

**FULFILLMENT OF THE RESPONSIBILITY TO PROTECT THROUGH THE USE OF THE
CIVILIAN POLICING OVERSIGHT INSTITUTION IN KENYA**



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for the master of Laws (LLM) Degree program*

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DECLARATION

I, **BERNADETTE MWIKALI MUTIE**, do declare that this is my original work and that the same has not been submitted to any institution for the award of a diploma, degree or post-graduate qualification.

Signature

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This project has been presented for examination with my authority as the University Supervisor

DR. NKATHA KABIRA

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Date:

DEDICATION

I dedicate this research project to my husband and our two lovely daughters.

ACKNOWLEDGEMENT

First and foremost, I thank the Almighty God for being my guard, guide, and provider during the time I undertook this project and throughout my life in general.

My profound gratitude goes to my supervisor Dr. Nkatha Kabira for the invaluable guidance and encouragement she extended to me during the project writing period without which this work would not have been completed in time.

To my dear husband and daughters, your love, support, and understanding saw me go through the project writing process without a hitch. A big thank you to you all.

To my workmates, this work will not have been complete without your support.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AComHPR	The African Commission on Human and Peoples' Rights
APCOF	African Policing Civilian Oversight Forum
AU	African Union
CEO	Chief Executive Officer
CIPEV	Commission of Inquiry into Post Election Violence
CoK	Constitution of Kenya
CPC	Criminal Procedure Code
DPP	Director of Public Prosecutions
eKLR	electronic Kenya Law Reports
HCCrC	High Court Criminal Case
ICCPR	International Convention on Civil and Political Rights
ICESER	International Convention on Social and Economic Rights
IPID	Independent Police Investigative Directorate
IPOA	Independent Policing Oversight Authority
KANU	Kenya African National Union
KDF	Kenya Defence Forces
KNCHR	Kenya National Commission on Human Rights
NARC	National Rainbow Coalition
NIS	National Intelligence Service
OAU	Organization of African Unity
OB	Occurrence Book
OPONI	Office of the Police Ombudsman for Northern Ireland

PEV	Post Election Violence
PRC	Post Rape Care
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCAT	United Nations Convention against Torture
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
US	United States
USSR	Union of Soviet Socialist Republics
WW I	First World War
WW II	Second World War

ABSTRACT

This study connects the international responsibility to protect to policing oversight institutions. It uses the example of Kenya's policing oversight to demonstrate that although Kenya has sought to fulfil its international State obligation to protect its citizens from police acts prohibited under the UNCAT through the Independent Policing Oversight Authority (IPOA), nevertheless, IPOA faces many institutional and legal challenges that hinder the execution of its mandate per international standards. The study makes three arguments. The first argument is that traditionally, the Police is a State organ, which was only accountable to the ruling regime. The second argument is that in Kenya, there exists non-adherence to the rule of law and a lack of full implementation of the existing laws relevant to policing oversight. The third argument is that the Kenyan laws such as the evidence Act, the Firearm Act, the Criminal Procedure Code, amongst others are not in tandem with IPOA Act thus limiting the scope of execution of IPOA's mandate. Because of the challenges it faces locally, IPOA's ability to help Kenya fulfil its international responsibility is compromised. The study relies on historical and sociological legal theories as it employs the doctrinal methodology to - One, illustrate the history of policing that led to the establishment of policing oversight institutions. Two, conduct an in-depth analysis of the institutional and legal framework on policing oversight. Three, outline lessons for Kenya from the best international policing oversight practices. By reviewing the legislative and institutional framework on policing oversight in Kenya, the study demonstrates that realizing effective execution of IPOA's constitutional and statutory mandate in line with set international standards requires a multi-faceted approach. The approach includes respect to the rule of law, full implementation of the existing law on policing oversight, amendment of IPOA Act and other policing oversight related laws to bridge the legal gaps and resolve the existing inconsistencies in those laws. The existing literature fails to examine the framework on civilian policing oversight in Kenya on the State's international responsibility to protect. This study, therefore, is a high reference point for both the Kenyan policymakers, other States and international institutions interested in establishing and strengthening policing oversight institutions.

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CHAPTER ONE: INTRODUCTION OF THE STUDY

1.0 Introduction

State Parties to international human rights legal instruments have to fulfil all the international obligations placed on them by the legal instruments they are member parties.¹ One of the State's obligations under the international conventions is the duty to protect citizens from violation of the rights provided for under the conventions. The States also have a duty to accord effective remedy to victims of human rights violations whenever the violations occur within the State's jurisdiction.² In order for State Parties to fulfil the international obligations, these international human rights instruments call upon State Parties to put in place effective national mechanisms³ that enables States to fulfil the responsibilities cited in the conventions. More particularly, the human rights instruments call upon State parties to hold State officials, including State's security officers, accountable for any human rights violation they may commit.⁴ One of the remedies that a State can accord to a victim of a violation of rights protected under the UNCAT is by way of carrying out investigations into the violations. However, for such investigations to be termed an effective remedy, the international requirements are that a State institution that is independent, impartial and competent enough to carry out conclusive investigations should carry out such investigations promptly.⁵

Scholars and stakeholders in the policing oversight sector agree that certain essential factors must be present for a State to successfully establish and sustain an institution that would hold State Security officers accountable for their actions to the required international standards.⁶ These essential factors are

¹Vienna Convention on the Law of Treaties, art 26.

² See UDHR, art 5; ICCPR, Arts 2(3) (a) and 7; UNCAT art; ACHPR, arts 4, 5 and 6.

³ Article 2(1) of the UNCAT calls upon states to take effective legislative, administrative, judicial or other measures that would eliminate torture of the people within a state's jurisdiction.

⁴ See ICCPR, art 3(2) (a).

⁵ See UNCAT, art 12.

⁶J Miller, 'Civilian Oversight of Policing: Lessons from the Literature' (Global Meeting on Civilian Oversight of Police, Los Angeles 5-8 May 2002), see also Amnesty International, *France: An Effective Mandate for the Defender of Human*

political support, police cooperation, activist support, sufficient resources, positive public attitude, as well as proper management and leadership.⁷

Kenya has an international legal duty to call to account its security agencies, including the Police, for any human rights violations they engage in, per the international human rights standards set in the international instruments it has ratified. In an attempt to fulfil this international duty of establishing, a national mechanism to protect individuals within its jurisdiction against violation of their rights by State security organs, Kenya established IPOA in 2011,⁸ with a broad mandate,⁹ which includes investigating police conduct that infringes on human rights.

The establishment of IPOA followed the incessant calls to the government by the Kenyan people, the civil society organizations and the international community, to put in a mechanism to hold the Police accountable for their rampant violation of human rights protected under the international human rights conventions.¹⁰ The Kenyan parliament enacted the Prevention of Torture Act¹¹ to cement the role of IPOA in helping the Kenyan State fulfil its international responsibility set under the UNCAT.¹² The Act mandates IPOA to investigate cases of violation of provisions of the legislation perpetrated by any member of the National Police Service.¹³ However, IPOA, as is currently constituted, faces a myriad of

Right (Amnesty International Publications 2009) 9-16, Amnesty International, *Public Outrage: Police Officers above the Law in France* (Amnesty International Publications April 2009, African Policing Civilian Oversight Forum, *An Audit of Policing Oversight in Africa*, (African Minds for the African Police Oversight Forum 2008).

⁷ J Miller, 'Civilian Oversight of Policing: Lessons from the Literature' (Global Meeting on Civilian Oversight of Police, Los Angeles 5-8 May 2002) 11.

⁸ See IPOA Act 2011.

⁹ IPOA Act 2011, ss 5, 6 and 25 sets out the objectives of IPOA and the specific mandate respectively.

¹⁰ See the CIPEV Report, in which the Commission reported and documented that during the 2007/2008 Post election Violence, police officers were perpetrators of Gender based violence and were responsible for occasioning 450 deaths.

¹¹ Prevention of Torture Act 2017.

¹² The Long Title to the Prevention of Torture Act provides that the legislation is for enacted "to give effect to Article 25(a) and 29(d) of the Constitution and to the principles of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for the prevention, prohibition and punishment of acts of torture and cruel, inhuman or degrading treatment or punishment; reparations to victims of torture and cruel, inhuman or degrading treatment or punishment; and for connected purposes"

¹³ Prevention of Torture Act 2017, s 13(6).

institutional challenges that hinder the carrying out of its mandate to the required international human rights standards. The challenges range from non-cooperation from the National Police Service and other institutions involved in policing oversight,¹⁴ inadequate resources, lack of political goodwill as well as lack of essential legal powers.¹⁵ Legal gaps and limiting provisions in IPOA Act, as well as inconsistencies and limiting provisions in other statutes relevant to policing oversight, contribute to IPOA's challenges. The parliament needs to address the challenges to enable the Authority to carry out its mandate effectively and per the internationally accepted standards.

1.1 Background of the Study

Countries all over the world saw the necessity to establish civilian policing oversight institutions when they realised that police power is a double-edged weapon that police officers may use, either, as a liberty or an oppression weapon.¹⁶ The realization then led members of the public to call on States to establish independent police accountability mechanisms to hold the Police accountable for any violation of human rights that they may perpetrate.¹⁷

The study covers its detailed background, which entails the history of policing oversight at the international, regional, and local levels in the next chapter. For clarity purposes, the study covers the history at each level as follows: - at the international level, the study has the history of policing in four parts that cover the First World War, the Second World War period, the Cold War period, and the Contemporary period. At the regional level, the study covers the history of policing oversight as a whole.

¹⁴ The National Police Service Commission, the Office of the Director of Public Prosecutions, the Office of the Attorney General, etc.

¹⁵ IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 93-99.

¹⁶ APCOF, *An Audit of Policing Oversight in Africa*, (African Minds for the African Police Oversight Forum 2008) 1.

¹⁷Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, ACHPR/Res.103a (XXXX) 06.

Further, the study has the history of policing oversight at the local level as at different periods that cover the Pre-colonial and the Colonial Era; Post-independence up to the promulgation of the Constitution of Kenya, 2010; and lastly the Post- promulgation of the Kenya's 2010 Constitution.

In essence, taking into account the history of policing oversight and the mandate that Kenya entrusts in IPOA to contribute towards the fulfilment of the State's international responsibility, the study examines the various institutional challenges that hinder IPOA in achieving its mandate. The study also examines the efficacy of the legal framework on policing oversight in Kenya to see whether the law is capable of addressing the various institutional challenges identified as facing IPOA. The study further benchmarks on two other policing oversight institutions with a view of drawing lessons that will enable IPOA to effectively deliver its mandate and make the Kenyan State meet its international responsibility.

1.2 Problem Statement

Although Kenya has sought to fulfill its international State obligation to protect its citizens from acts prohibited under the UN Convention against Torture through IPOA, nevertheless, the Authority is facing many institutional and legal challenges that hinder the execution of its mandate to the required international standards. IPOA's failure to meet international standards exposes Kenya to the risk of being held to be in breach of its international State duty to protect its citizens from police acts outlawed in the UNCAT. The failure also leaves the Kenyan population without any independent policing accountability mechanism to hold the police accountable for any breach of human rights in line with international standard given that IPOA is the only institution in Kenya mandated to investigate police acts outlawed in the Prevention of Torture Act and the UNCAT.

1.3 Research Questions

The research project aims to answer the following questions: -

- a) Why is IPOA failing to meet international standards in the execution of its constitutional and statutory mandate?
- b) What is the history of policing that necessitated the establishment of policing oversight institutions?
- c) What is the efficacy of the legal framework for policing oversight in Kenya?
- d) What lessons can Kenya learn from best international policing oversight practices?
- e) What recommendations can one make for the effective execution of IPOA's mandate?

1.4 Objectives of the Research

The study covers the following objectives: -

- a) To examine why IPOA is failing to meet international standards in the execution of its constitutional and statutory mandate.
- b) To outline the history of policing that brought the necessity of policing oversight institutions internationally, regionally and Kenya in particular.
- c) To analyse the efficacy of the legal framework on policing oversight in Kenya.
- d) To identify the lessons that Kenya can learn from the best international policing oversight practices.
- e) To make recommendations that will lead to better execution of IPOA's Constitutional and statutory mandate.

1.5 Hypothesis

The study hypothesizes that although Kenya has mandated IPOA to contribute to its fulfilment of international State obligation set under the UN Convention against Torture, nevertheless, the institution is facing numerous challenges that hinder its execution of the mandate to live up to the international human rights standards. This is because; first, traditionally, the Police institution is a State organ, which was only accountable to the ruling regime. Second, in Kenya, there exists non-adherence to the rule of law and a lack of full implementation of the existing laws relating to policing oversight. Third, Kenyan laws such as the Evidence Act, the Firearm Act, and the Criminal Procedure Code, amongst others are not in tandem with IPOA Act thus limiting the scope of execution of its mandate. Because of the challenges it faces locally, IPOA's ability to meet international standards and help Kenya fulfil its international obligation is compromised.

1.6 Theoretical Framework

The study bases its foundation on the interaction of the two interdependent theories of historical jurisprudence and sociological jurisprudence. The study, however, is more inclined to the sociological jurisprudence given that scholars take the historical school of jurisprudence as a weak and slightly eccentric relation that jurists mention as the antecedent of the sociological jurisprudence.¹⁸

1.6.1 Historical Jurisprudence

Friedrich Carl von Savigny is one of the strong proponents of the Historical Jurisprudence.¹⁹ He advocates that one should view law as an inherent part of the ongoing life of a society emanating from

¹⁸Rodes RE, *On the Historical School of Jurisprudence*, (2004) 49(165) Am. J. Juris; Maureen Maina, 'Land Disputes Resolution in Kenya: A Comparison of the Environment and Land Court and the Land Dispute Tribunal' (LLM Dissertation, University of Nairobi 2012).

¹⁹R Pound, *The Scope and Purpose of Sociological jurisprudence*, I. School of Jurists and Methods of Jurisprudence (28 Harvard Law Review 24), (June1911, 591-619)599.

the spirit of the people and shaped by the specific experience of each society.²⁰ He proposes that law is not a product of conscious process but that social pressure brings about rules.²¹ He is of the view that legislation can never be effective as it seeks to attain the unattainable and seeks to make that, which is impossible.²² He insists that one should look at the law in action in line with the people's past experiences and current circumstances in society.²³ Von Savigny, opposes the idea of the universality of the law underpinned in the natural law theory.²⁴

Bluntschli criticizes von Savigny's view of the law on the basis that while law should reflect the first experiences of a society, law should also concern itself with the future to enable society to know where it is heading.²⁵ In his view, society should use law for the present and that past experiences or future prediction are only relevant to the law if they influence the present life of a society.²⁶

Just like Von Savigny, this study agrees that the historical experiences of people should impact and shape the law, which should reflect their particular historical experiences.²⁷ The study also agrees with Von Savigny, in as far as he is opposed to the idea of the universality of the law underpinned in the natural law theory.²⁸ The study, however, departs from Savigny's legal theory in as far as it underscores the importance of legislation.²⁹ The study also identifies with Bluntschli's criticism of the Historical

²⁰Rodes RE, *On the Historical School of Jurisprudence*, (2004) 49(165) Am. J. Juris.; R Pound, The Scope and Purpose of Sociological jurisprudence, I. School of Jurists and Methods of Jurisprudence (28 Harvard Law Review 24), (June 1911, 591-619) 599.

²¹ *ibid* (n 19).

²² *ibid*.

²³ JP Omony, *Key Issues in Jurisprudence: An In-Depth Discourse on Jurisprudence Problems* (1st edn, Law Africa 2006) 98.

²⁴ *ibid*.

²⁵ *ibid* (n 19) 603.

²⁶ *ibid*.

²⁷ *ibid* (n 23).

²⁸ *ibid*.

²⁹ Roscoe Pound (n 22) 599.

Jurisprudence in as far as he holds that law should concern itself with a society's future for it to steer the society to where it desires to go.³⁰

In view of the foregoing regarding the postulates of historical jurisprudences, the study is concerned that despite the wide past experience of the Kenyan people with police violation of human rights, Parliament did not take all the major experiences into account at the time when it legislated IPOA Act. The Parliament should have left matters of police misconduct for the exclusive investigation of IPOA, since the police institution had previously failed to hold the police accountable for human rights violation in line with international standards and as such contributed to Kenya's failure to fulfill its international State obligation to protect its citizens against the police misconduct. Parliament should also have reviewed the existing laws to harmonize them with the provisions of IPOA Act to ensure that those laws do not hinder the execution of IPOA's mandate.

1.6.2 The Sociological Jurisprudence

Roscoe Pound is one of the strong proponents of sociological jurisprudence.³¹ In advancing this theory of law, Pound draws from the postulates of other proponents of sociological jurisprudence. For instance, with regard to the purpose of the law being to serve societal needs by reconciling the ever-conflicting societal needs and the individual's selfish interest,³² Pound borrows this idea from R. von Jhering.³³ He further develops the idea and propounds that law orders conduct to satisfy the needs and interests of as many people as possible with the minimum friction and waste.³⁴ He goes further and classifies interests

³⁰ibid 603.

³¹ MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7thedn, Sweet & Maxwell, 2001) 472-678.

³² ibid 662.

³³ Lived between 1818 and 1892.

³⁴ ibid (31) 673.

into individual interests, public interests and social interests.³⁵ Pound also draws the idea of living law from Eugen Erlich³⁶ whereby Erlich argues that one needs to look within and observe how the society follows, modifies, ignores and supplements the formal law, to come up with the living law.³⁷ Roscoe Pound on the other hand argues that one should determine actual law through observable phenomenon in the society, by observing both the law as provided in statutes and texts and law in action.³⁸

Pound strongly advocate for the law to go beyond the historical development of a nation and to reflect the current needs and desires of the people in contemporary social conditions.³⁹ He argues that when the legislature enact laws that reflect beyond the history of a nation, the law will be capable of resolving challenges faced by a nation at every particular time.⁴⁰ He, therefore, proposes one to use law as a social engineering tool.⁴¹

Pound argues that law that does not reflect the social realities and conditions of the people it seeks to serve is inadequate and incomplete and amounts to what he terms as dead law.⁴² The reflection of social realities and conditions of a people is the point where the sociological school of thought departs from the natural school of thought.⁴³

Julius Stone criticizes Pound's propositions on public desires. He argues that in the era of technology, one may experience difficult in determining what amounts to real public desires or even actual desires

³⁵ MDA Freeman (n 31) 673, see also, Charles Fried, "Two Concepts of Interests" (76 Harvard Law Review) 755.

³⁶ Lived between 1862 and 1922.

³⁷ MDA Freeman (n 31) 670.

³⁸ JP Omony, *Key Issues in Jurisprudence: An In-Depth Discourse on Jurisprudence Problems* (1stedn, Law Africa 2006) 91.

³⁹ *ibid* 86.

⁴⁰ *ibid*.

⁴¹ MDA Freeman (n 31) 673.

⁴² *ibid* (n 38) 86.

⁴³ *ibid*.

of a specific group.⁴⁴ Stone is of the view that these desires persuaders operating either in the open or at the background may influence the determination of the desires.⁴⁵ He is also of the view those who are powerful may manipulate public expressions, to take the form of public interests, for their selfish gains.⁴⁶

The study identifies with Roscoe Pound on the view that States can deliberately use legislation to lead their people in the direction they consider to be of benefit to them or in response to its people's desires and to advance international development.⁴⁷ States are currently demonstrating this by the establishment of policing oversight institutions to comply with provisions of international human rights conventions.

There exists a conflict of interest between the interests of the members of the public and the demand of the international law on one hand, and the interests of the police leadership and Kenya's Political leadership on the other. While the Kenyan public and the international law have an interest to a competent police accountability mechanism to hold the police accountable for human rights violations as per international standards, the political and the police leadership are interested to retain the status quo whereby the police institution was only accountable to the ruling regime.

Kenya established IPOA to deal with police violation of human rights and later mandated the institution to contribute to its fulfilment of international responsibility to protect. This study therefore questions whether the parliament applied the balancing equation in enacting IPOA law to meet the desires of the Kenyan people and those of the police. The study will also examine whether the Kenyan parliament have observed IPOA Act and other policing oversight related laws in action to take note of the need to

⁴⁴ MDA Freeman (n 41).

⁴⁵ MDA Freeman (n 31) 673, see also J. Stone, "Human Law and Human Justice" (Stanford University Press, 1965) 278-279, 282-284).

⁴⁶ MDA Freeman (n 31) 674.

⁴⁷ JP Omony, *Key Issues in Jurisprudence: An In-Depth Discourse on Jurisprudence Problems* (1stedn, Law Africa 2006) 98.

reform those laws to enable IPOA meet international standards in execution of its mandate. The study further relies on the sociological school of jurisprudence to demonstrate that at the time of enacting IPOA Act, parliament did not consider using law as a tool of social engineering in that; it did not enact IPOA Act with the necessary foresight to seal all the possible legal gaps and inconsistencies that hinder IPOA's execution of its mandate.

In summary, the study adopts the sociological approach to law with slight reference to the historical jurisprudence. This is because the historical experiences of the Kenya people informed Kenyan need to establish IPOA and later bestowed the institution with an additional mandate, to act as a mechanism to help the Kenyan State fulfil its international responsibility of protecting its population against torture by Police.⁴⁸ Kenya lacked an independent competent oversight mechanism to hold the Police accountable per international human rights standards.⁴⁹

Further, observations made in dealing with issues of unprofessionalism in the police will continue to shape reforms of IPOA Act and other laws relevant to policing oversight. The theoretical framework, which the study adopts, therefore, well suits it.

