence.

Establishing a system that reinforces compliance with international human rights obligations and promotes standards and norms on crime prevention and criminal justice as well as international good practices requires not only an adequate legal and operational framework but also the political will, the resources and institutions to implement and act accordingly.¹⁴⁵ In order to mitigate this systemic failure, it would be important for the oversight mechanisms that have been created under the law to regulate police conduct. It would also be necessary for the international human rights standards which are just guidelines at this point to be legislated.

5.3 Widespread nature of extrajudicial killings and police involvement in investigation

As has been shown, there is an issue of extrajudicial killings being widespread. This is in respect to the number of killings as well as the number of places that the killings occur. The number of killings that are reported tend to be high, with the highest having been 117 between January and June 2016.¹⁴⁶ The reports by IMLU also show that the killings occur in various counties, with the latest report detailing killings in 9 out of the 47 counties.¹⁴⁷ This is a problem because IPOA only has offices in Nairobi, Kisumu, Garissa and Mombasa.¹⁴⁸ It is necessary to further decentralise the services of the Authority to the remaining counties to ensure that their investigations are more effective.

From the previous chapters, it has been clear that the police are involved at various stages from commission of the act to its investigation. The police are not only perpetrators of the killings, they are also relied upon during the investigation of the killings, for example, the use of the police ballistics laboratory. There were also various complaints of the police delaying responses to requests for information as well as contamination of evidence which would be

¹⁴⁵ Office of the United Nations High Commissioner for Human Rights and United Nations Office on Drugs and Crime, *Resource book on the use of force and firearms in law enforcement*, 2017, 8.

¹⁴⁶ Independent Policing Oversight Authority, *Performance report (January - June 2016)*, 2016, 18.

¹⁴⁷ Independent Medico-Legal Unit, *Deaths by police officers from January to March 2017*, 2017, 3.

¹⁴⁸ Independent Policing Oversight Authority, *Performance report (July - December 2016)*, 2016, 21.

necessary for the Authority to conduct their investigations. It is clear that the fact that the police are involved in the operations of the Authority is a hindrance to the investigation of the killings. This also brings up the issue of the independence of the oversight mechanisms from the NPS.

In order to be ‘independent’, there must be ‘practical independence’ and a ‘lack of hierarchical or institutional connection’ between investigators and those implicated in abuses.¹⁴⁹ Therefore, there must be both independence in law and in fact. Investigators may not rely entirely or heavily on information provided by those implicated in abuses.¹⁵⁰ Moreover, the ‘investigation’s conclusions must be based on thorough, objective, and impartial analysis of all relevant elements’.¹⁵¹ This would mean that the oversight bodies ought not to rely too much on the police while conducting their investigations. It would also mean that when it comes to the IAU, it would be important to ensure that they are located separately from the rest of the Service in order to partially guarantee their independence and comply with the National Police Service Act.

Police involvement also becomes an issue when it comes to compliance with the law. They are required to give IPOA details of any killings or serious injury within 24 hours of their occurrence. IPOA has stated that the number of deaths reported by the NPS is not reflective of the number of deaths as a result of police actions that were received through other channels, implying non-compliance by the NPS.¹⁵² This is because it is difficult to assume that police will want to be held liable for their actions, knowing that they would then end up being prosecuted and punished. The requirement that superior officers should report any unlawful use of force and firearms is also not met. An example can be drawn from the July to December 2016 report whereby out of the 35 death complaints that the Authority received, only 3 were from a police station.¹⁵³ This hinders investigation in that the oversight authorities would not have sufficient information while conducting an investigation.

¹⁴⁹ *Report of the special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 28 May 2010, UN Doc A/HRC/14/24/Add.8, para. 23.*

¹⁵⁰ *Report of the special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 28 May 2010, UN Doc A/HRC/14/24/Add.8, para. 23.*

¹⁵¹ *Report of the special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 28 May 2010, UN Doc A/HRC/14/24/Add.8, para. 23.*

¹⁵² Independent Policing Oversight Authority, *Performance report (July - December 2016)*, 2016, 21.

¹⁵³ Independent Policing Oversight Authority, *Performance report (July - December 2016)*, 2016, 21.

5.4 Mandate and resources of the Authority

Mandates need to be realistic and fair, and powers and resources must be adequate to fulfil those mandates.¹⁵⁴ The Authority has as clear mandate which is set out under Section 6 of the Independent Policing Oversight Authority Act. The powers are limited to conducting investigations but the Authority does not have any prosecutorial powers. Whether or not a matter is to be prosecuted is at the discretion of the DPP. This could be seen as an issue because very few matters out of the ones reported to IPOA end up getting prosecuted, meaning that those liable for the extrajudicial killings would not be prosecuted or punished.

It is important to consider whether the Authority should have the power to initiate proceedings without necessarily having to go through the Director of Public Prosecutions. This would not be a discretionary power, it would be dependent on the findings of the investigations that have been conducted and if an officer is found to have committed an offence, they would initiate proceedings, instead of having to wait for the DPP to determine whether or not the matter would be prosecuted. Having such a power would create a higher possibility that the police officers who have committed extrajudicial killings would be held liable for their actions, thus deterring other officers from perpetrating them.

There have also been instances where Parliament has attempted to interfere with the mandate of the Authority, which would affect the independence which is necessary for the Authority's operation. These instances were covered in Chapter 4. These did not succeed due to the backlash that Parliament faced from the Authority itself as well as civil society.¹⁵⁵ However, IPOA has faced a challenge in relation to resources, especially funding. The Authority has complained about the reduction in their budget allocation, most recently at the onset of the 2016/2017 budget.¹⁵⁶ This hinders the capacity of the Authority to investigate complaints. It is necessary for IPOA to have adequate monetary resources to enable effective execution of its mandate.

¹⁵⁴ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, 55.

¹⁵⁵ Mukinda F and Ngirachu J, 'Government wants to reduce powers of IPOA through law' Daily Nation 21 January 2017, —<<https://www.nation.co.ke/news/government-reduce-power-ipoa-law/1056-3782348-s180i8/index.html>> on 18 December 2017.

¹⁵⁶ Independent Policing Oversight Authority, *Performance report (July - December 2016)*, 2016, 45.

5.5 Enhanced co-ordination between internal and external oversight mechanisms

From the analysis of the reports by IPOA in the previous chapter, it is clear that there has been very little cooperation between the Authority and the IAU. It is unwise to vest all authority over the police on any single body, regardless of whether that body represents the executive, or the community, or is an independent oversight body, since impartiality cannot be assured.¹⁵⁷ This justifies the existence of both internal and external oversight mechanisms.

External oversight and accountability mechanisms act together with internal police mechanisms to monitor police performance and ensure it is in accordance with the law and professional standards, and to hold officers accountable where misconduct does occur.¹⁵⁸ The mechanisms aim to prevent police abuse of powers and illegitimate interference in policing, thereby increasing police professionalism and integrity and improving public trust in the police.¹⁵⁹

Without external oversight mechanisms, police leaders could fail to investigate or punish misconduct, which could lead to ineffective internal control. There are several benefits of external oversight mechanisms. They may achieve greater impartiality (at least in the public's view) in the investigation of serious allegations against police officers.¹⁶⁰ Furthermore, they may be better placed to encourage police officers to give evidence against other officers, particularly against their supervisors.¹⁶¹ Nevertheless, external oversight mechanisms have to be complemented by internal control and oversight, because in a number of instances internal investigation mechanisms might have structural advantages such as a greater amount of resources, more available data (police archives; witness reports; police officer statements), and better knowledge of the police environment.¹⁶²

¹⁵⁷ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, 13.

¹⁵⁸ Commonwealth Human Rights Initiative, *A force for good? Improving the police in Kenya, Tanzania and Uganda*, 2014, xi.

¹⁵⁹ Commonwealth Human Rights Initiative, *A force for good? Improving the police in Kenya, Tanzania and Uganda*, 2014, xi.

¹⁶⁰ Geneva Centre for the Democratic Control of Armed Forces, *Guidebook on democratic policing*, 2009, 20.

¹⁶¹ Geneva Centre for the Democratic Control of Armed Forces, *Guidebook on democratic policing*, 2009, 20.

¹⁶² Geneva Centre for the Democratic Control of Armed Forces, *Guidebook on democratic policing*, 2009, 20.