1.7 Literature Review

A review of the literature on the establishment and use of civilian policing oversight institutions indicates that many authors and stakeholders in the policing oversight sector have authored a number of books, articles, reports, amongst other in which they agree that, all over the world, the police force has a history

⁴⁸ See the Government of Kenya, 'Report of the Commission of Inquiry into Post-Election Violence' (Waki or CIPEV Report) (Government Printers, 2008).

⁴⁹ *ibid.*

of violating human rights.⁵⁰ The Authors further agree that for a long time, there lacked proper mechanisms of State to hold the Police accountable for the violations necessitating the establishment of the civilian policing oversight bodies.⁵¹ The Authors also go further to enumerate the international standards that a policing oversight institution should meet in executing its mandate and identify the challenges that hinder such an institution from meeting international standards in execution of its mandate.⁵²

Up until now, the existing literature, however, fails to examine the legal and institutional framework of civilian policing oversight in Kenya with regard to its mandate to contribute to fulfilling Kenya's State international responsibility to protect its citizens from acts prohibited under the UN Convention against Torture perpetrated by police officers. This study therefore conducts the indepth analysis of the policing oversight framework in kenya to examine why the institution fails to meet international standards in execution of its mandate. The study is conducted with a view of making recommendations to inform reform of IPOA's legal and institutional framework to enable it meet international standards in executing its constitutional and legal mandate.

Different authors on policing oversight differ on the best way of resolving cases of police misconduct. Some authors argue that the police forces are in a better position to deal with wayward officers through internal disciplinary mechanisms, while others argue that an independent civilian body would be in a better position to oversight the police service.⁵³ This study agrees with the authors that historical

⁵⁰ *ibid*; see also African Policing Civilian Oversight Forum, *An Audit of Policing Oversight in Africa*, (African Minds for the African Police Oversight Forum 2008); Amnesty International, *Public Outrage: Police Officers above the Law in France* (Amnesty International Publications April 2009).

⁵¹ *ibid*.

⁵² *ibid*.

⁵³ Amnesty International, *France: An Effective Mandate for the Defender of Human Right* (Amnesty International Publications 2009).

experiences of police misconduct resulting in violation of human rights have informed societal need to have mechanisms that would enable citizens to hold police service/force accountable to them. This study further argues that independent civilian policing oversight institutions would easily win public trust in handling complaints against the Police.

A review of the literature further reveals that in African countries there exists limited jurisprudence on the independent civilian policing oversight bodies that States establish to deal with police misconduct in a wholesome, comprehensive, and conclusive manner. The Republic of South Africa and Kenya are the only African States that have established such bodies.⁵⁴ Thus, the study sources publications on the civilian oversight over the work of the Police from other jurisdictions all over the world. This study, however, does not imply that civilian policing oversight bodies in these jurisdictions have been entirely successful in dealing with issues of police misconduct but argues that Kenya can draw learning lessons from the relevant areas of success in these institutions.

1.7.1 Police Violation of Human Rights and the Need for a Policing Oversight Mechanism.

The National Taskforce on Police Reforms⁵⁵ argues that Kenyans have continuously accused the police of violation of their human rights including torture during times of conflicts.⁵⁶ For instance, during the clashes that erupted after the 1992 general presidential elections,⁵⁷ Kenyans accused the police of contributing to the clashes directly or indirectly through police action or inaction.⁵⁸ The Taskforce argues that lack of an independent policing oversight institution to hold the police accountable for the

⁵⁴IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 17.

⁵⁵ Government Report, 'Report of the National Taskforce on Police Reforms' (Government Printer, 2009).

⁵⁶ *ibid* 35.

⁵⁷ *ibid* 16.

⁵⁸*ibid* 35.

impunity led to the rampant police violation of human rights.⁵⁹ The Taskforce notes that the police institution used to carry out investigations into complaints against its members and because of lack of objectivity in the investigations, the members of the public developed a mistrust in the police.⁶⁰ The taskforce recommends for Kenya to establish an independent policing oversight mechanism to hold the police accountable for the human rights violations.⁶¹

The observations made by the taskforce are very relevant to this study in that they point out the fact that the police violate human rights and that its investigation into complaints on the violation does not win public trust. Further, the taskforce advocates for Kenya to establish and facilitate an independent policing oversight mechanism to deal with issues of police violation of human rights for such an institution to meet international standards. The issues that the taskforce raises are similar to the issues that this study examines. This study departs from the views expressed by the taskforce in that while this study deals with the institutional and legal framework of the policing oversight institution that Kenya has already established to deal with complaints against the police, the report by the Taskforce enumerates police violation of human rights before Kenya established IPOA.⁶²

Phillip Alston⁶³ argues that the unwillingness demonstrated by senior Government and Police officials in dealing with complaints against the Police perpetuates Police impunity in Kenya regarding Police violation of international human rights and particularly Police carrying out of extra-judicial killings in Kenya.⁶⁴ According to Alston, these senior officials would instead shoot the messenger who bears the

⁵⁹ *ibid.*

⁶⁰ *ibid* 35.

⁶¹ *ibid* 90.

⁶² The Taskforce presented the report to Kenya's president in October 2009 while Parliament enacted IPOA Act in 2011.

⁶³United Nations Human Rights Council, Report by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (United Nations Human Rights Council, Geneva 3 June 2009).

⁶⁴*ibid* 2.

news of violation of international human rights by the Police than tackle the actual issues raised by the messengers that bedevil the police service and other security organs.⁶⁵ He is further of the view that the impunity is exacerbated by the fact that members of the public live in fear of criminal gangs and in the view of the members of the public, the extra-judicial killing of members of these gangs is a necessary evil they would rather condone.⁶⁶ To members of the public, any attack on the misconduct of the police officers who tackle these criminal gangs is tantamount to condoning crime.⁶⁷

The observations made by Alston are very relevant to this study in that they identified the challenges, faced by anyone attempting to raise awareness of police misconduct that violates international human rights of the Kenyan population. The same challenges are existent in Kenya as at today. This study departs from the view expressed by Alston in that Alston identified the challenges that existed before Kenya established a national civilian policing oversight mechanism.⁶⁸ The study focuses on the challenges faced by IPOA, which is an already established institution mandated to deal with complaints against the Police, hopefully in line with the international human rights standards.

1.7.2 Models of Policing Oversight Accountability Mechanisms

Michael Rowe⁶⁹ states that accountability in policing involves holding the Police to account by interrogating actions of an individual officer as well as controlling the general direction of policing. This study agrees with him that accountability in the police service should be for both individual police

⁶⁵ibid 3.

⁶⁶ibid 5.

⁶⁷ibid 15.

⁶⁸ While Alston visited Kenya from February 16th to 25th 2009, IPOA was established in June 2012 following the enactment of IPOA Act in 2011.

⁶⁹ M Rowe, *Introduction to Policing* (2ndedn, Sage Publication Ltd 2014) 74.

officers and the policing institution as a whole.⁷⁰ The Kenyan police oversight takes after the wholesome police accountability model as it investigates the misconduct of individual police officers as well as monitors policing operations of the Police Service.⁷¹ Michael Rowe further argues that the idea to have only internal mechanisms within the police service/force to hold its officers accountable is untenable. He argues that the public will have no confidence that the internal police mechanism would investigate complaints lodged against fellow police officers with objectivity. He advocates for States to establish a civilian oversight body to hold the Police accountable. This study agrees with the author that only a civilian policing oversight body would be in a better position to hold the Police accountable to the members of the public, which is the model currently, adopted in Kenya. This study further holds the view that Kenya needs to strengthen its civilian policing oversight body to enable it to execute its mandate effectively and per international human rights standards.

This study, however, differs from Michael Rowe's study in that, while Michael Rowe addresses the global issue of police accountability, this study focuses specifically on the Kenyan Independent Policing Oversight Authority with a view of identifying the institutional challenges facing it. This study also examines the efficacy of Kenya's legal framework in enabling IPOA to contribute to Kenya's fulfilment of its international responsibility to protect its citizens against acts prohibited under the UNCAT, perpetrated by the Police.

⁷⁰See IPOA Act 2011 s 6, which mandates IPOA to oversight the police as an institution and the acts of individual members of the service.

⁷¹ IPOA Act 2011, s 6.

Monica Boer & Roel Fernhout⁷² argue that defining a police force that is professional in fulfilling their tasks is not hard.⁷³ They advocate that one should apply the objective international standards on policing.⁷⁴ This study agrees with the author on the standards that one should apply in holding the Police accountable in doing their work. Although these authors were addressing the police force in Britain, this study believes that the same is applicable in Kenya since policing oversight involves holding the Police accountable in line with the international standards of policing. Indeed, the CoK⁷⁵ and the NPS Act⁷⁶ contain standards that the Police should observe when carrying out policing duties. The law requires IPOA to rely on these standards when it oversees policing work to see that the police officers adhere to the set standards.

The two authors identify the civilian review model, civilian input model and civilian model as the three models of civilian policing oversight institutions from which a State can choose to model its national mechanism of dealing with complaints against the Police.⁷⁷ The models depend on whether a State wants the policing oversight institution to either review investigations on police misconduct or whether the policing oversight institution should itself receive the complaints and conduct investigations into police misconduct.⁷⁸ The models also depend on whether the oversight institution should monitor by providing oversight of the police complaints mechanism.⁷⁹ This study agrees with these authors in that the

⁷² M Boer & R Fernhout, 'Policing the Police-Police Oversight Mechanisms in Europe: Towards a Comparative Overview of Ombudsmen and Their Competencies' (Improving the Role of the Police in Asia and Europe Seminar, Delhi 3-4 December 2008) <www.asef.org/.../1270Police_Oversight_Mechanisms_in_Europe.pdf> accessed 12 November 2016.

⁷³ *ibid* 2.

⁷⁴ The standards are contained in the UN-Code of Conduct for Law Enforcement Officials, the UN-Basic Principles on the Use of Force and Firearms and provisions on binding human rights treaties.

⁷⁵ CoK 2010, art 244.

⁷⁶ The provisions of the schedules to the NPS Act has various guidelines on use of force, firearms and conditions of lock-up facilities to guide the police in their everyday work.

⁷⁷ M Boer & R Fernhout, (n 72) 4.

⁷⁸ *ibid*.

⁷⁹ *ibid*.

establishment of independent policing oversight institutions to conclusively deal with complaints against the Police is very important irrespective of the model that a State chooses to model its institution.⁸⁰

This study, however, departs from the authors' view in that the Kenyan IPOA represents a model that is an amalgamation of the three models presented by the authors.⁸¹ Further, while the authors are generally addressing policing oversight in Europe,⁸² this study is specific in addressing the Kenyan model of policing oversight. This study examines the efficacy of the Kenyan laws in enabling IPOA to contribute to the State's fulfilment of Kenya's international responsibility placed on Kenya by various human rights instruments that prohibit torture and more specifically the UNCAT.

1.7.3 Challenges Facing Policing Oversight Institutions and the International Standards of Policing Oversight

Amnesty International⁸³ identifies some of the challenges that hinder police oversight institutions from dealing with complaints against the Police per international laws that prohibit human rights violations. The challenges include under-resourcing, low public profile, lack of powers to enforce recommendations, non-binding power of recommendations of policing oversight institutions, non-cooperation by Police and institution of charges of "false accusation" against victims of police misconduct by the Police.⁸⁴ The study by the Amnesty International recommends that policing oversight institutions should be equipped with powers, authority and resources, sufficient to enable the institutions to investigate, effectively and conclusively, complaints of police misconduct in an independent, prompt

⁸⁰ *ibid* 33.

⁸¹ The provisions of Section 6 of IPOA Act are to the effect that IPOA can receive complaints against the police, investigate into the complaints and review the internal police complaints handling mechanism.

⁸² See the title of their study.

⁸³ Amnesty International, *France: An Effective Mandate for the Defender of Human Right* (Amnesty International Publications 2009) 9-16.

⁸⁴ *ibid* 6.

and impartial manner.⁸⁵ This study believes that the challenges identified by Amnesty International are similar to the challenges faced by IPOA.⁸⁶ The recommendations that Amnesty International makes are therefore well applicable to Kenya's situation to enable IPOA to contribute effectively to the States fulfilment of international responsibility of protecting its population against violation of human rights by the Police.

This study, however, differs from the study by the Amnesty International in that; the Amnesty International study addressed policing oversight mechanism in France⁸⁷ while this study addresses the challenges faced by the policing oversight mechanism in Kenya-IPOA. This study further examines the impact of the said challenges on compliance of IPOA on the international human rights standards in the execution of its mandate.

Amnesty International,⁸⁸ in yet another study, identifies other contributing factors that hinder policing oversight institutions from holding wayward police officers to account as per the set standards of protecting international human rights.⁸⁹ The factors include statutory gaps, inconsistency in the laws, and reliance on the Police to assist during investigations into complaints against their fellow police officers.⁹⁰

The study by Amnesty International goes ahead to identify and define standards that investigations should meet in order for them to be in line with the international standards set in the various international human rights instruments protecting life and freedom from torture.⁹¹ These standards relate to the level

⁸⁵ibid 15-16.

⁸⁶IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 92-96.

⁸⁷See the title to the study.

⁸⁸Amnesty International, *Public Outrage: Police Officers above the Law in France* (Amnesty International Publications April 2009).

⁸⁹ibid 6.

⁹⁰ibid.

⁹¹ibid.

of independence, adequacy, promptness, impartiality, and victim involvement in the investigations by the policing oversight institution.⁹² The study by Amnesty International is very informative to this study since it seeks to find out the efficacy of laws dealing with policing oversight in Kenya to recommend a review of those laws for purposes of enabling IPOA's investigations to live up to the international standards.

However, this research is different from the study carried out by the Amnesty International in that, whereas this study deals explicitly with the role of IPOA and challenges experienced by IPOA in carrying out its policing oversight of the Police, the study by Amnesty international focuses on the policing oversight mechanism in France.⁹³

African Policing Civilian Oversight Forum (APCOF)⁹⁴ previously expressed the concerns echoed by Amnesty International, that the existence of policing oversight mechanisms have not eliminated police misconduct due to various challenges.⁹⁵ APCOF identifies the challenges to include, pervasive lack of capacity and resources, lack of normative and legal framework, weak institutional capacity, pervasive insecurity, and uncondusive political culture.⁹⁶ APCOF goes further to note that most of policing oversight mechanisms in Africa are reactive measures.⁹⁷ APCOF observes that these oversight institutions deals with police misconduct only to bring a deterrence effect to both the police offenders and the police population at large in the hope that they learn from punishment meted on the offenders.⁹⁸

⁹²ibid.

⁹³See the title of the study by Amnesty International.

⁹⁴African Policing Civilian Oversight Forum, *An Audit of Policing Oversight in Africa*, (African Minds for the African Police Oversight Forum 2008).

⁹⁵ ibid 2.

⁹⁶ ibid.

⁹⁷ ibid.

⁹⁸ Ibid 1-3.

This study considers APCOF's study as of relevance to it in that the challenges identified by APCOF and the observation on the reactionary nature of policing oversight mechanisms obtains in Kenya.⁹⁹ This study, however, differs from the study by APCOF in that while APCOF expresses views of policing oversight mechanisms in Africa in general,¹⁰⁰ this study explores the challenges faced specifically by IPOA. This study further notes that Kenya does not restrict its Policing Oversight mechanism, IPOA, to only reactionary measures of investigating misconduct.¹⁰¹ Kenya also mandates IPOA to monitor police operations and inspect police detention facilities to bring about preventive measures against police torture and violation of other human rights.¹⁰²

The United Nations Office on Drugs and Crimes (UNODC)¹⁰³ notes that many policing oversight mechanisms lack independent forensic capacity leading them to rely on the same Police they are investigating.¹⁰⁴ UNODC argues that reliance on the Police turns out to be cumbersome in as far as maintaining exhibits chain of custody is concerned.¹⁰⁵ UNODC is of the view that long evidence chain opens avenues for corruption and more importantly leads to delay of investigations.¹⁰⁶ It argues that taken as a whole, the lack of capacity affects the promptness, impartiality, and independence aspects of investigations expected under the international human rights instruments.¹⁰⁷ UNODC further argues that lack of specialized civilian personnel trained in investigation work in many countries forces most policing oversight institutions over the world to employ police officers to carry out the investigative

⁹⁹IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 92-96.

¹⁰⁰See the title and content of the study by APCOF.

¹⁰¹Section 7 of IPOA Act is to the effect that IPOA can influence policies on policing.

¹⁰²See IPOA ACT 2011, ss 6 and 7, which provides for the broad mandate of IPOA including power to influence policy reforms by making relevant recommendations.

¹⁰³United Nations Office on Drugs and Crime, *Handbook on Police Accountability Oversight and Integrity*, (Criminal Justice Handbook Series, United Nations 2011).

¹⁰⁴*ibid* 37.

¹⁰⁵*ibid* 38.

¹⁰⁶*ibid*.

¹⁰⁷*ibid*.

work for the independent policing oversight bodies.¹⁰⁸ UNODC argues that this also hurts the independence of the policing oversight, sometimes leading to the pitfalls that necessitated the establishment of these independent policing oversight institutions.¹⁰⁹ It recommends that these institutions if they opt to employ police investigators, should source these investigators from a jurisdiction outside the one that the institution seeks to serve or the employed investigators should be retired police officers.¹¹⁰

This study finds the study by UNODC very relevant to her work since the issues addressed directly touch on what is happening in IPOA.¹¹¹ However, this study departs from the study by APCOF in that while this study is particularly concerned with IPOA, which is the Kenyan national policing oversight mechanism, UNODC was dealing with issues of policing oversight globally.

The Independent Policing Oversight Authority (IPOA)¹¹² identifies the challenges that IPOA face in the execution of its mandate to hold the Police accountable to the members of the Kenyan public.¹¹³ The report lists non-cooperation from the Police and other agencies, high staff turnover, the threat to legislative amendments to IPOA Act to abolish the investigative role of IPOA, and misunderstood mandate.¹¹⁴ In its report, IPOA argues that non-cooperation by the Police and other agencies causes delay in investigations and even leads to aborted investigations for lack of essential documents, or expert reports that IPOA expects the Police or the other agencies to facilitate.¹¹⁵ The report by IPOA is very relevant to this study since it identifies the specific challenges that IPOA experiences in the execution

¹⁰⁸ibid 60.

¹⁰⁹ibid.

¹¹⁰ibid 60.

¹¹¹IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 92-96.

¹¹²IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018).

¹¹³ibid 92-96.

¹¹⁴ibid.

¹¹⁵ibid 93.

of its mandate, which is part of what this study seeks to address. This study, however, differs from IPOA's report in that, while the report by IPOA was a general report on the different aspects of IPOA, this study seeks to identify the different challenges faced by IPOA.

This study further identifies the impact of the challenges on IPOA's contribution to the fulfilment of Kenya's international responsibility of holding the Police accountable for violation of human rights per the international human rights standards. Furthermore, the report by IPOA does not address this vital role placed on IPOA under the Prevention of Torture Act, which is the concern of this study.

1.7.4 Conditions Necessary for a Successful Oversight Institution

Joel Miller¹¹⁶ argues that all over the world, certain factors determine whether a policing oversight institution will have positive or negative development depending on whether the relevant stakeholders support or oppose the establishment and sustainability of these policing oversight institutions.¹¹⁷ He identifies the factors to include political support, police cooperation, activist support, resources, management, and leadership as well as public attitudes.¹¹⁸ Miller further argues that the negative impact of these factors has led to many policing oversight institutions being rendered ineffective and inefficient, eventually leading to their disbarment.¹¹⁹ Miller goes further to identify critical parameters that one can use to measure the success of any oversight institution.¹²⁰ He discusses the parameters to include Integrity, legitimacy of civilian oversight institutions, and the lessons that one can draw from the works

¹¹⁶ J Miller, 'Civilian Oversight of Policing: Lessons from the Literature' (Global Meeting on Civilian Oversight of Police, Los Angeles 5-8 May 2002).

¹¹⁷ *ibid* 15.

¹¹⁸ *ibid* 10-15.

¹¹⁹ Consider the case of Civilian Oversight in Washington DC where the policing oversight institution faced many challenges leading to disbarment a number of times. See J Miller, 'Civilian Oversight of Policing: Lessons from the Literature' (Global Meeting on Civilian Oversight of Police, Los Angeles 5-8 May 2002) 10.

¹²⁰ J Miller, (n 116) 10.

of the civilian oversight institutions to inform police policy reforms.¹²¹ Miller is, however, quick to warn that civilian oversight institutions are just an essential element but not a panacea of producing an accountable police service.¹²² He believes that other forms of police accountability, which include the public, the State, and the internal police accountability mechanism, need to complement and reinforce these police oversight institutions for reformed police service.¹²³

Miller's study is very relevant to this study. It addresses the challenges facing policing oversight institutions and goes ahead to make recommendations relevant for the successful establishment and sustenance of the oversight institutions to enable them effectively hold the Police accountable for violation of International human rights.¹²⁴ This study is concerned with the same issues dealt with by Miller in as far as they affect IPOA in Kenya. This study, however, differs from that done by Miller in that while Miller considered policing oversight institutions in English speaking countries,¹²⁵ this study concerns itself with policing oversight in Kenya. More specifically, this study interrogates whether the law relevant to policing oversight in Kenya is sufficient to address the institutional challenges facing IPOA. This study further examines whether the law enables IPOA to contribute towards Kenya's international responsibility to hold the Police accountable for any misconduct in line with the international human rights standards.