There have been complaints by IPOA that the IAU delays in processing complaints that the Authority refers to them. With the Authority aiming at focusing on the investigation of deaths resulting from police actions or inactions, such delay can be detrimental. This is because the Authority ends up handling more cases than it ideally should. In their biannual reports, there have been several instances in which they have provided the number of backlog cases. In the July to December 2016 report, it is stated that backlog is an issue that the Authority has faced since its inception.¹⁶³ Between January and June 2014, there were 179 complaints out of the 281 received which were awaiting investigation, which made the backlog 64%.¹⁶⁴

Between July and December 2014, there were 429 complaints out of the 697 received which were awaiting investigation, which made the backlog 62%.¹⁶⁵ Between January and June 2015, there were 540 complaints out of the 911 received which were awaiting investigation, which made the backlog 59%.¹⁶⁶ Between July and December 2015, there were 767 complaints out of the 1927 received which were awaiting investigation, which made the backlog 40%.¹⁶⁷ These numbers show that backlog is a big challenge to the Authority. The police bear the prime responsibility for the integrity and overall performance of their force, and as a consequence they should continue to carry out internal investigations. This can also help to prevent external bodies from becoming overloaded with work, which may seriously jeopardize their effectiveness.¹⁶⁸

Extrajudicial killings are very sensitive, owing to the fact that they violate principles on use of firearms as well as fundamental rights such as the right to life. In the reports published by IPOA, it has been stated that the IAU is yet to become fully operational, with IPOA giving recommendations to ensure adequate staffing so as to increase its capacity. There are various reasons why internal oversight mechanisms need to be effective. Without a strong internal oversight system, it would be impossible to create a culture of accountability, discipline and laws within the police and external systems would be unable to secure the co-operation that

¹⁶³ Independent Policing Oversight Authority, *Performance report (July - December 2016)*, 2016, 24.

¹⁶⁴ Independent Policing Oversight Authority, *Performance report (July - December 2015)*, 2015, 26.

¹⁶⁵ Independent Policing Oversight Authority, *Performance report (July - December 2015)*, 2015, 26.

¹⁶⁶ Independent Policing Oversight Authority, *Performance report (July - December 2015)*, 2015, 26.

¹⁶⁷ Independent Policing Oversight Authority, *Performance report (July - December 2015)*, 2015, 26.

¹⁶⁸ United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, 2011, 13.

they need from the police in order to take corrective action.¹⁶⁹ It would therefore be important to ensure that the IAU is well established in order to ensure that a culture of accountability is fostered within the NPS, making it easier for IPOA to execute its mandate.

5.6 Conclusion

This analysis has shown why it is necessary for improvements to be made in relation to both the IAU and IPOA in order to ensure that there is effective oversight of extrajudicial killings. These improvements are required for some aspects of the law as well as in the operationalisation of the existent legal framework.

¹⁶⁹ African Policing Civilian Oversight Forum, *Building capacity in the civilian oversight of African policing*, 2013, 11.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

The social contract theory, the deterrence theory and the normative human rights framework have provided a foundation for this study. With the state having entered a social contract with its citizens and the police being state agents, it is clear that the perpetration of extrajudicial killings by the police is a violation of this contract. The state will then have an obligation to protect its citizens right to life from any violation that is not within the limits of the law. The oversight mechanisms would need to be effective in order to ensure that the social contract is not continually violated as has been the case since the establishment of the oversight bodies, therefore necessitating enhanced accountability of the National Police Service.

The deterrence theory is also important because punishment or threat of punishment should prevent the perpetration of extrajudicial killings. However, as was shown in Chapter 4, even with the existence of the IAU and IPOA, extrajudicial killings are still rampant. This is an indicator that the police are not being deterred from committing extrajudicial killings. It is necessary for these institutions to be operating effectively in order for the police to know that there is a possibility of punishment for their conduct.

The Constitution of Kenya of 2010 lays emphasis on the protection and promotion human rights. This makes the soft law covered under the normative human rights framework extremely relevant and persuasive in this study. This framework gives requirements for well-established oversight mechanisms and throughout the study, it has been shown why it would be necessary for the oversight mechanisms in Kenya to be improved. These include the fact that state has an obligation to protect the right to life and in case the right is violated, the victim has an effective remedy.

The framework also includes principles on the use of force and firearms which should guide law enforcement officials. It is important that these principles are included in Kenyan legislation in order for the state to meet its international obligations. The normative human rights framework also shows the importance of the National Police Service having a set code of conduct to guide their operations. It also shows why the oversight mechanisms would need to have some changes implemented to ensure they meet the elements of the duty to investigate.

The Constitution of Kenya of 2010 necessitated police reforms which led to an extensive human rights framework as well as the establishment of oversight bodies which had police oversight as their sole mandate. With these reforms, crimes such as extrajudicial killings would have been expected to reduce. This is because it gives primacy to the recognition of human rights and their protection, including by national security organs such as the National Police Service. Based on the findings on the occurrences of extrajudicial killings, this is not the case. It is clear that there is a grave violation of rights and that the established oversight mechanisms are not adequately playing their role in ensuring that the police are held accountable for their actions.

The findings prove the hypothesis that was given at the beginning of the study, that the legal framework and the institutions tasked with police oversight are weak, and that the existing police oversight system needs to be improved in order to adequately address valid complaints of extrajudicial killings. This is because they show that there are various challenges, mostly operational ones, that are faced by the oversight bodies, especially IPOA, which in turn make them weaker than they ought to be in exercising their mandate. These challenges include the lack of cooperation by the National Police Service, interference by the police in investigations, delays by the IAU in processing complaints, parliamentary interference with both the mandate and the resources allocated to IPOA and the IAU not being operationally autonomous, among others.

With all these challenges, I would propose both legal and operational changes in order to enhance police accountability in cases of extrajudicial killings, ensuring that there is no violation of the social contract, that the deterrence theory is effective and that the human rights framework, both internationally and locally, is promoted and protected.

6.2 Recommendations

There are various recommendations to improve the existent oversight mechanisms and ensure that there will be more effective oversight over extrajudicial killings based on this study. These are:-

- A. Establishment of timelines for conducting investigations.

IPOA and the IAU ought to have timelines stipulated in law to ensure that their investigations are prompt. Parliament should bring in the stakeholders in order to provide a reasonable timeline.

B. Drafting of a publicly available Code of Conduct for the NPS.

The Constitution of Kenya of 2010 recognises the applicability of international law in the country. This includes the Code of Conduct for Law Enforcement Officials. There is currently no publicly available Code of Conduct for the National Police Service. I recommend that one be drafted, borrowing from the UN Code of Conduct for Law Enforcement Officials.

C. Drafting of regulations on the use of force and firearms.

The Sixth Schedule requires that the Cabinet Secretary drafts regulations on the use of firearms. However, it is my recommendation that the regulations be drafted on both the use of force and firearms to ensure clarity in the National Police Service in instances where they have no option but to resort to the use of force and firearms.

D. Ensure that the IAU are given separate offices to guarantee their independence.

With Section 87 of the National Police Service Act stating that the offices of the IAU should be located separately from the rest of the Service, I recommend that the Government takes steps to ensure that this is done. This would guarantee physical independence from the rest of the Service and assist in discharging their mandate.

E. Establishment of an Independent Ballistics Laboratory

Independence is a key requirement for IPOA. However, with IPOA currently has to rely on the Police Ballistics Laboratory to conduct their investigations, I recommend that an Independent Ballistics Laboratory is set up to guarantee and protect the independence of IPOA.

F. Give the IAU a clear mandate.

With IPOA intending to shift its focus to investigation of deaths which occur or are suspected to have occurred as a result of police action, it is necessary for the IAU to have a clear mandate on the complaints which they can investigate. Parliament should amend Section 87 of the National Police Service Act to include the mandate.

G. Accessibility of IPOA's services in all 47 counties.

Currently, IPOA only has offices in 4 out of the 47 counties: Nairobi, Mombasa, Kisumu and Garissa. I recommend that they open offices in the remaining counties to make their services more accessible to the people and to ensure that investigations are easier to conduct.

H. Establishment of County Policing Authorities in all 47 counties.

These Authorities ensure accountability of the police at a decentralized level. These Authorities should be established in all counties pursuant to Section 41 of the National Police Service Act and should also report to IPOA since they are supposed to monitor trends and patterns of crimes in their respective counties.

I. Giving IPOA prosecutorial powers

The Independent Oversight Policing Authority Act should be amended to grant IPOA prosecutorial powers upon the conclusion of their investigations. This could be done by establishing a Commission which could comprise of individuals who have served as judges who would listen to cases in case investigations disclose the commission of an extrajudicial killing.

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