¹²¹ *ibid.*

¹²² *ibid* 18.

¹²³ *ibid* 17-18.

¹²⁴ *ibid* 14.

¹²⁵ United States, Canada, Australia, and the United Kingdom.

1.7.5 Benefits of a Successful Policing Oversight Mechanism to the Police Institution

David Bruce & Rachel Neild¹²⁶ argue that while the work of policing oversight institutions in holding the Police accountable may breed an adversarial relationship between the policing oversight institution and the police service it oversees, this need not be so.¹²⁷ They argue that effective and collaborative oversight is beneficial to the police service in that once the policymakers who provide funds for police reform initiative see actual reforms in the police service; this translates to the allocation of bigger budgets to the police service.¹²⁸ They further argue that police leadership should understand that effective oversight and accountability assist them in understanding and finding solutions to the challenges they face in dealing with wayward police officers.¹²⁹

This study agrees with Bruce and Rachel in that their observation is a true reflection of policing oversight in Kenya. The police leadership in Kenya thwarts the efforts of IPOA in holding the Police accountable per the international human rights standards without the understanding that a success for IPOA would translate to a significant gain for reformed police service.¹³⁰

This study, however, is different from the Bruce and Rachel's study in that while this study focuses on challenges faced by IPOA in the execution of its mandate, their study focuses on the general police reforms in South Africa.

¹²⁶ D Bruce and R Neild, *The Police That We Want: A Handbook for Oversight of Police in South Africa* (Centre for the Study of Violence and Reconciliation in Association with Open Society Foundation for South Africa and Open Society Justice Initiative 2005).

¹²⁷ *ibid* 8.

¹²⁸ *ibid*.

¹²⁹ *ibid*.

¹³⁰ *Law Society of Kenya & 3 others v Attorney General & 3 others* [2016] eKLR 14.

1.8 Justification of the Study

The existing literature fails to examine the legal and institutional framework of civilian policing oversight in Kenya concerning the States international responsibility to protect its citizens from acts, prohibited under the UN Convention against Torture perpetrated by police officers. In order to help the reader understand why IPOA fails to execute its Constitutional and Statutory mandate in line with international human rights standards, the study outlines the history of policing that led to the establishment of policing oversight institutions. The study also conducts an in-depth analysis of the institutional and legal framework on policing oversight. The study further sets out the lessons that Kenya can learn from best international policing oversight practices and proceed to make recommendations for strengthening IPOA to ensure effective execution of its mandate.

This study is informed by the fact that the establishment of effective national mechanisms is one of the international responsibilities placed on States by various human rights conventions that prohibit torture, including the UN Convention against Torture.¹³¹ The international law requires that for the established State mechanisms to meet international human rights standards, it should be independent and competent enough to deal with complaints of human rights violations promptly and impartially. Investigations by such institutions should be capable of identifying and punishing the offender.¹³² Kenya's realization that it lacked an independent mechanism to deal with complaints against the Police led it to establish the Independent Policing Oversight Authority. The parliament later mandated IPOA to contribute to fulfilment of its international responsibility to protect. Kenya did so when it realized the potential of the Authority in helping the State meet its international human rights responsibility to prevent and

¹³¹ See UDHR, Art 5; ICCPR, arts 2(3) (a) and 7; UNCAT, art 2; ACHPR, arts 4, 5 and 6.

¹³² UN Human Rights Committee (HRC), 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) 11-24 <<https://www.refworld.org/docid/453883fb0.html>> (accessed 14 May 2019).

protect its population against acts of torture and cruel, inhuman or degrading treatment or punishment perpetrated by the Police.¹³³

The establishment of civilian independent policing oversight institutions for holding the Police accountable for violations of international human rights instruments is relatively a new idea in many States and Kenya in particular.¹³⁴ The implementation of the CoK provisions concerning civilian oversight of security organs and more specifically, the implementation of policing oversight laws in Kenya is at a critical formative stage. This formative stage provides the perfect opening for Kenya to review, amend and synchronize all policing oversight related laws with a view of providing a competent Independent Civilian Policing Oversight Authority that meets the international standards in dealing with complaints against the Police.

If the policing oversight laws, and particularly IPOA Act, are not implemented with the international human rights standards perspective in mind, IPOA risks falling into the pitfalls that led to mistrust in the internal police complaints handling mechanisms. Such pitfalls will lead members of the public to construe IPOA as a toothless dog constituted by the government just for formality purposes and without the real intention of independently and competently dealing with complaints against the Police.

Rendering IPOA toothless will go against the intention of the Kenyan people and the requirements of the international human rights instruments. Moreover, the adoption of civilian policing oversight authority as a mechanism to help the State meet its international human rights responsibilities is a new idea in Kenya. The nascent idea of establishing a policing oversight in Kenya then makes this study to

¹³³ See the Long title to the Prevention of Torture Act 2017 as read with s 13(6) of the said Act.

¹³⁴ 'Civilian police oversight agency' <https://en.wikipedia.org/wiki/Civilian_police_oversight_agency#History> accessed 06 April 2019.

be a great reference point not only for the Kenyan policymakers but also for other States and international institutions interested in establishing and strengthening policing oversight institutions.

The study is therefore necessary as it seeks to point out the challenges currently facing IPOA due to shortcomings in the institutional and legal framework. The study provides information that will present a basis for the legislature and other stakeholders in the policing oversight sector to review the legal and institutional framework governing IPOA. The review will guide the stakeholders to steer the framework to achieve permanent, comprehensive, and wholesome resolutions to the problems facing IPOA and enable it to contribute to Kenya meeting its international human rights responsibility effectively.

1.9 Methodology

This study relies on mixed methodological approach. It entails doctrinal, international and historical research methodologies.

This study will be explorative research mainly based on existing literature. The study shall rely on relevant secondary source of data from relevant books, articles from journals, reports by various national and international commissions and organizations, newspapers, articles, publications on the subject, from the library and internet sources.

Further, since the study examines the extent to which the law enables IPOA to deliver on its mandate in contributing towards Kenya meeting its international responsibility under the UNCAT, the study draws the primary source of data from the international human rights legal instruments that Kenya has ratified. The instruments include the ICCPR, the UNCAT, ACHPR, amongst others; the CoK; statutes on

policing oversight including IPOA Act, the Prevention of Torture Act, the NPS Act, the NPSC Act, the Evidence Act, the CPC, the Fire Arms Act, amongst other legal instruments.

The study further entails review of the best practices on policing oversight from Northern Ireland and South Africa. The study benchmarks IPOA against policing oversight institutions from these two jurisdictions for Kenya to draw lessons to strengthen IPOA and enable it contribute to fulfilling the State's international responsibility to protect.

1.10 Scope and Limitation of the Study

It is possible to have other mechanisms through which Kenya can fulfill its international State obligation to protect its citizens from acts prohibited under the UNCAT. Such mechanisms would include the use of internal police accountability mechanisms or other independent constitutional commissions which have mandate in the field of human rights protection. For instance, the National Police Service has ways of holding its members accountable for any unlawful act through the Internal Affairs Unit. Kenya also has the Kenya National Commission on Human Rights that oversees the general compliance of the State with human rights protected in the constitution and international legal instruments. This study however zooms into Kenya's use of a civilian oversight institution to fulfil its international State responsibility to protect for two reasons. One, previously, the internal police accountability mechanism had failed to hold its members to account for human rights violations in accordance with the international human rights standards. Two, other independent commissions that deal with issues concerning human rights have a very broad mandate since they investigate human rights violations committed by ordinary kenyans as well as public officers. These commissions may therefore lose focus for the fine details required in holding the police accountable given that unlike the ordinary population, the police are allowed to use force in execution of their policing duties. The State therefore requires a committed

accountability mechanisms to pay keen attention in holding the police accountable. The scope of the study is thus limited to the examination of Kenya's independent policing oversight institution as a means of holding the police accountable in line with required international standards and enable Kenya discharge its international obligation to protect under the UNCAT.

Further, it is possible to do a comparative study between the Kenya's policing oversight institution and other policing oversight institutions from other jurisdictions. This study, however, limits itself to benchmarking IPOA on the best international practices to draw lesson for dealing with the challenges that hinder execution of IPOA's mandate. Jurisprudence on independent civilian policing oversight bodies in African countries is limited since only the Republic of South Africa and Kenya, in the whole of the African Region, have established such bodies. Thus, the study sources publications on the civilian oversight over the work of the Police from other jurisdictions all over the world. In addition, the study examines policing oversight institution from South Africa and another jurisdiction outside Africa, Northern Ireland in particular. This study, however, does not imply that civilian policing oversight bodies in these jurisdictions have been entirely successful in dealing with issues of police misconduct but believes that Kenya can draw learning lessons from the relevant areas of success from these institutions.

1.11 Conclusion

This chapter has outlined the background of the study, the problem statement, the research questions, the objectives of the study, the study hypothesis, theoretical framework, literature review, justification of study and the study methodology. The next chapter will examine the background of the study.

1.12 Chapter Breakdown

This study shall contain five chapters.

Chapter one majors on the general introduction to the research whereby the study covers the following issues: - background of the study, the problem statement, the research questions, the objectives of the study, the study hypothesis, theoretical framework, literature review, justification of study and the study methodology.

Chapter two covers the historical background of the study, whereby it contains the history of policing oversight at the international, regional, and local levels.

Chapter three examines the Kenya's policing oversight institutional and legal framework to find out their efficacy in enabling execution of IPOA's mandate to live up to international human rights standards. Under this chapter, the study covers an in-depth review of IPOA Act to establish how well the Act enables the Authority to deliver in holding the Police accountable for their actions and or inactions.

Chapter four establishes for benchmarking, international best practices in policing oversight to draw lessons for strengthening IPOA.

Chapter five concludes the study and contains recommendations to improve the legal and institutional framework on policing oversight in Kenya in order to strengthen IPOA to enable it to deliver on its mandate more comprehensively, effectively, efficiently as per the international human rights standards.

CHAPTER TWO: HISTORICAL BACKGROUND OF POLICING OVERSIGHT

2.0 Introduction

This chapter covers the history of policing oversight, which will include the history regarding all that, which brought about the necessity of policing oversight institutions in the world. More particularly, the chapter covers the historical background to the establishment of the Independent Policing Oversight Authority in Kenya. The Chapter also extends to cover the State's decision to mandate the institution to investigate police misconduct that amounts to acts prohibited under the UNCAT. For clarity purposes, the chapter has three main thematic areas that cover international history, the regional history, and the local history. However, given the fact that the study examines the efficacy of IPOA in contributing towards fulfilment of Kenya's international responsibility under the UNCAT; the chapter delves into more details on the local history regarding the establishment of IPOA in Kenya.

2.1 International History

One would expect that the Police as an institution is as old as the human society and therefore, the need for an independent policing oversight mechanism is as old as the society as well. The expectation is however far from the truth given that modern police institution is relatively a new concept that emerged in the 19th Century since, before that, the military carried out law enforcement function as the society and cultures developed.¹³⁵ The call for centralized police institution commenced as most philosophers and sociologists in the field of criminology, including Jeremy Bentham,¹³⁶ expressed the need to have centralized Police to carry out the function of maintaining order and protecting the citizenry.¹³⁷

¹³⁵ T Roufa, 'Early History of Policing' (Balance Careers, 17 April 2019) <<https://www.thebalancecareers.com/early-history-of-policing-974580>> accessed 5 May 2019.

¹³⁶ Jeremy Bentham was a Legal Philosopher.

¹³⁷ T Roufa, (n 135).

The call for a professionalized police came to fruition in 1829 when Sir Robert Peel established the Metropolitan Police Services in London.¹³⁸ Despite extensive public opposition against the establishment of the police force for the fear that the police will be another form of military officers invading the public space, Sir Peel managed to persuade the public to accept the now formed police force.¹³⁹ Sir Peel convinced the masses to accept the institution of police after he developed a framework of how a police force should be.¹⁴⁰ In that framework, he defined the conduct expected from a proper police officer and formulated the primary principles of good policing, often referred to as the Peelian's principles to guide the police in the conduct of their policing duties.¹⁴¹

Peel's Concept and the idea of the police force after that found its way in the United States and later in the Century, the idea spread around the world as it developed with input from sociologists and criminologists.¹⁴² Sir Peel made sure that the police force was distinct from the military, the officers never carried firearms, and insisted the need for one to instill in police officers the need to develop and maintaining public interest.¹⁴³ As such, the need for a police oversight institution was yet to arise.

2.1.1 First World War (WW I)

With the break out of the First World War in 1914,¹⁴⁴ most of the police organizations in the world continued to perform the function of maintaining order and protecting the citizenry in their countries. As such, the officers in their capacity as police officers did not perform law enforcement roles. As the war continued, the military absorbed, for its reinforcement, the police officers, together with the other

¹³⁸ *ibid.*

¹³⁹ *ibid*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴²*ibid*

¹⁴³ *Ibid.*

¹⁴⁴Wikipedia, World War 1 (the free encyclopedia) <https://en.wikipedia.org/wiki/World_War_I> accessed 4 May 2019.

male members of the society. The absorption of the police officers to the military created vacancies for people who would perform the roles of the police which forced most countries, for the first time to engage women as police officers to take over the duties that had been left by the men.

The WWI ended in 1918 following, which States established the League of Nations in 1919 to address major peace issues that had led to the war at the time, human rights were not on the agenda of the League of Nations since member States to the organization were more preoccupied with maintaining global peace.

States considered the issue of establishing policing oversight mechanisms in the Member States of the League of Nations, to hold police officers accountable for their actions to the members of the public of those States as an internal issue. States did not consider the issue of dealing with wayward police officers a priority since they first sought to deal with external threats.

The League of Nations and its Member States continued to engage itself in dealing with global security issues until 1939 when its efforts proved futile with the break out of the next world war. This is, therefore, a clear indication that the League of Nations and its Member States never addressed the issue of independent policing oversight mechanism during WWI and in the intervening period leading to WWII.

2.1.2 Second World War (WWII)

The Second World War which was on who should dominate the world began on September 1, 1939 at 4.45 a.m. when Germany invaded Poland. In a number of aspects, the WWII that occurred after an

uneasy break of 20 years following WWI appeared to be an extension of unsettled disputes of WWI.¹⁴⁵ Since Axis powers¹⁴⁶ and Allied Powers¹⁴⁷ devoted almost all their resources towards fighting WWII,¹⁴⁸ police force on either side of the war were also engaged in reinforcing military during the war. For instance, in England and Wales, young police officers and many police reservists- trained men, who had previously been soldiers, were required to go back to the army or navy.¹⁴⁹ One, therefore, expects that whatever atrocities or human rights violations occurred during WWII, the police officers who had gone to reinforce the military were also involved in committing the atrocities. The accountability for these police officers, however, fell under the mechanisms, if any, that were to hold other military personnel accountable, given that at the time, they were carrying out military duties and therefore one should regard them as military officers. For the officers who had been left in the police force, they continued with their usual duties to keep peace, pursue criminals and ensure free flow of traffic. In addition, the police officers acquired new duties in which they implemented restrictions set during the war, kept vigilance on enemy foreigners, and hunted down army deserters.¹⁵⁰ As already stated, the parties involved in the Second World War were more concerned with the domination of the world and guarding their territory from invasion, and as such, the issue of human rights did not occur. One is therefore right to conclude that the issue of independent mechanisms to hold the police accountable to the members of the public for any human rights violation never arose during the war.

¹⁴⁵ JG Royde-Smith and TA Hughe, 'World War II' (Encyclopaedia Britannica 30 December 2018) <<https://www.britannica.com/event/World-War-II>> accessed 06 May 2019.

¹⁴⁶ Germany, Italy and Japan.

¹⁴⁷ France, Great Britain, the United States, the Soviet Union, and, to a lesser extent, China.

¹⁴⁸ JG Royde-Smith (n 145).

¹⁴⁹ International Centre for the History of Crime, Policing and Justice, 'Police during the Second World War' (open University, 2019) <<http://www.open.ac.uk/Arts/history-from-police-archives/PolCit/polww2.html>> accessed 4 May 2019.

¹⁵⁰ *ibid.*

2.1.3 Cold War

The period of the cold war that runs from 1945 to 1991 is one of the most crucial periods in the history of policing and police accountability. During this period, States in different parts of the globe started incorporating the institution of Police as a tool of internal State Security. During this period also, States commenced equipping the police with high investigative skills aimed at gathering information regarding the subversive individuals and organization that had infiltrated the US Government and US-backed Governments in other nations, causing civil unrest.¹⁵¹ The US also trained its police and ensured that the other nations it supported trained police officers in paramilitary to enable them to control demonstrations, riots, and other civil disorders.¹⁵² Police paramilitary and intelligence collection training that States solely purposed to help them silence the disgruntled voices of those who were dissatisfied with its leadership came with rampant human rights violations perpetrated by the Police officers. The officers violated human rights in the course of collecting the intelligence and controlling the masses involved in demonstrations since they used torture and illegal searches and seizures as tools of obtaining information from the subversive individuals.

The police at the time, therefore, faced severe loathing and resistance from the general masses who continuously kept on calling for independent mechanisms of police oversight to hold the police accountable for human rights violations. The justice system in the USA, in a way, reinforced the need for police to refrain and restrain themselves from violating human rights. This reinforcement, also, in a way, echoed the voice of those who called for police accountability, when the Supreme Court issued

¹⁵¹ J Rohde, 'Police Militarization is a Legacy of Cold War Paranoia' (SAST, The Conversation-Academic rigour journalistic Flair 22 October 2014 11.30am) <<https://theconversation.com/police-militarization-is-a-legacy-of-cold-war-paranoia-32251>> accessed 08 May 2019.

¹⁵² WN Grigg, 'From Red Scares to Orange Alerts: How the Cold War Launched the Modern American Police State' *Foundation for Economic Education* (USA 11 July 2016)<<https://fee.org/articles/from-red-scares-to-orange-alerts-how-the-cold-war-launched-the-modern-american-police-state/>> accessed 8 May 2019.

court decisions to outlaw use of evidence obtained through unlawful seizures¹⁵³ and further sought to protect freedom from self-incrimination.¹⁵⁴

The period is also essential to policing oversight, given that during the period, many independent Nations converged and formed the United Nations.¹⁵⁵ Part of the UN principles and commitments is to secure and safeguard human rights and freedoms to all people in the world.¹⁵⁶

Following the establishment of the United Nations, States started taking seriously the commitment to deal with issues of human rights internationally. States formulated and adopted many Human Rights Conventions, including the International Bill of Rights¹⁵⁷ and the UNCAT. After that, the States took the necessary legal steps to become parties to the conventions. These international human rights instruments have had significant influence on police accountability. Part of the influence is on the issue of torture and other cruel, inhuman or degrading treatment or punishment that the Police are likely to perpetrate when carrying out policing duties.

The issue of police oversight remained a thorny issue throughout the cold war period, as States did not heed to the calls to establish a police oversight, or an external police accountability mechanism. The US government and the other US-backed Governments around the world interpreted the calls to be emanating from the USSR and the communist sympathizers. Kirkpatrick well captures this interpretation in his infamous statement when he declared, 'every effort to publicize police brutality and corruption, or

¹⁵³Mapp v Ohio [1961] 367 US 643.

¹⁵⁴Miranda v Arizona [1966] 384 US 436.

¹⁵⁵ Established through the United Nations Charter. 1 United Nations, Treaty Series, XVI.

¹⁵⁶ See the preamble and Art 1(2) of the UN Charter.

¹⁵⁷ The International Bill of Rights is comprised of the following Declaration and Conventions: The UDHR, the ICCPR and the ICSEER.

to impose accountability on police, advanced the Communist design of "sap[ing] the morale of the force,"¹⁵⁸

2.1.4 Contemporary Period

With the end of the cold war, the international community, through the United Nations, continued to engage in the field of human rights seriously. The engagement was mainly on the issue of prevention of torture and protection of citizens found in the Member States from acts of torture most of which the States acknowledged their security organs perpetrated during detention or collection of evidence.

States adopted the Protocol to the Convention on Prevention of Torture after the cold war. The Protocol is one of the international human rights instruments, which has a sweeping influence on policing oversight matters. The Convention establishes the office of the Special Rapporteur to visit detention facilities in all the Member States of the United Nations, including police detention facilities, as a means to end torture in those facilities.

Although State parties to the various international conventions are the implementers of the provisions of the Conventions, the conventions have mechanisms to monitor, through the relevant Committees and Commissions, the fulfilment of State's international responsibility. These mechanisms are therefore relevant in matters of policing oversight.

¹⁵⁸ WN Grigg (n 152).

2.2 Regional History: The African Region

This study concerns itself with examining the efficacy of IPOA, the Kenyan national mechanism, of holding the police accountable in line with international human rights standards. It, therefore, would follow that since Kenya falls within the African region, the regional history of policing oversight covered in the study will as well be limited to the African region.

To begin with, in Africa, modern police forces are a creation of the colonial rule since they were introduced to Africa in the late 19th Century by the European Colonial Powers who conquered almost the whole Africa with the sole intention of exploiting resources found in the colonized territories.¹⁵⁹ Given the fact that right from the beginning, the colonizers were not interested in advancing the welfare of the Africans, they faced much resistance from Africans. In order to protect their properties and suppress the insurgency by the Africans, the colonizers introduced written laws and brought in police forces trained in paramilitary to enforce the laws on tax collection and forced labor, and this came with many human rights violations by the officers.¹⁶⁰

Moving forward to the 1920s and 1930s, the colonizers made efforts to phase out the paramilitary strategy of policing since as at the time the colonial society and economy had taken shape. The colonizers exercised indirect rule as they transferred the role of every day maintenance of law and order to African leaders. The colonial rule took steps to change their policing by attempting to professionalize the Police as they embarked on advanced scientific methods of collecting evidence such as fingerprinting and forensics.¹⁶¹ It was, however, difficult to change the Police since the colonial Police remained the

¹⁵⁹ TJ Stapleton, 'Police and Policing' (African studies 30 November 2015) <<http://www.oxfordbibliographies.com/view/document/obo-9780199846733/obo-9780199846733-0024.xml> > accessed 08 May 2019

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

supervisors of the oppressive system that was hell-bent on exploiting African territories and its people. Therefore, the Police continued with human rights violations without any means to hold them accountable for the violations.

During the 1950s and 1960s, which was a period of rapid decolonization, the colonial rule returned their paramilitary style of policing to counter the insurgency brought about by 'African nationalist protest'.¹⁶² It was, however, unfortunate that even after the decolonization; the African rulers who took over power transformed the former colonial forces to national security forces for the newly independent nations.¹⁶³

The African leaders who assumed power from the colonizers consolidated police force and power in the executives and mostly used the police force to suppress any opposition from other Africans who detested the Authoritarian rule adopted by the African independence leaders. The misuse of Police power was contrary to the expectation of masses that the leaders would establish independent police accountability mechanisms to hold the Police accountable since the leaders were once victims of the violation of human rights by the Police. In essence, neither the African Heads of States nor the police leaders were interested in police oversight and accountability, since to hold the Police accountable would be exposing the leaders' impunity and tolerance to abusive policing that they advanced to silence their political opponents.¹⁶⁴

Having noted that the African leaders were never interested in establishing independent mechanisms to hold the police accountable for human rights violations, one expects that these African leaders were as well not interested in issues concerning human rights. Such expectations, however, are unfounded given

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ African Policing Civilian Oversight Forum, *An Audit of Policing Oversight in Africa*, (African Minds for the African Police Oversight Forum 2008) 3.

that in 1963, leaders of the then independent African countries came together and formed the Organization of the African Unity (OAU).¹⁶⁵ One of OAU's main agenda was to fight for the liberation of the African countries that were still under colonial rule. Although the leaders establishing the OAU did not expressly provide for human rights in the OAU charter, these leaders were not opposed to the idea of human rights. To begin with, most of these leaders were already members of the United Nations, an organization that takes the human rights issue seriously. Secondly, the leaders committed in the preamble to the OAU Charter to adhere to identified human rights principles.¹⁶⁶ The leaders also made sure that their countries became State Parties to the 1966 ICCPR Convention as well as the other international human rights conventions. Further, in 1979, the OAU drew its own human rights instrument,¹⁶⁷ and member states adopted the same in 1981 and entered into force in 1986.¹⁶⁸

The end of the cold war in 1991 was significant to Africa since the commencement of political reforms in the early 1990s purposed to establish multi-party democracy in most of the African countries. The reforms saw members of the public intensify the calls for 'development of normative and legal frameworks for police oversight and accountability in most of the African States'.¹⁶⁹ However, despite the calls for these reforms, many African countries still struggle with the issue of policing oversight accountability mechanism. The struggle is mainly occasioned by former authoritarian State leaders who are still holding political power and therefore uninterested in the real professionalism of the police force.¹⁷⁰

¹⁶⁵ Established through the OAU charter, which was adopted on 25th May 1963.

¹⁶⁶ Principles of the UN Charter and the Universal Declaration of Human Rights (UDHR).

¹⁶⁷ African Charter on Human and People's Rights.

¹⁶⁸ B Gawanas, 'The African Union: Concepts and Implementation Mechanisms relating to human rights' <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwj0xtevpIXjAhUExYUKHbhCBXwQFjABegQIBhAB&url=http%3A%2F%2Fwww.kas.de%2Fnamibia%2Fen%2Fpublications%2F16347%2F&usg=AOvVaw3mh3MSQsO8BrSVrXxRqSEj>> accessed 8 May 2019.

¹⁶⁹ African Policing Civilian Oversight Forum (n 164).

¹⁷⁰ *ibid.*

High Crime rates in most African countries compounds the problem of slow realization of police accountability mechanisms.¹⁷¹ In many African Countries, violent organized criminal groups carry out heinous crimes against the public and when the police deal with these criminals ruthlessly and brutally, the members of the public seem to develop tolerance for unlawful policing.¹⁷² According to the members of the public, the Police are acting for the good of the larger society. Calling the Police to account at such times and circumstances amounts to hindering effective policing.¹⁷³

Although in the current time's governments of some African States¹⁷⁴ have embarked on dealing with the issue of police impunity and violation of international human rights by the Police, through the establishment of police oversight institutions, 'police accountability and oversight remain weak due to several factors.¹⁷⁵ The factors include politically affiliated policing institutions, lack of appropriate normative and legal frameworks; weak institutional capacity; high crime rates, as well as inadequate resources and funding.¹⁷⁶

The issue of policing oversight in Africa is not dull and hopeless. In 2004, critical stakeholders in policing oversight established the African Police Civilian Oversight Forum (APCOF) to support governments of the African States interested in carrying out police reforms and establishing policing oversight institutions.¹⁷⁷

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ *ibid.*

¹⁷⁴ Consider South Africa and Kenya.

¹⁷⁵ African Policing Civilian Oversight Forum (164).

¹⁷⁶ *ibid* 2.

¹⁷⁷ <https://apcof.org/about-us/>.

In cooperation with the African Commission on Human and Peoples Rights, this regional policing oversight organization came up with the Robben Island guidelines. The guidelines strengthen the call for all African States to establish policing oversight institutions to deal with acts of torture and other human rights violations perpetrated by police officers.

2.3 Local History

The establishment of an effective police accountability mechanism is relatively a new idea in Kenya. The idea is recent partly because Kenyan leaders did not embrace policing for the benefit of the population but for that of the ruling and economic masters.¹⁷⁸ The section covers the local history in various sub-headings, to capture well the history leading to the establishment of IPOA and mandating it to carry out investigations that would contribute towards fulfilment of the State's international responsibility set under international conventions. The section covers the local history as analyzed below: -

2.3.1 Pre-Colonial and Colonial Period

The establishment of IPOA in Kenya¹⁷⁹ was not far from the realisation that the police as an organization was not interested in safeguarding public interest. Several conflicts, in which Kenyans accused Police force of violation of their various international human rights, including torture, preceded IPOA's establishment. Kenya did not have an independent mechanism of holding the Police accountable for these violations,¹⁸⁰ despite it being a State Party to most of the international human rights conventions that call for State Parties to put in place effective State mechanisms to remedy the violations.¹⁸¹ Police

¹⁷⁸Government of Kenya, 'Report of the National Taskforce on Police Reforms' (Government Printers, 2009) 14.

¹⁷⁹ Established in 2011 through IPOA Act 2011.

¹⁸⁰Report of the National Taskforce on Police Reforms (n 178) 35.

¹⁸¹ The ICCPR; the UNCAT; the ACHPR.

officers investigated complaints against fellow members of the police force¹⁸² and due to that, members of the public lost trust in the Police that they could handle complaints competently with the required impartiality.¹⁸³ It was therefore hard for Kenya to fulfil its international responsibility to provide a sufficient remedy to its citizens that would meet the international standards.¹⁸⁴

2.3.2 Post-Independence up to Promulgation of the Constitution of Kenya, 2010

Right from the time when Kenya gained its independence¹⁸⁵ and adopted the first Constitution,¹⁸⁶ the Kenyan population had every reason to hope that police impunity would be a problem of the past since the government would effectively deal with issues regarding police accountability. The independence Constitution brought about the high expectation to end police impunity since it envisaged an independent and impartial police force. The Constitution created the Police Service Commission to oversee the police service and deal with police misconduct.¹⁸⁷ The constitutional amendments that took place under the leadership of Mzee Jomo Kenyatta, in 1966, saw the removal of the autonomy of the Police. The amendments concentrated police powers on the executive rendering the Police a part of the Civil Service since the President, who headed the Executive and State, factually headed the civil service.¹⁸⁸

The passing on of the first president of Kenya in 1978 and the takeover of the Country's leadership by the then Vice-President, Daniel Toroitich Arap Moi did not bring with it any change in dealing with police impunity. Instead, with the further amendment to the Constitution in 1982 that made Kenya a

¹⁸² The Kenyan Police changed from being referred to as a “police force” and instead the law currently refers to the police as the “Police service” with the enactment of the NPS Act 2011, which was geared towards reforming the police service.

¹⁸³Government of Kenya, ‘Report of the Commission of Inquiry into Post-Election Violence’ (Waki or CIPEV Report) (Government Printers, 2008) 420.

¹⁸⁴ *ibid.*

¹⁸⁵On 12 December 1963.

¹⁸⁶Constitution of Kenya 1963 (the independence Constitution).

¹⁸⁷Report of the National Taskforce on Police Reforms (n 178) 15.

¹⁸⁸*ibid.*

single-party State,¹⁸⁹ the government faced increased resistance in the years that followed. In retaliation, the government used the police force to oppress those who were opposed to it. Since up to that point the Police was only answerable to the ruling regime and that there was no independent mechanism to investigate and prosecute the Police, the Police continued with the violation of human rights undeterred.¹⁹⁰

With the increased agitation for reforms, the government amended the Constitution of Kenya, yet for another time, in 1991 during which it repealed Section 2A. Kenya held elections, the first election ever since independence, under the new multi-party State Regime.¹⁹¹ The elections saw an eruption of clashes that Kenyans fought along political and tribal lines leading to displacement and death of many people.¹⁹² Kenyans accused the Police of having contributed to the violence either directly or indirectly through their actions and omissions. Kenyans believed that the lack of a police accountability mechanism that would hold the Police accountable in the discharge of their policing duties or responsible for their misdeeds contributed to the involvement of the Police in the clashes.¹⁹³

In 1997, following calls for institutional reforms, the government adopted the IPPG that saw the establishment of the Constitution of Kenya Reform Commission in 2001.¹⁹⁴ The Commission published its report in 2002 whereby it highlighted police impunity and lack of police independence.

During 2002, Kenya held national elections and witnessed a change of the Country's political leadership whereby the long-time-ruling political party, KANU, was defeated and the then opposition coalition

¹⁸⁹Through insertion of Section 2A to the constitution.

¹⁹⁰Report of the National Taskforce on Police Reforms (n 178) 16.

¹⁹¹ *ibid.*

¹⁹²About 300,000 people were displaced and 1500 others were reported as dead.

¹⁹³Report of the National Taskforce on Police Reforms (n 190).

¹⁹⁴The commission was established through the Constitution of Kenya Review Act 1997.

took over.¹⁹⁵ With the change of leadership, the new ruling political regime, in 2004, appointed a task force¹⁹⁶ to examine the role and reform of the Police. Despite the resultant voluminous report produced by the task force with numerous recommendations on police reforms, the issue of policing oversight and accountability remained an elusive dream for Kenyans. The government was not keen on effecting the necessary police reforms, which would have included establishing a civilian policing oversight mechanism to hold the Police accountable to members of the public.

The clamour for Kenya to establish a policing oversight mechanism, however, gained strong momentum after the 2007/2008 Post-Election Violence. During the violence, the Police involved themselves in various malpractices, including participating in sexual gender-based violence,¹⁹⁷ indiscriminately fatally shooting members of the public¹⁹⁸ and acting with indifference when Kenyans lodged with the police complaints against fellow police officers.¹⁹⁹ The Post-Election Violence saw Kenya establish a Commission of Inquiry, CIPEV, and mandated the Commission to, amongst other things, probe into security forces role and conduct during post-election violence and make recommendations to that.²⁰⁰

Part of the recommendation that the Commission made was for Kenya to establish an Independent Police Conduct Authority.²⁰¹ The Commission set out parameters that would enable the suggested institution to deal with complaints against the Police in a manner that would meet the international human rights requirements.²⁰² Other reports that were produced subsequently fully supported CIPEV's

¹⁹⁵NARC.

¹⁹⁶The police force task force

¹⁹⁷CIPEV Report (n 183) 252.

¹⁹⁸ In the CIPEV Report, pg. 384, the Commission reported that 450 people died of gunshot wounds during the Post-Election Violence and 557 others were treated for gunshot injuries.

¹⁹⁹CIPEV Report (n 183) 257.

²⁰⁰ibid2.

²⁰¹ibid 479.

²⁰² See CIPEV Report, pg. 479, recommendation 2 on “An ‘Independent Police Conduct Authority’ is established with legislative powers and authority to investigate police conduct and provide civilian oversight.”

recommendations on the need for reforming the Kenyan Police through the establishment of a Civilian Policing Oversight Institution, which would hold the Police accountable for violation of international human rights.²⁰³

The first attempt for the Kenya Government to deal with police impunity was on September 2008 when the then President²⁰⁴ solely sought to establish a Police Oversight Board.²⁰⁵ CIPEV, however, rendered the President's efforts futile since it vehemently opposed the establishment of the Board citing lack of independence and inadequate resources.²⁰⁶ According to CIPEV, the proposed Board was incapable of meeting required international standards for a body mandated to hold the Police accountable.²⁰⁷

The call for legal and institutional reforms, including calls to establish a mechanism to hold the Police accountable, persisted, culminating into a constitutional referendum held on 27th August 2010 during which Kenyan people gave themselves a new Constitution.²⁰⁸

2.3.3 Post-Promulgation of Constitution of Kenya, 2010

The call for an independent oversight mechanism that would hold the security organs, including the police, accountable to the members of the public was such a matter of necessity for the Kenyan people to a point where they pronounced it in the Constitution,²⁰⁹ which is the supreme law of the Country. The

²⁰³ See the Government of Kenya, 'Report of the National Taskforce on Police Reforms' (Government Printers, 2009), United Nations Human Rights Council, Report by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Philip Alston) (United Nations Human Rights Council, Geneva 3 June 2009).

²⁰⁴ Mzee Mwai Kibaki.

²⁰⁵ vide gazette notice 8144

²⁰⁶ IPOA, 'The Inaugural Performance Report: (June to December 2012)' (IPOA 2012).

²⁰⁷ UN Human Rights Committee (HRC), 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) 11 <<https://www.refworld.org/docid/453883fb0.html>> accessed 14 May 2019.

²⁰⁸ CoK 2010.

²⁰⁹ CoK 2010.

Kenyan people subordinated the Kenyan national security organs to a civilian oversight.²¹⁰ The Kenyan Constitution recognizes international law²¹¹ to form part of the Kenyan law, albeit on some conditions.²¹² The recognition, therefore, further reaffirms and strengthens Kenya's obligation to protect individuals within its jurisdiction against violation of human rights per expected international human rights standards.

In 2011, the clamour for an independent oversight authority to hold the Police accountable came to fruition when the Kenyan Parliament enacted the Independent Policing Oversight legislation,²¹³ establishing an institution with a comprehensive mandate in dealing with police misconduct.²¹⁴

As recent as 2017, the Kenyan Government enacted another legislation that sought to have IPOA, enable it to partly meet its international responsibility to protect its citizens against acts prohibited under the UNCAT perpetuated by its police officers.²¹⁵

As it stands, IPOA's ability to overcome the many challenges posed by the weak institutional and legal framework relevant to policing oversight is doubtful. Dealing with these challenges at the earliest time possible will enable the Kenyan State to meet its international human rights obligations per the required international human rights standards.

²¹⁰CoK 2010, art 239(5).

²¹¹ International treaties or conventions ratified by Kenya.

²¹²CoK 2010, art 2(6).

²¹³ IPOA Act 2011.

²¹⁴ IPOA Act 2011, ss 6 and 25.

²¹⁵ See the Long title to the Prevention of Torture Act 2017 as read with s 13(6) of the Act.

2.4 Conclusion

The present chapter has explored the history of policing at the international, regional, and local levels. The examined history has revealed the following: - first, at all the three levels, the necessity of policing accountability mechanisms was brought about by the realization that police officers have enormous powers that are susceptible to abuse by the Police when performing their policing duties. Second, the idea of establishing policing oversight mechanism to hold the Police accountable to the members of the public is relatively new. Third, at all the three levels, the development of the law to help States establish policing oversight institutions that would hold the Police accountable is slow but in the right direction. Lastly, that more efforts and commitments will be required from all the stakeholders at all the three levels to ensure that all over the world, competent institutions are established to hold the Police accountable for any human rights violations that they perpetrate.

The next chapter will examine the efficacy of the institutional and legal framework regarding policing oversight in Kenya to find out whether they facilitate IPOA to carry out its mandate in line with international human rights standards.

CHAPTER THREE: POLICING OVERSIGHT INSTITUTIONAL AND LEGAL FRAMEWORK

3.0 Introduction

This chapter outlines the mandate of IPOA as provided for in the different provisions of law for purposes of pointing out the numerous legal and institutional challenges that impede IPOA from executing its mandate in line with international human rights standards. For clarity purposes, the study divides the legal framework governing the work of IPOA into three parts. The first and the second parts cover the international legal framework and the regional legal framework respectively, since the two sets out the international standards, which IPOA should meet in the execution of its mandate. The third part covers the local legal framework, which establishes the actual IPOA Mandate. The Chapter proceeds to cover the institutional challenges that hinder IPOA in executing its mandate in line with the identified international standards. Further, the chapter analyses the efficacy of the laws on policing oversight to see whether they address the identified challenges facing IPOA. After that, the chapter shall end with a conclusion part.

3.1 The International Legal Framework

The local laws provide for the express mandate of IPOA.²¹⁶ Part of IPOA's mandate is to investigate acts prohibited under UNCAT committed by police officers to contribute to the State's fulfilment of her international responsibility to protect its citizens against torture and other inhumane acts.²¹⁷ Different international and regional human rights instruments also provide for this State's duty of citizen's protection. Kenya, therefore, is bound to ensure that IPOA, as an institution, is availed with the necessary legal and institutional mechanisms to guarantee the execution of its mandate in line with all the

²¹⁶CoK 2010; IPOA Act 2011; Prevention of Torture Act 2017, amongst other legislation.

²¹⁷Prevention of Torture Act 2017, s 13(6).

international human rights standards set under the various international and regional human rights instruments. Notably, the provisions of the UNCAT, which create the States responsibility that Kenya seeks to fulfil through IPOA binds Kenya.

3.1.1 United Nation Related Legal Instruments

Kenya is a State Party to several international human rights instruments that prohibit torture and other cruel, inhuman or degrading treatment or punishment.²¹⁸ As such, the provisions creating State obligations under the various international human rights instruments bind Kenya, and therefore, Kenya has an international duty to fulfil those obligations. The various international human rights instruments that are relevant to the study are: -

a) The Charter of the United Nations²¹⁹

The United Nations is an international organization to which Kenya is a member.²²⁰ A read of the UN Charter reveals that the organization is committed to issues of human rights internationally and member States, therefore, are legally bound by the Charter provisions to ensure that they guarantee those within their territories the enjoyment of international human rights.²²¹

For instance, the charter in enumerating the purposes of the organizations makes it clear that the organization beliefs in human rights and commits to come up with conditions to guide states in respecting and executing states obligations established in international law.²²²

²¹⁸ UDHR, art5; ICCPR art 7.

²¹⁹United Nations Charter. 1 United Nations, Treaty Series, XVI.

²²⁰ Kenya became Party of the United Nations on 16 December 1963.

²²¹UN Charter, art 1.

²²² UN Charter, art 1.

Further, the provision of the Convention that contains the principles of carrying out the purposes of the UN enjoins all the members of the UN to carry out the obligations assumed by them under the charter in good faith.²²³

b) The Universal Declaration of Human Rights (UDHR)²²⁴

The UDHR is the first human rights instrument that the Members States adopted following the formation of the UN. Kenya became a State Party to the declaration on July 31, 1990. Many States worldwide have, since the adoption of the declaration, widely invoked and used the expressions on human rights made in the declaration.²²⁵ The States' extensive reliance on the UDHR provisions led the rights and obligations created thereunder to develop to the level of Customary International Law, eventually acquiring a binding effect.²²⁶

One of the Declaration provisions prohibits subjecting any human being to torture and other acts listed thereunder.²²⁷

The declaration further enjoins all State Parties to establish competent tribunals to deal with victim issues arising from breach of fundamental rights granted under each State's constitutions or the law.²²⁸

²²³ UN Charter, art 2(2).

²²⁴ UDHR.

²²⁵ Australian Human Rights Commission, 'What Is the Universal Declaration of Human Rights' < <https://www.humanrights.gov.au/our-work/what-universal-declaration-human-rights> > accessed 14 May 2019.

²²⁶ *ibid.*

²²⁷ UDHR, art 5, which also prohibits subjecting one to cruel, inhuman, or degrading treatment or punishment.

²²⁸ UDHR, art.8.

c) International Covenant on Civil and Political Rights (ICCPR)²²⁹

The ICCPR is one of the leading international human rights instruments that gives binding force to the various UDHR provisions.²³⁰ The ICCPR treaty is binding on all State Parties to it. Kenya became a party to the Convention on 23rd January 1992, and three months thereafter, the Convention became enforceable on her.²³¹

Specific provisions of the Convention prohibits torture, inhuman, or degrading treatment or punishment.²³²

States that are Parties to the Convention bear an international State responsibility to ensure that people within their jurisdictions enjoy all the rights enumerated in the convention.²³³ Further, States should establish competent Authorities and enact laws that accord effective remedy to victims of human rights violation, regardless of whether State officials occasion the violation.²³⁴

d) The United Nations Convention against Torture²³⁵

The UNCAT is an international treaty specifically dedicated to deal with issues regarding prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention is binding to all State Parties, including Kenya.²³⁶

²²⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

²³⁰ Equality and Human Rights Commission, 'International Covenant on Civil and Political Rights' <<https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-civil-and>> accessed 14 May 2019.

²³¹ The ICCPR, art 49.

²³² ICCPR, art 7.

²³³ ICCPR, art 2(1).

²³⁴ ICCPR, art 2(3) (a).

²³⁵ UNCAT.

²³⁶ Kenya Ratified the Convention on 21 February 1997.

The convention creates international responsibility for all States to establish state mechanisms²³⁷ to prevent torture in any area within its control.²³⁸

The Convention, in express mandatory terms, demands for States to provide reporting avenues to victims of the violation of human rights provided for in the Convention.²³⁹ The Convention further binds States, through their competent institutions, to investigate the victim's allegations promptly and impartially.²⁴⁰ Where States confirm the allegations of the violation, the Convention further mandates States to provide redress to the victims.²⁴¹

3.1.2 The Regional Legal Framework

Kenya is a Party to several regional legal instruments some of which commit, in general terms, to protect international human rights of the population found in the African States, provided for under the United Nations human rights instruments.²⁴² Other regional legal instruments are specific on dealing with issues of human rights in Africa.²⁴³ Kenya is a State Party to some of these instruments.²⁴⁴

The Banjul charter has provisions that prohibit, amongst other human rights violations, subjecting one to torture, cruel, inhuman or degrading punishment and treatment.²⁴⁵

²³⁷ Including taking legislative, administrative or judicial measure.

²³⁸ UNCAT, art 2

²³⁹ UNCAT, art 13.

²⁴⁰ UNCAT, art 12.

²⁴¹ UNCAT, art 14.

²⁴² See the Charter of the Organization of the African Unity (OAU) and the Constitutive Act of the African Union (AU), which, have provisions that are to the effect that the member states to the organizations recognize and intends to adhere to the United Nations Charter and the UDHR.

²⁴³ African Charter on Human and People's Rights (Banjul Charter).

²⁴⁴ Kenya ratified the Banjul Charter on 23 January 1992.

²⁴⁵ Banjul Charter, art 5.

The Charter also establishes the African Commission on Human and People's Rights.²⁴⁶ The Charter mandates the Commission to formulate framework to assist African States in dealing with human rights violations.²⁴⁷ The Charter further enjoins the Commission to cooperate with other institutions in promoting and protecting human and people's rights.²⁴⁸

In cooperation with others, AComHPR drew the Robben Island guidelines that deal explicitly with issues of torture in Africa.²⁴⁹ The guidelines are not legally binding on States Parties to the Banjul Charter.²⁵⁰ They, however, are particularly relevant to the mandate of IPOA in that they persuasively call on the African States to provide reporting avenues to victims of torture and other cruel, inhuman or degrading treatment or punishment.²⁵¹ The guidelines further demand States, through independent competent State institutions, to conduct impartial and prompt investigations into the allegations.²⁵² The Guidelines further urge the African States to establish independent oversight mechanisms that would hold State Security organs accountable for any torture related to human rights violations.²⁵³

3.1.3 The International Human Rights Standards on Policing Oversight

The provisions of the above-cited international and regional human rights instruments, discloses the international human rights standards that institutions established to carry out policing oversight should meet in the execution of their mandate. These instruments create the State responsibility that Kenya

²⁴⁶ Banjul Charter, art 30.

²⁴⁷ Banjul Charter, Preamble.

²⁴⁸ *ibid*

²⁴⁹ J Niyizurugero and G Lessène, 'The Robben Island Guidelines: An Essential Tool for the Prevention of Torture in Africa' 67 <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwi7-P3KltDkAhVB4OAKHat7DZ8QFjAAegQIABAC&url=http%3A%2F%2Fprojects.essex.ac.uk%2FEHRR%2FV6N2%2FNiyizurugeroLessene.pdf&usg=AOvVaw2iWEYWid-sToLHmyo219jY>> accessed 14 September 2009.

²⁵⁰ *ibid*.

²⁵¹ Robben Island Guidelines, rr 17.

²⁵² Robben Island Guidelines, rr 17, 18 and 19.

²⁵³ Robben Island Guidelines, rr 40 and 41.

seeks to fulfil through IPOA, which standards this study claims that IPOA has failed to meet in execution of its mandate. The set standards that the policing oversight institutions should meet are as follows: -

3.1.3.1. Competence²⁵⁴

Competence is a crucial requirement for any institution since the effective execution of the mandate placed on any institution will largely depend on whether the organization is capable enough to do so.²⁵⁵ Competence of an institution covers broad issues ranging from the quantity and the level of training of staff that the authority employs, the availability of necessary facilities as well as the sophistication of equipment in use by the institution.²⁵⁶ The demands of the functions that a policing oversight institution performs calls for it to have enough trained workforce to carry out its mandate all over the jurisdiction and all equipment necessary to handle and analyse forensic evidence.²⁵⁷ Only then will one be able to consider such an institution to be competent enough to oversight the police.

Competence of an institution extends also to cover issues on whether all matters regarding a complaint lodged with the institution can be dealt with conclusively without referring the complainant to bodies that might compromise the work of the authority.²⁵⁸ For instance, one of the requirements is that oversight institutions should issue a complainant with all the documents including P3 forms, Post-Mortem forms, and any other document relevant for a complete investigation into violation of human rights.

²⁵⁴UNCAT, art 12.

²⁵⁵Amnesty International, *Public Outrage: Police Officers above the Law in France* (Amnesty International Publications April 2009) 39.

²⁵⁶ibid.

²⁵⁷ibid.

²⁵⁸ibid.

IPOA has failed to meet this standard in that, it has not maintained enough staff numbers to carry out its mandate as the institution experiences high staff turnover due to uncompetitive terms of staff engagement.²⁵⁹ IPOA also lacks some key experts to carry out certain procedures vital to investigations.²⁶⁰ The Authority relies on police officers to process scenes of crimes and incidents. It also relies on police ballistic experts to analyse ballistic exhibits.²⁶¹ Further, with regard to facilities, IPOA relies on services provided by other institutions since it lacks facilities that are key in execution of its mandate. For instance, IPOA lacks a laboratory for analysis of chemical samples, ballistic exhibits, and document examination, amongst others.²⁶²

In addition, in execution of its mandate, IPOA refers complainants of police brutality to the police to obtain vital documents including P3 Forms, Post Rape Care forms and Post-mortem forms that the Authority does not have. Lack of these vital documents impacts negatively on IPOA's competence making execution of its mandate to fall below the competence standard set under the international law.²⁶³

3.1.3.2. Independence and Impartiality²⁶⁴

Another requirement set under international human rights instruments is that institutions that oversight the police should be both structurally and practically independent from the police organizations they seek to oversight.²⁶⁵ Given that, the failure of police officers to investigate their colleagues' misconduct impartially necessitated policing oversight institutions, which led to the loss of public trust in the internal

²⁵⁹ IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 95.

²⁶⁰ *ibid*94.

²⁶¹ *ibid*.

²⁶² *ibid*.

²⁶³ *ibid*.

²⁶⁴ UNCAT, art 12.

²⁶⁵ Amnesty International (n 255) 13; see also United Nations Office on Drugs and Crime, *Hand book on Police Accountability Oversight and Integrity*, (Criminal Justice Handbook Series, United Nations 2011) 50.

police accountability mechanism, civilian institutions established to hold the police accountable need to be independent.²⁶⁶ These civilian institutions also need the public to see them as independent to protect the public trust in them.²⁶⁷

The international players take the call for the independence of a policing oversight institution seriously. They demand that in carrying out its mandate, the oversight institution should rely neither on officers nor on resources from the same police nor should it employ police officers as its investigators, to carry out its investigation work.²⁶⁸ The International experts further demand that if a lack of trained personnel in the institution's State's jurisdiction forces the policing oversight institution to employ police officers, then the police officers should be retired police officers or sourced from an outside jurisdiction.²⁶⁹

For one to consider institutions of policing oversight to be independent, the institution must have full control in exercising its functions or powers.²⁷⁰ The law and most preferably, the Constitution should establish the institution.²⁷¹ The institution should also report directly to the parliament, and it should have independent funding with a legal guarantee on the size and disbursement of its budget.²⁷² Further, the State should base the appointment of the institution's top management and members of staff appointment on merit.²⁷³

A number of factors make IPOA fail to meet this standard. To begin with, IPOA relies on police officers to carry out certain steps relevant to its mandate including analysis of ballistic exhibits and tracking of

²⁶⁶ibid.

²⁶⁷ibid.

²⁶⁸United Nations Office on Drugs and Crime, *Hand book on Police Accountability Oversight and Integrity*, (Criminal Justice Handbook Series, United Nations 2011) 50.

²⁶⁹ibid.

²⁷⁰ibid.

²⁷¹ibid.

²⁷²ibid.

²⁷³ibid 50-70.

telephone calls.²⁷⁴ While carrying out these steps to assist in IPOA investigations, the police officers rely on police resources and facilities including ballistic laboratories, phone tracking devices, scene of crime processing equipment, which is a further breach of the international standard on the independence of a policing oversight institution.²⁷⁵

Further, IPOA opened a possibility of employing police officers as members of its staff,²⁷⁶ risking the perception of members of public viewing it as being partisan.

3.1.3.3. Ready Accessibility by Complainants²⁷⁷

The international players demand that States establish policing oversight institutions and require that the institutions provide an avenue to victims of human rights violations to report police actions that lead to violations without the fear of having to report the culpable officers to their colleagues.²⁷⁸ Such a mechanism, therefore, ought to be accessible to everyone who might fall victim to abuse of police power, including police officers themselves. Accessibility of institutions involves creating awareness for the intended users to understand the institution's mandate, the complaint process, and the physical offices where one can complain.²⁷⁹ The institution can do awareness creation by educating members of the public.²⁸⁰ Accessibility will also demand that the institution brings near the people the actual means of reporting a violation of human rights and make the mechanisms of lodging a complaint affordable to all.²⁸¹ Accessibility standard would also demand that the institution brings the physical offices near the

²⁷⁴ IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 94.

²⁷⁵ *ibid.*

²⁷⁶ IPOA, 'The Inaugural Performance Report: (June to December 2012)' (IPOA 2012) 17.

²⁷⁷ UNCAT, art 13.

²⁷⁸ UNCAT, art 13.

²⁷⁹ United Nations Office on Drugs and Crime (n 268) 34.

²⁸⁰ Amnesty International (n 255) 25.

²⁸¹ United Nations Office on Drugs and Crime (n 279).

people, particularly in the areas where violations of human rights by officers is highly likely, including police detention facilities.²⁸²

Writers identify ways for States to ensure accessibility to policing oversight institutions. They include developing communication strategies to explain the mandate of an independent oversight body, active outreach to marginalized minorities, establishment of toll-free numbers or free postal services to lodging complaints and establishing mechanisms to allow reporting of police misconduct in all the police stations.²⁸³

IPOA, to an extent, has failed to meet this international standard given that it has not done much to ensure its accessibility by all the Kenyan population. Regarding accessibility of its physical offices, one should be concerned that IPOA in its more than seven years of existence has only established eight regional offices and one set light office which are only in nine counties out of Kenya's 47 counties.²⁸⁴ Further, during the period covering its inception to 2018, IPOA only managed to carry out public outreach, publicity and awareness creation activities in twenty counties out of Kenya's 47 counties.²⁸⁵

3.1.3.4. Protection of Complainants and Witnesses from Intimidation

Police officers have immense powers within their disposal. When they abuse the police powers to violate the rights of people whose protection the State entrusts, then the victims of such human rights violations become more vulnerable to further abuse by the same police institution.²⁸⁶ More particularly, further abuse is more likely in instances where the perpetrators want to ensure that no one will ever hold them

²⁸²ibid 45.

²⁸³Ibid.

²⁸⁴ IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 13.

²⁸⁵ ibid101.

²⁸⁶Amnesty International (n 255) 32-37.

to account for the abuse. More often than not, the police employ the tactic of pressing false and unjustified charges on those who fall victim of or witness police misconduct in an attempt to intimidate potential complainants and prospective prosecution witnesses to the police misconduct.²⁸⁷

This human right standard, therefore, is necessary to give more meaning to the above first three standards/requirements. Without the protection of victims and witnesses from intimidation by the police, it means that no complainant will ever report police misconduct to the policing oversight institution.²⁸⁸ If any complainant lodges a report, then chances of gathering evidence to implicate the culprits of human rights violations will be minimal since no one will be willing to give evidence for fear of intimidation.

IPOA has failed to protect victims of police brutality who go to seek its services in holding the police accountable for the human rights violations. IPOA complain that often, the police institutes false charges before courts against victims of police misconduct to discourage the victims from pursuing complaints they lodge at IPOA.²⁸⁹ In other times, IPOA has reported that the police in an attempt to defeat justice eliminate witnesses, intimidate them by being present in court in large numbers when courts schedule for hearing cases investigated by IPOA.²⁹⁰ When IPOA results to complaining instead of taking actions to protect the complainants and witnesses from police elimination and intimidation, it fails to attain this international standard created under the conventions.

²⁸⁷ibid.

²⁸⁸ibid.

²⁸⁹ IPOA (n 284)93.

²⁹⁰ ibid94.

3.1.3.5. Promptness of Investigations²⁹¹

The above-cited international legal instruments requires that investigations carried out by policing oversight institutions be prompt. This requirement is essential given that whenever delays occur in investigating matters regarding torture and other human rights violations, the victims of the violations begin to have the impression that the policing oversight institution is not seriously interested in having their case investigated.²⁹² The families of the victims may also share this impression.²⁹³ The impression of disinterest on members of the public may lead to erosion of public trust in the policing oversight institution.²⁹⁴ Delay in investigations further worsen public trust in the police institution, whose members violated human rights in the first instance.²⁹⁵ Moreover, whenever delay in investigating a matter that involves collection of forensic evidence occurs, there is always high likelihood that the quality of evidence collected will deteriorate. Worse still, is the possibility of having such evidence interfered with. This standard is a safeguard to ensure those police officers guilty of human rights violation are not otherwise let free for lack of evidence which would have been available had prompt investigations been conducted.

At times, IPOA has failed to meet this standard in execution of its mandate particularly in instances where it relies on police officers to carry out key steps of investigations. When the police delay in forwarding resultant reports of exhibit analysis, this translates to delay of IPOA investigations.²⁹⁶ This delay therefore affects IPOA's ability to attain the international standards discussed in this study.

²⁹¹UNCAT, art 12.

²⁹²Amnesty International (n 255) 25.

²⁹³ibid.

²⁹⁴ibid.

²⁹⁵ibid.

²⁹⁶ IPOA (n 284) 93-94.

3.1.3.6. Thorough and Adequate Investigations

The international human rights instruments set a further standard to the effect that whenever police oversight institutions carry out investigations into allegations of police violation of human rights, then the resultant investigations should be thorough and adequate to identify the perpetrators of the human rights violation.²⁹⁷ The instruments term investigations as adequate when the investigating body does everything to collect all available evidence and the investigations outcome is able to determine the justification or otherwise of the force used given the obtaining circumstance.²⁹⁸

When oversight institutions carry out adequate investigations to bring culpable police officers to book, the institutions strengthen the grounds for complainants to claim compensation for the torture they have suffered.²⁹⁹

In essence, under this international human rights standard, States may fail to fulfil its international duty even though it has established a police oversight institution. For instance, where the police torture someone, but the institution cannot prove the same due to the insufficiency of evidence occasioned by difficulties posed by the non-cooperation of police or obstacles met during the cause of investigations. The Concerned State, therefore, will fail to discharge its international responsibility of protecting and providing a sufficient remedy to victims of torture within its jurisdiction.

A number of times, IPOA has failed to attain this standard in that, it has admitted that in certain times it has terminated its investigations for lack of evidence.³⁰⁰ In other times, IPOA investigations have failed to identify police perpetrators of violation of human rights. For instance, IPOA investigations failed to

²⁹⁷ Amnesty International (n 255) 19.

²⁹⁸ *ibid.*

²⁹⁹ *ibid.*

³⁰⁰ IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 94.

reveal the assailant of a six-month-old baby³⁰¹ who was fatally assaulted by police officers during a police operation to quell 2013 post-election chaos at Nyalenda Estate, Kisumu County. IPOA's failure to identify the officer who caused the fatal injuries on the baby was mainly because IPOA could not secure the police operation order relied upon during the incident in question.³⁰² The death of the deceased baby was disposed of by way of public inquest during which the Court was able to identify a number of officers for prosecution to account for the death of the deceased child.³⁰³ The fact that IPOA could not secure the relevant police document in itself amounts to IPOA's failure to meet the international standard discussed in this study. Further, the failure to identify the perpetrators of the deceased's death also amounts to IPOA's failure to meet the set standards.

3.1.3.7 Effective Legislation to Anchor a Policing Oversight Institution.

Anchoring an institution of policing oversight in the law and most preferably the constitution is one of the identified international standards. Securing the institution under the law safeguards the institutional independence from political interference. Further, once the law provides for the institution's matters regarding funding and competence, the law enables the institution and its stakeholders to easily fight for adequate resources and government facilitation of the policing oversight institution. One, therefore, does not leave the institutions funding at the favour and control of the executive who in most cases, control the police force that violates human rights.

IPOA meets this international standard given that the Kenyan parliament secured the establishment of the institution in an Act of Parliament.³⁰⁴

³⁰¹Baby Samantha Pendo

³⁰² Inquest No. 6 of 2017 before Chief Magistrate's Court at Kisumu (unreported).

³⁰³ *ibid.*

³⁰⁴ IPOA Act No. 35 of 2011.

Having enumerated in this study the international human rights standards that a policing oversight institution should meet in the effective execution of its mandate, the study proceeds to examine IPOA's mechanism. The examination helps to determine whether the government and the law enable the institution to contribute to the State's fulfilment of its international responsibility to protect those within Kenya's jurisdiction against torture perpetrated by police officers.

3.2 Local Legal Framework and the Mandate of IPOA

The local laws that provide for the mandate of IPOA or are related to civilian policing oversight in Kenya include both the Constitution and other legislation enacted by the parliament. The specific laws are as follows: -

3.2.1 The Constitution of Kenya, 2010³⁰⁵

The Constitution of Kenya subordinates the national security organs³⁰⁶ to a civilian authority.³⁰⁷ The constitution also lays a basis for all the other laws relevant to policing oversight in Kenya.³⁰⁸

3.2.2 The Independent Policing Oversight Authority Act³⁰⁹

This Act of Parliament is the specific law that establishes the civilian policing oversight mechanism, IPOA, in Kenya³¹⁰ and it provides for the comprehensive IPOA mandate. The Act, in its provisions, has the general and overarching mandate of IPOA.³¹¹ The Act identifies the objectives of IPOA as amongst

³⁰⁵CoK 2010.

³⁰⁶Identified in the CoK 2010, art 239(1) as the Kenya Defence Forces, the National Intelligence Service and the National Police Service.

³⁰⁷CoK 2010, art 239(5).

³⁰⁸CoK 2010, art 2.

³⁰⁹ IPOA Act 2011.

³¹⁰See the Long Title to IPOA Act 2011.

³¹¹ IPOA Act 2011, s 5.

others, holding the Police to account for their misconduct in accordance with Article 244 of the Constitution and overseeing the internal police complaints handling mechanism.³¹²

Section 6 of IPOA Act goes ahead to provide for thirteen (13) specific functions of IPOA. The functions range from investigation of police operation, criminal or disciplinary acts committed by the police regardless of whoever makes the reports.³¹³ The institution also monitors, reviews and audits internal complaint mechanisms.³¹⁴ Further, IPOA has a mandate to make policy recommendations and, inspect detention facilities.³¹⁵ It also monitors police operations and facilitate access to IPOA services.³¹⁶ The law also mandates IPOA to create public awareness on IPOA functions and present evidence in inquest proceedings.³¹⁷ IPOA further cooperates with other institutions in the policing oversight sector and most importantly, it has the function to perform any other function that advances promotion of the institution's objectives.³¹⁸

The Act further mandates IPOA to investigate all deaths and severe injury including death or severe injuries that are occasioned by Police officers.³¹⁹

³¹² IPOA Act 2011, s 5.

³¹³ IPOA Act 2011, s6((a), (b) and (c))

³¹⁴ IPOA Act 2011, s 6 ((d) and (g))

³¹⁵ IPOA Act 2011, s 6(e).

³¹⁶ IPOA Act 2011, s 6(g).

³¹⁷ POA Act, s 6(h).

³¹⁸ I consider this as the most important role since it presents IPOA with an opportunity do anything legal that would ensure that the police act with professionalism when dealing with members of the public. This role is very important especially given the fact that the legislature cannot enact laws covering all the possible ways of dealing with situations of police misconduct. IPOA need to seize the opportunity presented by Section 6(m) to deal with all policy issues or police misconduct that warrant intervention by a policing oversight institution.

³¹⁹ POA Act, s 25.

3.2.3 The Prevention of Torture Act³²⁰

The long title to this Act is to the effect that Kenya enacted the legislation to, amongst other things, give effect to the principles of the UNCAT as it also seeks to prevent and outlaw certain acts.³²¹ Further, the Act covers reparations to persons who fall victims of the identified and outlawed police acts.

The Act mandates IPOA to investigate acts outlawed in it whenever police officers are the perpetrators and the procedure for such investigations is per section 25 to 29 of IPOA Act.³²²

The Act further mandates IPOA, as an enforcement agency to work closely with KNHCR to ensure that the State complies with international good practices of prevention of torture.³²³

A reading of Section 12 (1) (h) of the Act reveals that IPOA is under a duty to submit reports to KNCHR on compliance with the provisions of the Act. Eventually, KNCHR, relying on these reports, together with other reports by State agencies, monitors Kenya's compliance with obligations set under international treaties that relate to torture and other related outlawed acts.³²⁴ The reporting requirement means that IPOA has a role of ensuring that the State fulfils its obligations under the international treaties prohibiting torture. In execution of this mandate, it follows therefore that IPOA's investigation will have to live up to the international human rights standards for it to contribute to the States fulfilment of the international responsibility to protect effectively.

³²⁰The Prevention of Torture Act 2017.

³²¹ Acts of torture and cruel, inhuman or degrading treatment or punishment.

³²²The Prevention of Torture Act 2017, s 13(6).

³²³Prevention of Torture Act Section 12(1) (j).

³²⁴Prevention of Torture Act Section 12(1) (e).

3.2.4 Other Policing Oversight Related Laws

Other national legislations have some provisions that have a bearing on execution of IPOA's mandate, although they do not directly provide for the mandate of IPOA. They include-

a) The National Police Service Commission(NPSC) Act³²⁵

The legislation operationalizes the National Police Service Commission created under the Constitution,³²⁶ to deal with welfare issues concerning members of the police Service.³²⁷

Section 10(1) (o) of the Act is to the effect that, where necessary, the Commission receives and refers complaints by civilians to IPOA.

b) National Police Service Act (NPS)³²⁸

An Act of Parliament that comprehensively covers policing in Kenya and is one of the crucial legislations against which IPOA gauges the (un)lawfulness of police (in)action and (mis)conduct.³²⁹

c) Evidence Act³³⁰

An Act of Parliament that governs matters related to evidence presented during Court proceedings. Since one of the mandates of IPOA is to investigate police actions, which involves collecting evidence with a view of relying on it during court proceedings, IPOA's involvement with witnesses, suspected police officers, exhibits and evidence in general, must adhere to the provisions of this Act.

³²⁵ NPSC Act 2011.

³²⁶CoK 2010, art 246.

³²⁷ Including, exercise of disciplinary control over and removal of persons holding or acting in offices within the National Police Service.

³²⁸ Act No. 11A of 2011.

³²⁹ The Act contains the laws on how a police officer is expected to conduct himself; it has provisions on use of force and firearms as well as what constitutes disciplinary action amongst other provisions.

³³⁰ Laws of Kenya, Chapter 80.

d) Fire Arms Act³³¹

An Act of Parliament, which regulates the possession, transportation, storage and use of firearms, ammunition, airguns and destructive devices amongst other things. In the course of executing its mandate, IPOA handles the items regulated under the Act and in so doing; it should adhere to the provisions of this Act.

3.3 Institutional Challenges Hindering the Execution of IPOA's Mandate in Line with International Human Rights Standards

IPOA being relatively a new institution is facing a myriad of challenges that negatively affect the execution of its mandate, and when one views these challenges through the international human rights standards lens, one would say that they threaten the very existence of the institution. Factors beyond IPOA's control pose most of the challenges experienced by the institution, which, this study classifies as externally caused institutional challenges. Factors within IPOA's control pose a few other challenges, and the study classifies them as internally caused institutional challenges. However, it may be difficult to draw a strict demarcation between the different challenges in the same category or even between challenges in the two different categories since most of the challenges-if not all, whether internally or externally caused, feed into one another.

3.3.1 The Externally Caused Institutional Challenges

a) Under-Funding

Right from the inception of IPOA, funding issues on its policing oversight role has remained a big challenge.³³²A comparison done on the rate of increase of complaints received by the Authority right

³³¹ Laws of Kenya, Chapter 114.

³³²IPOA, 'Inaugural Performance Report: (June to December 2012)' (IPOA 2012) 6.

from the time of its inception compared to the rate of budgetary allocation reveals that the problem of underfunding has been a persistent challenge that hinders the execution of its mandate. IPOA's broad mandate which includes carrying out inspections of police detention facilities as well as monitoring of police operations, in addition to dealing with complaints and other mandate set in IPOA Act further compounds the problem of underfunding. For instance, during the first year of its inception, 2012/2013 IPOA received a total of 594 complaints, and as of April 2018, IPOA had received a total of 1836 meaning that the complaints received at IPOA increased by a rate of 309%.

During the same period, IPOA received a budget of 246 million in 2013 while in 2018 it received a budget of 696 million translating to a budget growth rate of approximately 282%. Further, while the budgetary growth rate of IPOA funding is not so bad, the budget compared to the size of the police service that IPOA oversees is so negligible. Joel Miller notes that underfunding of policing oversight institutions undermines their effectiveness in the performance of their duties, and this may eventually lead to the institution's loss of legitimacy and support, eventually leading to their disbandment.³³³ The observations made by Miller are valid in as far as IPOA budgetary allocations are concerned. He observed that underfunding impacts negatively on the operations of the policing oversight institution since securing of staff to perform operations, going to the field to carry out investigations, inspections and monitoring work as well as facilitating members of the public to access IPOA services involves the spending of funds. Lack of funds, therefore, would, translate to an ineffective policing oversight institution since it will not be able to address issues of police misconduct with the promptness and thoroughness they require. When this challenge faces IPOA, in essence, execution of its mandate will fail to be in line with the standards set under human rights conventions relevant to the work of IPOA.

³³³J Miller, 'Civilian Oversight of Policing: Lessons from the Literature' (Global Meeting on Civilian Oversight of Police, Los Angeles 5-8 May 2002) 13.

b) Inadequate Capacity

Inadequate and lack of capacity in some areas of IPOA as an institution is a real challenge that is threatening the independence, impartiality, and promptness of the institution in dealing with policing oversight matters that fall under its mandate. IPOA relies on the police to facilitate and carry out some of the vital steps in its work, particularly investigations.

For instance, IPOA cannot carry out vital roles that are relevant to holding the police accountable. Some of the roles include, arrest suspect officers, conduct identity parades, take confessions from accused persons, conduct mobile data tracking, conduct a ballistic examination, process scenes of crime photos, issue Post-mortem and P3 forms. IPOA relies on police officers from the service it oversees, to carry out the enumerated roles, casting doubt on the independence and impartiality of IPOA investigations.³³⁴

Moreover, the lack of capacity forces IPOA to rely on other institutions and experts for the performance of specific vital procedures and the provision of critical documents. The experts include prosecutors, pathologists, government chemists, chemical analysts, as well as hospitals, which sometimes fails or delays in providing the necessary information, sometimes leading to delay or abortion of IPOA investigations. The long working relationship between the police and the experts or institutions often occasions the experts to be unwilling to accord IPOA their much-needed cooperation. The police, therefore, may use the experts to frustrate or interfere with IPOA's investigations into a complaint against fellow police officers.³³⁵

³³⁴ IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 94.

³³⁵ *ibid.*

Further, the lack of capacity by IPOA to carry out specific procedures in their day-to-day work would mean a delay in investigations since IPOA has to transport these exhibits to the different institutions that IPOA cannot control.

While one appreciates that IPOA is relatively a new organization and establishment of critical facilities including ballistic and chemical laboratories require massive resources and take long, the study proposes a number of ways to ensure the independence of IPOA investigation, even with the available facilities. For instance, IPOA should have its expert officers seconded to the already established different government institutions to carry out the expert examinations into its investigation cases. Moreover, the State should allow relevant IPOA members of staff to carry out arrests of police officers, conduct identity parades and take confessions in order to safeguard the independence, impartiality, and promptness of its investigations.

c) Non-Cooperation by the Police.

Non-cooperation is the major challenge that IPOA faces in the execution of its mandate. Police officers' impunity of non-adherence to law provisions is the primary cause of non-cooperation.³³⁶ The cooperation of the police is paramount for successful policing oversight. IPOA needs the Police at some point during its investigations, inspection of detention facilities, monitoring of police operations as well as the implementation of IPOA recommendations, amongst others. Police cooperation is also crucial since they are the custodians of most of the documents including the firearms movement registers, duty rosters, occurrence books, cell registers, amongst other documents, that IPOA will have to rely on in carrying out its mandate. The success of IPOA investigations, therefore, depends on the goodwill of the police not to tamper with these documents. Unfortunately, the police have sometimes tampered with the

³³⁶ *ibid*93.

documents in an attempt to cover-up the misconduct of their fellow officers. Other times, the Police have interfered with the documents or even refused to supply IPOA with the document in time or at all, occasioning delay of IPOA investigations and at other times terminating IPOA investigations for lack of evidence.³³⁷

For instance, while the law demands that the police should promptly notify IPOA of any death and serious injury that occur because of police action, the Police have perpetually not complied with this legal provision.³³⁸ The Police have also failed to comply with the legal provisions that require them to secure the scenes of the incidents, collect evidence from the scene and forward it to IPOA immediately.³³⁹

Further, since the law allows the police to conduct a parallel investigation to those being conducted by IPOA in some particular incidence,³⁴⁰ most of the time, the police carry out shoddy and hurried investigations. The Police carry out shoddy investigations to ensure that the State charges the offending officer with a lesser offense or to block IPOA investigations³⁴¹ given that the law bars IPOA from investigating matters whose subject is under litigation before a court or tribunal.³⁴² The Police non-cooperation has led to them not appreciating, acknowledging and implementing IPOA's recommendations on police reforms.³⁴³

³³⁷ *ibid.*

³³⁸ *ibid.*

³³⁹ IPOA Act 2011, s 25.

³⁴⁰ NPS Act 2011, sch 6, Pt A, r 6 and pt B r 6.

³⁴¹ IPOA (n 334) 93.

³⁴² IPOA Act 2011, s 26.

³⁴³ IPOA (n 341).

Although non-cooperation by the police is not specific to IPOA only since many policing oversight institutions all over the world have experienced it; it poses a real threat of IPOA's disbandment. The police non-cooperation negatively affects policing oversight legitimacy leading to the public uproar against the oversight institution. The threat of disbandment is real since it has happened in other jurisdictions where police officers have frustrated the work of oversight institutions.³⁴⁴

d) Lack of Political Support / Unconducive Political Culture

Political support is everything in as far as sustenance of policing oversight institutions is concerned. With the right political support, governments strengthen policing oversight institutions in all aspects of the performance of its mandate. Right political support guarantees the institution allocation of adequate finances, relevant facilities, stakeholders' total cooperation, and a review of policing oversight laws to strengthen them. Conversely, lack of political support or unconducive political culture will lead to the weakening of the institutions and eventually disbanding it.³⁴⁵

Lack of political support for IPOA is a significant challenge facing the institution, and this becomes cumbersome for IPOA in carrying out its mandate. Instead of IPOA focusing all its attention and resources towards the performance of its mandate, many times, lack of political goodwill forces it to direct its resources including human capital, time and finances, towards fighting unnecessary battles. For instance, despite the stipulated IPOA mandate, IPOA had to file a case before the court to challenge the integrity of police recruitment exercise.³⁴⁶ The Court case was necessary, given that illegalities and irregularities marred the recruitment exercise.³⁴⁷ It was unfortunate that the President issued a statement

³⁴⁴ J Miller, 'Civilian Oversight of Policing: Lessons from the Literature' (Global Meeting on Civilian Oversight of Police, Los Angeles 5-8 May 2002) 11.

³⁴⁵ *ibid.*

³⁴⁶ See *Independent Policing Oversight Authority & another v Attorney General & 660 others* [2014] eKLR.

³⁴⁷ IPOA (n 341).

validating the exercise by ordering the recruits to report to the training institutions³⁴⁸ and it was no surprise that the Attorney-General, the NPSC and the NPS ganged up to oppose the case. The president's statement and the acts of the government agencies was the ultimate show of lack of political goodwill concerning civilian policing oversight in Kenya, but fortunately enough the judiciary saved the day by vindicating the sentiments by IPOA.³⁴⁹

The absence of political support for the work of IPOA has continued to manifest itself in other instances mainly where some government quarters have attempted to amend policing oversight laws with a view of weakening the power of IPOA in holding the police accountable for violation of human rights. A case at hand is the attempt to interfere with the independence of IPOA by trying to remove the security of tenure of the Chairperson and the members of IPOA Board through the Statute Law (Miscellaneous Amendments) Bill, 2015.³⁵⁰ Politicians did not stop their attempts to weaken IPOA as in 2016 they also attempted to amend IPOA Act.³⁵¹ In the 2016 proposed amendments, the politicians wanted to scrap IPOA's investigative role on the basis that the police hold "privileged information" that the police cannot reveal to IPOA.³⁵²

Further, over a year after IPOA forwarded draft regulations to the State Law Office for review and gazettelement,³⁵³ the government is yet to gazette the regulations.³⁵⁴ Also, although IPOA sought to have

³⁴⁸ G Andae, 'Uhuru Defies Court, Orders Enrolment of Police Recruits' (Business Daily 2 April 2015 21:26) <<https://www.businessdailyafrica.com/news/Uhuru-defies-court--orders-enrolment-of-police-recruits/539546-2674560-o411jiz/index.html>> accessed 17 May 2019.

³⁴⁹See Independent Policing Oversight Authority & another v Attorney General & 660 others [2014] eKLR.

³⁵⁰ IPOA (n 341).

³⁵¹ Vide Statute law (Miscellaneous Amendments) Bill 2016, published in November 2016.

³⁵² IPOA (n 341).

³⁵³The draft regulations were forwarded to the office of the AG in January 2011.

³⁵⁴ IPOA (n 341) 99.

some sections³⁵⁵ of IPOA Act amended³⁵⁶ to have a new Board appointed three months before the expiry of the serving Board, parliament is yet to debate and pass those amendments.³⁵⁷ IPOA suggested the amendments to ensure the continuity of leadership and operations of the Authority, which is in line with the international human rights standards

Given this current challenge of lack of political goodwill, one would then understand the other preceding challenges of underfunding, inadequate facilities, and rampant, unchecked police non-cooperation since solving the three would heavily rely on political goodwill.

e) Negative Public Attitude

Negative Public attitude is a significant challenge facing IPOA since the members of the public see policing oversight as a hindrance to the police in dealing with crimes that directly affect them. To the members of the public, it does not matter the means that the police use to tackle criminal gangs, notwithstanding the fact that the police may kill or torture the members of gangs. A case in point is during the trial of a Police officer for fatally shooting a young man in cold blood for allegedly stealing a phone from a matatu passenger.³⁵⁸ Members of the public supported the rogue police act of shooting the young man. According to the public, the rogue officer was a savior to them, and IPOA was only bedeviling their savior. Indeed, in solidarity with the members of the public who through public demonstration advocated for termination of the trial against the officer, a prominent politician³⁵⁹ paid cash bail for the officer.

³⁵⁵ IPOA Act 2011, ss 11 and 12.

³⁵⁶ See Statute Law (Miscellaneous Amendments) Bill, 2018, published on 10 April 2018 under the National Assembly Bills, 2018.

³⁵⁷ IPOA (n 354).

³⁵⁸ Republic v Titus Ngamau Musila Katitu [2018] eKLR.

³⁵⁹ Mike Mbuvi Sonko, the current Nairobi County Governor.

The public view on the role that IPOA does in holding the police accountable is further affected negatively when police officers justify the rise in crime on the fact that they are facing frustration from IPOA during their policing work. The Police, therefore, blame IPOA for their failure to combat crime effectively.³⁶⁰

Once members of the public lose trust in IPOA's work, and instead see it as adding to their problems, this will be the last stage of IPOA's death. The members of the public will call for IPOA's disbandment and given the prevailing political culture discussed in the preceding part of this study; the political elites will be quick to disband it citing the will of the common Mwananchi.

3.3.2 The Internally Caused Institutional Challenges

Although the internally caused challenges are fewer compared to the challenges posed by factors beyond IPOA control, the ramifications of these internally caused challenges are enormous. The internal challenges compound IPOA's failure in not performing its mandate per the international human rights standards. The challenges are as follows: -

a) Employment of Police Officers to Carry Out its Mandate

One of the rationale for the establishment of civilian policing oversight institutions was the loss of public trust in the police complaints handling mechanisms. Members of the public did not feel that the police would live up to the international human rights standards in holding their colleagues accountable for violation of human rights protected under the international human rights conventions objectively and impartially.

³⁶⁰ J Miller (n 344) 14.

Employment of former police officers in a civilian oversight Authority risks the institution being seen not to be impartial in its work mainly in instances when the officers carry out the institution's investigations and this would fall below the internationally set human rights standards. IPOA has created an opening for the employment of police officers.³⁶¹

b) Inadequate Public Profile

The low public profile has been a perennial challenge to IPOA since its inception. The Authority has not taken enough effort to create the much-needed public awareness of its roles in overseeing police work. IPOA has more than seven years since its inception. One is correct to term it unfortunate that IPOA has nine (9) Regional Offices countrywide,³⁶² and has only visited twenty (20) counties out of forty-Seven (47) Counties.³⁶³ The few regional offices and visits to the counties are clear evidence that IPOA has not made enough effort to create public awareness. Even though the external challenges might have exacerbated this challenge, IPOA can do much to create public awareness. IPOA can have posters within every police detention facility detailing how one can reach the Authority for purposes of lodging a complaint regarding Police violation of human rights. This challenge may be fueling the challenge posed by a negative public attitude since IPOA does not do much to counter the lies peddled by the police on the role of IPOA in policing oversight.

3.4 The Efficacy of the Policing Oversight Legal Framework in Addressing the Challenges Facing IPOA.

The previous parts of this chapter have enumerated and discussed the mandate of IPOA, the perennial challenges undermining the mandate of IPOA and the international human rights standards against

³⁶¹IPOA, 'The Inaugural Performance Report: (June to December 2012)' (IPOA 2012) 17.

³⁶² IPOA, 'End-Term Board Report: 2012 - 2018' (IPOA 2018) 13.

³⁶³ *ibid*101.

which one should use to evaluate the effective execution of IPOA's mandate. This part now proceeds to give a critical and in-depth analysis of how the civilian policing oversight legal framework deals with the perennial challenges undermining the mandate of IPOA. The legal framework includes-

3.4.1 The Constitution of Kenya, 2010

This is the supreme law of the Kenyan State and it has a binding effect on all persons and State organs in Kenya.³⁶⁴

The Constitution's Article 2(5) and 2(6) in unambiguous terms makes the general rules of international law and treaties or Conventions ratified by Kenya to form part of the law of Kenya. The import of application of these constitutional provisions is that, apart from the provisions binding Kenya to fulfil its international responsibility in line with international human rights instrument standards, it nationalizes the international obligations. The constitutional provisions, therefore, further justifies why Kenya should provide IPOA with all-necessary mechanisms to ensure that it meets international standards in execution of its mandate.

The Constitution enumerates the national values and principles of governance, which in clear terms, bind everyone including state organs whenever they, amongst other things, apply or interpret any law.³⁶⁵ Part of the national values enumerated thereunder, include - the rule of law, public participation, human rights, and accountability.

³⁶⁴CoK 2010, art 2(1).

³⁶⁵CoK 2010, art 10.

The Constitution further calls police officers to observe professionalism and adhere to human rights standards set in the constitution.³⁶⁶

Further, the Constitution has provisions on leadership and integrity regarding State officers.³⁶⁷ in which the provisions call upon State officers to act in a manner that demonstrates and brings honor, dignity, and respect to the people, the nation and the state office, they hold.³⁶⁸ The provisions also clothe State officers with the power to serve the people rather than power to rule them,³⁶⁹ and further calls them to act with integrity, honesty and ready to account for their actions to the members of the public³⁷⁰

The above-cited constitutional provisions lay the basis on which IPOA as an institution can hold the police accountable for human rights violations. What remains is necessary cooperation from the police, the political leadership, and support from other government organs. The law expects the national police service, which IPOA oversees to be professionalized enough to offer proper, and safe policing services to everyone within the jurisdiction of Kenya.

Moreover, the Constitution subordinates the police to a civilian authority further cementing the mandate of IPOA in ensuring that the institution holds the police to account to members of public for any of police misdeeds.³⁷¹

³⁶⁶CoK 2010, art 244.

³⁶⁷CoK 2010, ch 6.

³⁶⁸CoK 2010, art 73(1) (a).

³⁶⁹CoK 2010, art 73(1) (b).

³⁷⁰CoK, art 73 (2).

³⁷¹CoK 2010, art 239 (5).

3.4.2 The National Police Service Act.

Parliament enacted this law to make further provisions on the establishment, the functions, and command and operations of the police institution in Kenya.³⁷²

The provisions of the NPS Act provide for the Inspector General to take control and direction of policing work in Kenya.³⁷³ The Act protects the Inspector General from taking directions from anyone.³⁷⁴ For the first time, the Act disentangles the police service from the control of the ruling regime and gives the service the potential of serving the public without any political interferences and inclinations. Further, the law on policing in Kenya establishes an internal police accountability mechanism that would hold rogue officers accountable to the Kenyan people.³⁷⁵ Further, to safeguard public interest, the NPS Act subjects the internal police accountability mechanism to a civilian policing oversight mechanism (IPOA) that would investigate police actions with the required independence and impartiality.³⁷⁶

Several provisions of the Act, in mandatory terms, require police officers to cooperate with IPOA whenever IPOA seeks to inspect police premises and investigate officers accused of human rights violations. The provisions enjoin the NPS to comply and implement IPOA recommendations whenever made to the service.³⁷⁷ Any non-cooperation from police officers is because of impunity and not as a result of inadequate laws.

³⁷² NPS Act 2011, long title.

³⁷³ NPS Act 2011, s 8.

³⁷⁴ NPS Act 2011, s 8.

³⁷⁵ NPS Act 2011, s 87 that provides for the establishment of the Internal Affairs Unit (IAU).

³⁷⁶ NPS Act 2011, s 87.

³⁷⁷ NPS Act, 2011, s 10(m) and (t) that calls the I.G to implement IPOA recommendations of victim compensations; s 35(j) that calls the DCI to investigate matters referred to it by IPOA; s 49(12) that protects police officers from intimidation for having lodged a complaint with IPOA or having given evidence to IPOA; s 50(3) that makes it compulsory for all complaints reported with the police against police officers to be recorded and reported to IPOA; s 87(3)(e) that requires IAU to investigate matters referred to it by IPOA and s 87(10) that require IAU to have effective reporting mechanism to IPOA; the sch 5 r 5(d) that gives detained persons right to lodge complaint on ill treatment and claims compensation which complaint will be investigated by IPOA, r 11 that calls officers in charge of police lock up facilities to open the same for IPOA to inspect; r 13 that mandates officer in charge of detention facility to report any death that occurs at the facility; sch 6 pt A r5

3.4.3 The Independent Policing Oversight Authority Act

For the first time, Kenya gives a civilian Authority the mandate to oversight policing work with a view of ensuring that the police adhere to human rights standards. Further, to cement IPOA's vital role, the Kenyan State mandates IPOA to contribute to the fulfilment of her international responsibility, to prevent and protect the violation of Kenya's population international human rights by the police.

To enable IPOA to carry out this enormous mandate, IPOA Act has provisions that cater to various aspects necessary to ensure that the execution of IPOA mandate lives up to the international human rights standards. The provisions touch on various issues, which include-

a) Independence and Good Political Will

The name adopted for IPOA is the first indication that the legislature in establishing the policing oversight institution in Kenya intended that the institution be independent.

Section 4 of IPOA Act has explicit provisions on the independence of the Authority, and those provisions insulates the institution from directions of any person, office or authority in the performance of its functions.³⁷⁸ To further guard the independence of IPOA, the section enjoins everyone in Kenya including government institutions to ensure protection of IPOA's independence by offering the

that requires reporting to IPOA any use of force that leads to death or serious injury by the officer in charge or another direct superior of the officer who uses the force, r 7 that mandates the officer reporting the use of force to secure the scene of the act for investigation purposes; pt B r 5 requires reporting to IPOA any use of fire arms that leads to death or serious injury or grave consequences by the officer in charge or another direct superior of the officer who uses the fire arm while r 7 mandates the officer reporting the use of fire arm to secure the scene of the act for investigation purposes; pt C r 1 of sch 6 mandates Station Commanders and any other direct superiors to do all that they can to prevent use of force and/or firearms by officers under them and where the use of the same occurs, the said officers are required to report the incident to IPOA within 24 hours in addition to taking steps to secure all the evidence relevant to the death and supply IPOA with the evidence and any other information that may lead to conclusive investigation of the matter. The rule makes it an offence for failure to comply with the rules.

³⁷⁸ IPOA Act 2011, s 4 (1).

institution all the assistance it may require in executing its mandate.³⁷⁹ Further, the provision prohibits all persons or bodies from interfering with execution of any of IPOA mandate.³⁸⁰

To provide another protection layer to the independence of IPOA, Section 8 of IPOA Act has provisions to the effect that the governing body of the institution is IPOA Board. Parliament took the independence of the Board seriously in that it cushioned IPOA Board from political interference or influence from the police. the Act bars any holder of political party office, a Member of Parliament, a Member of County Assembly, a Governor or a Deputy Governor, a senior police officer and an officer who retired from service five years before the commencement of IPOA Act, from being a chairperson or a member of the Board of IPOA.³⁸¹

Further, the process of appointing the chairperson and members of IPOA Board,³⁸² and their removal from office,³⁸³ is very rigorous and involves public participation. The rigorous process ensures that their appointment does not solely depend on the executive or parliament only. The processes provide security of tenure to the entire board to ensure that in discharging IPOA mandate, they do so without any fear of intimidation from any quarters.

In addition, the Act limits the term of office of IPOA board members to a six-years. The limitation in itself accentuates the independence of IPOA in ensuring that its governing body, once appointed, carries out IPOA mandate objectively and effectively without inclining to compromise on IPOA's work as they seek favors from some quarters to secure their reappointment.

³⁷⁹ IPOA Act 2011, s 4(3).

³⁸⁰ IPOA Act 2011, s 4(4).

³⁸¹ IPOA Act 2011, s 10.

³⁸² IPOA Act 2011, s 11.

³⁸³ IPOA Act 2011, s 14.

The Act further absolves members of IPOA Board and the employees of IPOA from any personal liability of any action, claim or demand, for any matter or thing they do in execution of the institution's mandate.³⁸⁴ This provision goes a long way in ensuring that all IPOA personnel carries out their duties with the commitment required in executing the policing oversight role.

To safeguard further the independence of the Authority in holding the police accountable for violation of international human rights, the Act allows IPOA to carry out investigations even in instances where some people³⁸⁵ do not approve of the institution conducting such investigation.³⁸⁶

In addition, the Act makes all the laws providing for interference with witnesses and evidence tempering to apply to the proceedings concerning IPOA investigations with necessary modifications.³⁸⁷

When stakeholders in the policing oversight sector adhere to the above-cited provisions of IPOA Act, the Act casts the net wide to protect the independence of the Authority. Any demonstration of lack of political goodwill is not due to a lack of sufficient laws but mainly due to non-adherence to the rule of law.

The amendment of statutes in Kenya is a simple process given that the process is an affair solely under parliament's control. It would not be a surprise for Kenyans to wake up one day and find themselves having a toothless IPOA given the various parliament attempts so far to amend IPOA Act. Parliament may wake up one day and decide to water down or restrict IPOA's mandate leaving IPOA with no means of holding the police accountable for violation of human rights.

³⁸⁴ IPOA Act 2011, s 36.

³⁸⁵ Either the target, victim or witness of the action.

³⁸⁶ IPOA Act 2011, s 24(13).

³⁸⁷ IPOA Act 2011, s 24 (14).

To secure IPOA's mandate and the independence from such an unfortunate threat, the government should elevate IPOA to the level of the independent offices or Commission.³⁸⁸ The constitution protects the independence and affairs of the constitutional institutions from interference since it calls for a rigorous process that involves public participation through a referendum.³⁸⁹

Furthermore, considering the Kenyan history on policing oversight, where members of the public called the government to establish IPOA, the Kenyan State should move to amend the law to elevate IPOA to a constitutional body. Only then will Kenya have satisfied the will of the people to anchor such an institution in the Constitution.³⁹⁰

The above notwithstanding, section 26 of IPOA Act excludes IPOA from investigating police conducts whose subject is under litigation in court or tribunal. This provision, when read together with provisions of the NPS Act that allows the police to investigate matters falling within IPOA mandate,³⁹¹ poses a challenge to the independent investigation of such complaints by IPOA. The challenge occurs, mainly, in instances where the police hurriedly investigate a matter and take it before a court intending to activate section 26 of IPOA Act and with no serious commitment to serving justice to the victim of police misconduct.

Besides, the provision does not distinguish between civil, constitutional, and criminal proceedings. Given the mandate of the Authority, it could not have been the intention of parliament to bar the Authority from investigating matters falling under its mandate where they are subject of civil

³⁸⁸ By entrenching it under the CoK 2010, ch 15.

³⁸⁹CoK 2010, art 255(1) (g).

³⁹⁰Government of Kenya, 'Report of the National Taskforce on Police Reforms' (Government Printers, 2009) 246.

³⁹¹ NPS Act, sch 6 pt A, r 6 and pt B r 6.

litigation. One buttress this view when they consider that under the CPC, Court proceedings of a civil nature do not in any way affect criminal proceedings of a similar subject matter.³⁹² However, the provision as it currently stands does not reflect this intention of parliament since one can interpret the provision to oust IPOA's mandate even where the proceedings in court are civil. Such an interpretation serves to defeat the mandate of the Authority to investigate misconduct of Police Officers in that, IPOA may never investigate the criminal aspect of police misconduct where the victim has decided to institute civil or constitutional proceedings concerning the same misconduct.

Parliament should amend section 26 to limit the exclusion to criminal proceedings only. The amendment will cure the legal difficulties that the provision poses. Further, the limitations should also be subject to section 24(5) that gives the Authority the discretion to decide whether to suspend investigations where the State institutes criminal proceedings after IPOA has already commenced its investigations.

b) Capacity

In analyzing the capacity of an organization, one should consider various aspects, which include-

i) Actual Legal Powers to Carry Out the Mandate

IPOA Act has numerous provisions that clothe institution with necessary powers for its effective execution of the institution's mandate.³⁹³ Under the provisions, IPOA has the power to requisition for any reports, records, documents or information from sources within or outside Kenya.³⁹⁴ IPOA also has the power to enter any establishment or premises, seize and remove objects from the premises.³⁹⁵

³⁹² CPC Cap 75, s 193A.

³⁹³ IPOA Act 2011, s 7.

³⁹⁴ IPOA Act 2011, s 7(1) (a) (i).

³⁹⁵ IPOA Act 2011, s 7(1) (a) (ii).

Further, IPOA has the power to interview and record witness statements from anyone.³⁹⁶ It also has the power to summon and compel anyone including retired officers to attend the institution's sessions.³⁹⁷ Besides IPOA has the power not to disclose the identity of complainants or witnesses.³⁹⁸ In addition, IPOA has the power to recommend prosecution of anyone to the DPP and require the DPP to give it its response.³⁹⁹ IPOA can also provide information to complainants to lodge civil proceedings.⁴⁰⁰ Lastly, in Section 7(1) (g) the provision clothes the Authority with sweeping powers to exercise any legal power necessary for execution of its mandate.

The correct interpretation of these provisions is that IPOA has enormous powers including powers to take confessions, the power to arrest, the power to handle firearms, ammunition and other related exhibits, the power to process scenes of crimes, as well as the power to carry out expert examination of exhibits.

One, therefore, is justified to term it unfortunate that when parliament enacted IPOA legislation, it did not take into account various provisions of other laws it enacted previously to frame IPOA law in a manner that navigates through any other written law provision that limit the powers of IPOA. The provisions of the other Statutes are as follows: -

First, the Evidence Act limits the admissibility of confessions to those taken before a judge, a magistrate or a Chief Inspector of the Police.⁴⁰¹ The legal implication of the provision is that evidence taken before

³⁹⁶ IPOA Act 2011, s 7(1) (a) (iv).

³⁹⁷ IPOA Act 2011, s 7(1) (a) (vii).

³⁹⁸ IPOA Act 2011, s 7(1) (a) (viii).

³⁹⁹ IPOA Act 2011, s 7(1) (a) (ix).

⁴⁰⁰ IPOA Act 2011, s 7(1) (c).

⁴⁰¹ Evidence Act Cap 80, s 25A.

an Officer of the Authority, in the form of a confession, is not admissible in court even though IPOA has investigative powers.

Second, the Fire Arms Act limits possession and transportation of firearms and ammunition to police officers or persons performing policing duties.⁴⁰² The provisions leave out IPOA officers although the execution of IPOA mandate will require IPOA officers, from time to time, to take possession and transport firearms, ammunition and other related materials specified under the legislation.

The Provisions of the NPS Act⁴⁰³ and the CPC⁴⁰⁴ creates the impression that apart from members of the public acting in their capacity, the law only allows police officers to carry out arrests of individuals, including arrest of rogue police officers. Without recognizing the fact that IPOA officers can carry out arrests in the execution of its mandate, these provisions of the law will continue to stand in the way of effective execution of IPOA's mandate.

Sections 385, 386, 387 and 389 of the Criminal Procedure Code⁴⁰⁵ limit the handling of inquests for deaths that occur to persons held in custody, including police custody, to police officers, magistrates and the Office of the DPP. The provisions do not mention the role that IPOA will play in such matters, even though some of the matters may fall squarely within its mandate. Any involvement of the offices mentioned above without the engagement of IPOA risks interfering with the independent investigation that the law mandates IPOA to carry out. The parliament should amend the above sections accordingly

⁴⁰² Firearms Act Cap 114, ss 4, 4A, 7 and 29.

⁴⁰³ NPS Act 2011, ss 54 - 59.

⁴⁰⁴ CPC Cap 75, pt III.

⁴⁰⁵ CPC Cap 75, ss 21 - 66.

given that the law mandates IPOA to participate in inquest proceeding by providing information to the court on such inquests.⁴⁰⁶

ii) Quantity and Quality of Personnel Engaged at the Institution.

IPOA Act sets very high qualification requirements for the chairperson and members of IPOA Board, which is a safeguard to ensure that IPOA governing body has the necessary competence relevant to give institutional guidance and direction on the mandate of the Authority.⁴⁰⁷

The act has a clear provision for the appointment of the Chief Executive Officer (CEO) of IPOA, and it enumerates high qualification standards, which ensure that the person in charge of the institution's everyday activities is competent enough to run the activities of the organization effectively.⁴⁰⁸

The Act also protects the security of tenure of IPOA CEO.⁴⁰⁹ The CEO's Security of tenure protects IPOA from disruption of its everyday activities, which may be occasioned by wrangles that may emerge between the Board and the CEO, thus cushioning the operations of IPOA from interruptions occasioned by such wrangles.

The Act further compels IPOA Board to appoint and train adequate staff members to execute the institutions mandate effectively.⁴¹⁰ The advantage of this provision is that the organization is solely in control of the number of members of staff it engages and the level of training and competence that its staff should have for carrying out activities under the institution's mandate. The section further gives

⁴⁰⁶ IPOA Act 2011, s 6(h).

⁴⁰⁷ IPOA Act 2011, s 10.

⁴⁰⁸ IPOA Act 2011, s 19.

⁴⁰⁹ IPOA Act 2011, s 21.

⁴¹⁰ IPOA Act 2011, s 22(1) and 22(2).

leeway for IPOA not to employ police officers or limit the employment of police officers at the institution to retired police officers only or police officers from jurisdictions outside Kenya. One, therefore, cannot justify the fact that IPOA lacks independent experts relevant for independently carrying out its mandate effectively. The employment of such experts squarely falls on IPOA board including ballistic experts, pathologists, and scenes of crimes officers, chemical analysts, and other experts. IPOA's opening of the opportunity to employ former police officers, who were engaged in active police service immediately before they joined the organization, is a breach of the international human rights standard of its own making. IPOA can devise means to rectify its mistake, going forward.

The legislation, however, waters down IPOA's ability to engage adequate staff since it requires the Public Service Commission to determine the terms and conditions of service of IPOA members of staff.⁴¹¹ The water down is glaring because policing oversight work is unique and requires unique ways of adapting to changing circumstances presented by the work that IPOA is mandated to carry out. Requiring that the Public Service Commission to set out terms of service for IPOA staff translate to a long process of review of those terms of service in instances where IPOA cannot secure or retain competent members of staff due to poor terms of service. Lack of or inadequate human capital is one of the sure ways of paralyzing the effectiveness of the Authority and can open avenues to ensure that IPOA will never promptly carry out its mandate in line with the international human rights standards. To seal this loophole, the law should leave IPOA Board to determine the terms of service for its employees in order to enable it to deal with human capital challenges posed by poor terms of service.

⁴¹¹ IPOA Act 2011, s 22(1).

iii) Availability of Facilities

IPOA Act has provisions on all the powers of IPOA Board.⁴¹² The Act clothes the Board with all the powers necessary for the proper execution of IPOA's mandate.⁴¹³ The section lists the powers to include, the power to determine the Authority's expenditure provisions be it capital or recurrent.⁴¹⁴ In addition, the Board has the power to associate with other institutions in furtherance of the objectives of IPOA.⁴¹⁵

The import of the provisions of section 8 is that IPOA Board can direct part of the institution's funds towards the establishment of critical facilities. Such facilities include ballistic laboratories, chemical analysis laboratories, and development of customized key documents including P3 forms, Post Rape Care (PRC) form, Post Mortem amongst other forms, for its use.

Further, the Board can apply the provisions of section 8 to enter into association with other bodies relevant to IPOA's work. Such bodies include the mobile phone network providers, including Safaricom, Telecom- Airtel, and others, to allow IPOA members of staff in those organizations solely to collect and report on information relevant to IPOA work.

While this study acknowledges the importance of having facilities independent of the police for the execution of IPOA's work, the study is also alive to the fact that establishing such facilities will call for huge funds. Kenyan State may not be in an economic position to commit such funds, at once. The study, therefore, proposes that IPOA should have its officers at the police facilities that carry out a forensic examination of exhibits to ensure that whatever exhibits it forwards for examination, a person independent from the police examines those exhibits.

⁴¹² IPOA Act 2011, s 8.

⁴¹³ IPOA Act 2011, s 8.

⁴¹⁴ IPOA Act 2011, s 8.

⁴¹⁵ IPOA Act 2011, s 8.

c) Co-operation

IPOA Act enjoins IPOA to co-operate with other institutions that have a role in policing oversight.⁴¹⁶

Section 31 of IPOA Act generally provides for offenses that one may face for not cooperating with IPOA. More particularly, the section makes it an offense for anyone not to cooperate with the institution or interfere with execution of the institutions mandate.⁴¹⁷

The Act, in clear terms, creates three important responsibilities on the police that if carried out well is to insure effective execution of the institutions mandate. The three responsibilities include the responsibility to report to IPOA deaths and serious injuries occasioned by police officers, the responsibility to secure evidence and supply IPOA with such evidence on any matter under the institution's investigations.⁴¹⁸

Section 25(3) makes it an offence for an officer to contravene section 25(2). The challenge of non-cooperation and interference with evidence that police, whether as an organization or particular police officers, pose to IPOA is as a result of impunity and disregard to the rule of law. Likewise, any non-cooperation with IPOA from anyone else other than the police is done with impunity since the act has sufficient provisions to guarantee cooperation to IPOA.

d) Funding

IPOA Act compels the National Assembly to make provisions that adequately fund IPOA for it to perform all of its functions effectively and efficiently.⁴¹⁹

⁴¹⁶ IPOA Act 2011, s 6(f).

⁴¹⁷ IPOA Act 2011, s 31(1) (h) and 31(1) (i).

⁴¹⁸ IPOA Act 2011, s 25(2).

⁴¹⁹ IPOA Act 2011, s 4(5).

IPOA Act provides that the sources of the funds of IPOA are the monies allocated to the institution.⁴²⁰ Other sources of the Authority funds are such monies that other sources may lawfully grant, donate or lent to the Authority, with the approval of the Cabinet Secretary responsible for matters relating to the Police Service and the Cabinet Secretary for Finance.⁴²¹

Further, the Act compels IPOA to prepare budget covering various areas including resourcing⁴²² the institution and funding the operations⁴²³ of the organization.⁴²⁴

Section 34(3) also subjects the budgetary estimates to the approval of the cabinet secretary who once he gives his approval IPOA is restricted from increasing the estimates without further consent. Besides, IPOA cannot incur expenditure except under funds voted or appropriated by Parliament.

IPOA Act clothes IPOA Board with vast powers that are necessary for the execution of the institution's functions and powers granted by any law.⁴²⁵ Part of the powers of IPOA Board includes control, supervision, and administration powers of IPOA's assets in a way to promote IPOA's objectives.⁴²⁶ The Board also has the power to make provisions for the Authority's capital and recurrent expenditure.⁴²⁷ The Board also has powers to receive and administer any funds given to the institution as a grant, gift,

⁴²⁰ IPOA Act 2011, s 32.

⁴²¹ IPOA Act 2011, s 32.

⁴²² The budget should cater for payment of the salaries, allowances and other charges in respect of the staff of the Authority as well as cover maintenance of the assets of the Authority, allow the creation of such funds to meet future or contingent liabilities in respect of benefits, replacement of buildings or installations and equipment.

⁴²³ Training, research, and development of activities.

⁴²⁴ IPOA Act 2011, s 34.

⁴²⁵ IPOA Act 2011, s 8.

⁴²⁶ IPOA Act 2011, s 8(2) (a).

⁴²⁷ IPOA Act 2011, s 8(2) (b).

donation or an endowment.⁴²⁸ The institutions Board has discretion to open a bank account for the institution.⁴²⁹

A look of these provisions reveal that the Authority has the discretion to draw budget estimates that will enable it to employ, retain, and engage enough human capital. The law also clothes IPOA with the discretion to acquire critical facilities and equipment necessary for the effective execution of its mandate, which parliament is required to avail. The law also allows the Authority Board leeway to receive donations and grants, which will fund its proper carrying out of its mandate. One, therefore, cannot excuse IPOA for stating that it lacks resources to execute its mandate when parliament gave IPOA Board the leeway to determine the size of resources required to carry out its mandate. Further, IPOA can freely manage and access for its mandate the funds that Parliament appropriates for its use since the law authorises the Board of IPOA to operate a bank account.

e) Access to the Authority and Public Awareness

IPOA Act places the institution headquarters at the Kenya's capital city and enjoins the institution to devolve its services to the people of Kenya.⁴³⁰

IPOA Act further mandates IPOA to do anything necessary to facilitate members of the public to access the services of the institution.⁴³¹

⁴²⁸ IPOA Act 2011, s 8(2) (c).

⁴²⁹ IPOA Act 2011, s 8(2) (e).

⁴³⁰ IPOA Act 2011, s 3(3).

⁴³¹ IPOA Act 2011, s 6(i).

In addition, IPOA Act makes it easy for anyone to lodge a complaint with IPOA since it allows lodging of complaints orally⁴³² and obliges IPOA officers to assist complainants in reducing the complaints in to writing for thorough investigations.⁴³³

Further, in order to safeguard free access to the services of the Authority, Section 24 protects complainants and witnesses, be it civilians or members of the police service, from intimidation for having complained with IPOA or having provided witness statements or other evidence to IPOA.

These provisions of the law are enough to clothe IPOA with enough powers to carry out programs geared towards creating public awareness on IPOA's mandate, the benefits of having such an institution, information on where and how potential complainants may access IPOA and lodge a complaint on police misconduct.

In essence, if IPOA has faced adverse public attitude, one can partly attribute the same to it, since the creation of public awareness is part of its mandate, which it has sole control.

3.5 Conclusion.

The analysis of the legal framework on policing oversight in Kenya points to the fact that IPOA is facing many institutional challenges that hinder it from meeting international standards during execution of its mandate. The analysis has also revealed that the independent policing oversight legal framework is efficient enough to deal with the challenges undermining the execution of IPOA's mandate in line with international human rights standards. The analysis has also revealed that the legal framework is strong

⁴³² IPOA Act 2011, s 24(1).

⁴³³ IPOA Act 2011, s 24(2).

enough to clothe IPOA with powers that will enable it to contribute to the States fulfilment of her international responsibility. What is remaining is the full implementation of the legal framework for the full realization of IPOA mandate. However, the analysis of the framework has also revealed that parliament needs to make a few amendments to the existing laws to strengthen the independence of IPOA, especially amendments that will elevate the institution to a constitutionally independent office or commission. Other amendments are necessary to make clarity in IPOA Act; particularly have provisions to the effect that IPOA officers have powers commensurate to police powers. That is, IPOA officers can take confessions, arrests and handle the forensic examination of exhibits and scenes of crimes. Parliament also needs to review the various legislation relevant to the policing oversight work to clarify the inconsistency or confusion they pose to the application of IPOA Act provisions in the course of execution of IPOA's mandate and powers.

The next Chapter will examine institutions of Civilian Policing Oversight in Northern Ireland and South Africa in order to draw lessons that will inform the strengthening of IPOA.

CHAPTER FOUR: BENCHMARKING OF POLICING OVERSIGHT AGAINST CASES OF BEST INTERNATIONAL PRACTICE

4.0 Introduction

This chapter deals with instances of policing oversight practices in Northern Ireland and the Republic of South Africa with a view to benchmark on policing oversight best practices. The challenges discussed in the preceding chapter are comparable with the challenges that the Independent Complaints Directorate faced. Independent Police Investigative Directorate (IPID) succeeded South Africa's Independent Complaints Directorate. IPID is the institution, which is South Africa's equivalent of IPOA and seems to be at an advanced level in overcoming the challenges that its predecessor faced. Its success in dealing with its challenges makes it the best choice from which Kenya can draw lessons to strengthen IPOA. Further, South Africa's police accountability mechanism is ideal to benchmark for Kenya's policing oversight institution since the two States are in the African Region and are parties to the same international and regional human rights instruments. They, therefore, have similar obligations, under the international instruments, which Kenya seeks to fulfill through IPOA.

Northern Ireland, on the other hand, presents a good case study because of its compatibility and progressiveness. The taskforce⁴³⁴ that recommended IPOA's establishment made benchmarking visits to a number of countries, Northern Ireland being one of those countries.⁴³⁵ Besides, players in policing oversight field have described OPONI⁴³⁶ as 'Golden standard' against which one should rate other civilian policing oversight institutions internationally.⁴³⁷

⁴³⁴National Taskforce on police reforms.

⁴³⁵Northern Ireland, Botswana, Ghana, and the United Kingdom.

⁴³⁶Office of the Police Ombudsman for Northern Ireland.

⁴³⁷ M Maguire, 'Dr Maguire addresses Imagine Belfast Festival of Ideas and Politics' (Office of the Police Ombudsman for Northern Ireland 29 March 2019) <<https://www.policeombudsman.org/Media-Releases/2019/Dr-Maguire-addresses-Imagine-Belfast-Festival-of-I>> accessed on 23 May 2019.

4.1 Policing Oversight in Northern Ireland

OPONI carries out policing oversight role in Northern Ireland. OPONI is a non-departmental government agency that, amongst other things, investigates all kinds of police misconduct. Before the establishment of OPONI, police officers investigated complaints against their fellow police officers. The legislation on police provides for all the issues of policing oversight in Northern Ireland including establishing OPONI.⁴³⁸

4.1.1 Independence

Northern Ireland's lawmakers addressed the issue of having an independent and impartial OPONI at the time of the establishment of the institution. Stakeholders in the policing oversight sector in Northern Ireland have continuously guarded OPONI's independence. The protection of the institution's independence is clear when one looks at the various factors touching on issues of independence of an institution. For instance, the legal provision establishing OPONI jealously guards its independence by bestowing the Ombudsman with the freedom to exercise his powers under Part VII of the Police legislation.⁴³⁹ The provision further grants the Ombudsman with wide discretion in exercising powers that would guarantee protection of the institution's efficiency, effectiveness, and independence.⁴⁴⁰ The provision, also, allows the Ombudsman to exercise powers to secure public confidence and trust of members of the police force in OPONI.

⁴³⁸Police (Northern Ireland) Act 1998, pt VII.

⁴³⁹Police (Northern Ireland) Act 1998, s 51.

⁴⁴⁰Police (Northern Ireland) Act 1998, s 51.

All the ombudsmen who have so far served the institution⁴⁴¹ are clear in their statements that their office has enjoyed independence right from the time North Ireland created the institution up to date.⁴⁴²

The law further enhances the independence and impartiality of OPONI by bequeathing OPONI investigators, who execute the mandate of the institution, with all the powers that police officers have. OPONI investigator's powers include arresting powers, the power to take confessions as well as the power to collect and handle forensic evidence.⁴⁴³

Stakeholders in the policing oversight field take the independence of OPONI as a crucial factor for effective execution of the institution's mandate in that they always insist that OPONI should have actual as well as perceived independence.⁴⁴⁴

4.1.2 Political and Public Goodwill

OPONI has enjoyed public as well as political support from the time the government instituted it. A look at the statement that Maurice Hayes made⁴⁴⁵ indicates that both the members of the public and the political leaders supported the idea of establishing a civilian oversight institution to hold the Police to account for their misdeeds.⁴⁴⁶ The currently serving Ombudsman, Maguire, attests to the fact that in all

⁴⁴¹Nuala O'Loan served between 2000 and 2007; Al Hutchinson Served between 2007 and 2012; and Michael Maguire Served from 2012 and his term ends in July 2019.

⁴⁴² M Maguire, 'Dr Maguire addresses Imagine Belfast Festival of Ideas and Politics' (Office of the Police Ombudsman for Northern Ireland 29 March 2019) <<https://www.policeombudsman.org/Media-Releases/2019/Dr-Maguire-addresses-Imagine-Belfast-Festival-of-I>> accessed on 23 May 2019.

⁴⁴³Police (Northern Ireland) Act 1998, s 56(3).

⁴⁴⁴ M Maguire (n 442).

⁴⁴⁵Together with others, he wrote the report that led to the establishment of OPONI.

⁴⁴⁶ Office of the Police Ombudsman for Northern Ireland (OPONI), 'History of the Office' <<https://www.policeombudsman.org/About-Us/History-of-the-Office>> accessed 23 May 2019.

his entire term at OPONI, no one, including the Minister responsible for policing matters, has ever attempted to interfere with OPONI's decision-making.⁴⁴⁷

Further, the Secretary of State's commitment to ensure that OPONI does not experience leadership vacuum when the term of service for the current Ombudsman expires is a clear indication that the country's leadership extends political goodwill to the institution. The Secretary of State for Northern Ireland has already indicated that she would propose that the relevant government authority should appoint Mrs. Marie Anderson as the next Police Ombudsman.⁴⁴⁸

4.1.3 Funding of the Oversight Institution

OPONI has enjoyed sufficient funding from the government of Northern Ireland. The fact that OPONI is the first policing oversight institution in the world to enjoy sufficient government funding and have full independence and a professional team of investigators is a clear indication of well-funded institution.⁴⁴⁹

Although there have been sweeping budget cuts to all the government departments and institutions as an austerity measure due to hard economic terms, the Northern Ireland government has not severely cut OPONI's budget as that of other institutions. The budget cut has negatively affected OPONI's

⁴⁴⁷ M Maguire (n 442).

⁴⁴⁸Office of the Police Ombudsman for Northern Ireland (OPONI), 'Secretary of State Announcement about New Police Ombudsman' (OPONI Press Release 03 May 2019< <https://www.policeombudsman.org/Media-Releases/2019/Secretary-of-State-announcement-about-new-Police-O>> accessed 23 May 2019.

⁴⁴⁹ Office of the Police Ombudsman for Northern Ireland (OPONI), 'History of the Office' <<https://www.policeombudsman.org/About-Us/History-of-the-Office>> accessed 23 May 2019.

effectiveness. The cut has forced OPONI to prioritize what matters to admit for investigations. The cut has also elongated the time that OPONI takes to complete investigations into complaints.⁴⁵⁰

4.1.4 Police Co-operation

The law well secures the cooperation of Northern Ireland Police with OPONI. For instance, the relevant statute has provisions to the effect that the Chief Constable has to comply with the directions of the Ombudsman in matters where the Ombudsman recommends disciplinary proceedings against an Officer.⁴⁵¹ The provision further requires the Chief Constable and any Authority undertaking the disciplinary proceedings to file reports with the Ombudsman as to whatever action they have taken regarding the recommendation for disciplinary by the Ombudsman.

The Act also has provisions that give OPONI the exclusive mandate to deal with reports of police misconduct and further compels the Chief Constable of the police to forward all complaints received by him against police officers to the Ombudsman for necessary action.

In practice, the cooperation of the Police with OPONI is apparent given that even during a time when three senior-most police officers in Northern Ireland were under investigation by OPONI, the Police, as an institution, publicly declared its support and commitment to cooperate with OPONI during those investigations.⁴⁵²

⁴⁵⁰ M Maguire, 'Dr Maguire addresses Imagine Belfast Festival of Ideas and Politics' (Office of the Police Ombudsman for Northern Ireland 29 March 2019) <<https://www.policeombudsman.org/Media-Releases/2019/Dr-Maguire-addresses-Imagine-Belfast-Festival-of-I>> accessed on 23 May 2019.

⁴⁵¹ Police (Northern Ireland) Act 1998, s 59.

⁴⁵² A Lonergan, 'Northern Ireland's Top Police Chiefs under Investigation as PSNI "Refute All Allegations"' (The Irish Post, 19 October 2017) <<https://www.irishpost.com/news/northern-irelands-top-police-chiefs-investigation-psni-refute-allegations-137420>> accessed 23 May 2019.

4.1.5 Public Access to OPONI

OPONI has devised several means to enable the public to access the Ombudsman to lodge a complaint. The means that OPONI has devised include lodging a complaint online, through email, through visiting the office of the Ombudsman during working hours as well as lodging a complaint at a police station, which the police must forward to OPONI immediately.

Access to the services of OPONI is something that OPONI takes seriously to the point that one can reach the office outside working hours by just making a telephone call.⁴⁵³

Moreover, through public awareness activities that OPONI conducts, a good population of the Northern Ireland, including school pupils, are aware of the existence of ombudsman most of whom believe on the independence and the impartiality of the office in handling complaints against the police.

4.2 Policing Oversight in the Republic of South Africa

The country's constitution lays the basis for the establishing a civilian policing oversight institution.⁴⁵⁴ This Constitutional provision is to the effect that whenever a person lodges a complaint against a police office, an independent police complaints institution must investigate it.⁴⁵⁵

Following the above-cited Constitutional provisions, South Africa's legislature established the Independent Complaints Directorate.⁴⁵⁶ The provision mandates the Directorate to investigate, whether on its own motion or upon a victim of police misconduct lodging a complaint at the institution.⁴⁵⁷

⁴⁵³OPONI website<<https://www.policeombudsman.org/Home>> accessed 23 May 2019.

⁴⁵⁴Constitution of the Republic of South Africa 1996.

⁴⁵⁵Constitution of the Republic of South Africa 1996, s 206(6).

⁴⁵⁶ South African Police Service Act No 68 of 1995, ch 10.

⁴⁵⁷ The South African Police Service Act 1995, s 53.

On 12 May 2011, the president of South Africa assented to a statute⁴⁵⁸ that establishes IPID⁴⁵⁹ with the objective of, amongst other things, ensuring independent oversight of the South African Police Service and the Municipal Police Services.

4.2.1 Independence and Impartiality

Right from the time that South Africa's population decided to have an institution to oversight the Country's Police Service, they safeguarded the institution's independence in the country's Constitution. South Africa has entrenched the independence of its policing oversight mechanism in both the 1994 interim Constitution and later in the 1996 Constitution. Provisions of the existing Constitution proves that South Africa's population wish to have an independent policing oversight mechanism.⁴⁶⁰ South Africa, therefore, enacted a statute⁴⁶¹ in which it set aside a whole chapter that establishes IPID and provides for its independence.⁴⁶²

South Africa's Parliament enacted another legislation in 2011 to cement the county's population desire to have an independent institution oversight the work of the Police.⁴⁶³ The 2011 Act of Parliament disentangled the institution of police oversight from the Police Service legislation. The legislation goes ahead to establish the Independent Police Investigative Directorate⁴⁶⁴ and specifically provides for the independence of the institution in Section 4 as it further secures cooperation of all State Organs necessary for maintaining IPID's impartiality and to effective performance of the institution's functions.

⁴⁵⁸ Independent Police Investigative Directorate Act, No 1 of 2011.

⁴⁵⁹ The Successor of the Independent Complaints Directorate.

⁴⁶⁰ Constitution of the Republic of South Africa 1996, s 206(6).

⁴⁶¹ South African Police Service Act of 1995

⁴⁶² South African Police Service Act 1995, s 50(2).

⁴⁶³ IPID Act 2011.

⁴⁶⁴ IPID Act 2011, s 3.

The South African Constitutional Court issued a judgment on 6 September 2016 directing the South African Parliament to effect an amendment to the IPID Act, 2011.⁴⁶⁵ The Court issued the directions to have the Parliament strengthen the Directorate's independence through securing of tenure of office of the institution's Executive Director. The Court's judgment demonstrates the seriousness with which the South African population takes the independence of the Independent Police Investigative Directorate. Following that Court's judgment, the South African National Assembly in 2018 commenced the process of amending the IPID legislation through the Independent Police Investigative Directorate Amendment Bill, 2018. The National Assembly passed the Bill on 4 September 2018 after which it sent the Bill to the National Council of provinces for concurrence.⁴⁶⁶

Regarding the issue of impartiality of the Directorate's staff, section 25 and 26 of the IPID Act requires staff members of the Directorate to declare any conflict of interest that may affect any investigation. The provisions further require IPID to conduct integrity tests on the staff to ensure that they remain impartial in their work.

4.2.2 Political Good Will.

From the previous part 4.2.1, one can testify that IPID enjoys goodwill from the political leadership. Right from its inception, South Africa's legislature only amends the law regarding police accountability with the sole purpose of strengthening the independence of the institution and enabling it to carry out its

⁴⁶⁵ McBride v Minister of Police and Another [2016] ZACC 30.

⁴⁶⁶Phakathi B, 'Parliament Amends Bill Aimed at Curbing Political Meddling with Police Watchdog' (Times Live, 5 September 2018 - 14:10) <<https://www.timeslive.co.za/politics/2018-09-05-parliament-amends-bill-aimed-at-curbing-political-meddling-with-police-watchdog/>> accessed 2 May 2019.

mandate effectively. For instance, the IPID Act, 2011, gives the institution investigators powers that are equivalent to investigative powers of Police officers.⁴⁶⁷

South Africa's Legislature consolidation of investigation powers on the Directorate and its continued review of the laws relating to policing oversight in South Africa is a clear proof that IPID enjoys political goodwill.

Generally, the Minister of the Police has continuously vowed to support IPID's work, including by securing additional funding to the organization. Such pronouncements are clear indication that IPID enjoys political goodwill.⁴⁶⁸

4.2.3 Police Co-operation

The IPID Act, 2011, has elaborate provisions on police cooperation. The Act puts in place, stipulated timelines for particularly identified officers to notify the institution on any complaint that comes within their knowledge immediately. It also enjoins the officers to submit, within 24 hours a written report on the said notification with all the details concerning the matter. The Act also secures the cooperation of the Police Service in the implementation of its recommendations. Its provisions demand that specific senior police commissioners should commence disciplinary action within 30 days of recommendation by the IPID. The Act also requires the police commissioner to keep on informing, periodically, IPID and the Minister on the progress and eventual finalization of all disciplinary matters.

⁴⁶⁷ The powers include the power to ascertain bodily features of an accused person; enter and search premises; seize and dispose of articles; arrest; execute warrants; and present an accused person in court.

⁴⁶⁸ Independent Police Investigative Directorate, 'Annual Performance Plan 2018/2019' (IPID 2018) 2 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjJvpqmta_iAhUKzoUKHQGH B-cQFjAAegQIBBAC&url=http%3A%2F%2Fpimg-assets.s3-website-eu-west-1.amazonaws.com%2FIPID_APP_2018-19_WEB.pdf&usg=AOvVaw0pN0HcBxI2GPHUyYItZw1D> accessed 22 May 2019.

4.2.4 Accessibility

The IPID Act provides that IPID shall have offices in all the provinces.⁴⁶⁹ The provision ensures that members of the public in all South Africa's provinces access IPID's services. Indeed, IPID has offices in all South Africa's Provinces, and in order to provide further access to its services, it has an additional five (5) district offices.⁴⁷⁰ The institution further carries out activities geared towards creating public awareness of its mandate and procedures.⁴⁷¹

4.3 Lessons for Kenya to Draw from Northern Ireland and South Africa

The Kenyan political and government leaders should emulate the leadership in Northern Ireland and South Africa where policing oversight institutions in the two countries has been effective due to the political goodwill that they enjoy from the leadership of the countries. As we have seen from the two countries, the presence of political goodwill has seen the countries have laws that well secure the independence of the institutions. The legislature of the two countries only amends the legislation on policing oversight to strengthen the policing oversight institutions. Furthermore, South Africa has taken the need for legislation on any issue affecting the independence of policing oversight institutions with the urgency that it requires. Besides, the existence of political goodwill, especially in Northern Ireland weighs down on top leadership of the Police to ensure that the police institution cooperates with the policing oversight institution even at times when the police top leadership is itself facing investigations. The presence of good political will has also seen the policing oversight institutions in both Northern

⁴⁶⁹ IPID Act 2011, ss 3, 19, 20 and 21.

⁴⁷⁰ Independent Police Investigative Directorate, 'Annual Performance Plan 2018/2019' (IPID 2018) 14 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjJvpqmta_iAhUKzoUKHQGH B-cQFjAAegQIBBAC&url=http%3A%2F%2Fpimg-assets.s3-website-eu-west-1.amazonaws.com%2FIPID_APP_2018-19_WEB.pdf&usg=AOvVaw0pN0HcBxI2GPHUyYItZw1D> accessed 22 May 2019.

⁴⁷¹ Independent Police Investigative Directorate, 'Annual Performance Plan 2018/2019' (IPID 2018) 30 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjJvpqmta_iAhUKzoUKHQGH B-cQFjAAegQIBBAC&url=http%3A%2F%2Fpimg-assets.s3-website-eu-west-1.amazonaws.com%2FIPID_APP_2018-19_WEB.pdf&usg=AOvVaw0pN0HcBxI2GPHUyYItZw1D> accessed 22 May 2019.

Ireland and South Africa enjoy relatively good funding even during times when their governments take austerity measures. As pointed out by Michael Maguire, the outgoing Ombudsman in Northern Ireland, sufficient funding of an institution is a political decision that requires political goodwill and commitment to ensure that an institution works.

Kenya should learn from both Northern Ireland and South Africa on the importance of providing IPOA with enough funds. Policing oversight institutions in the two countries have been able to achieve reasonable success in holding the Police accountable to the public while adhering to international human rights standards through sufficient funding. Through their respective government's provision of relatively sufficient funds to IPID and OPONI, the two institutions have been able to secure enough personnel to carry out their mandates, acquire relevant facilities for independent investigations, as well as enable public access of the members of the public to the institution's services. The provision of sufficient funds has contributed to the ultimate success of the two institutions.

Kenya should emulate South Africa in protecting the independence of IPOA by anchoring the institution in the Constitution. South Africa has entrenched the establishment of its policing oversight institution in its Constitution and elevating the institution to a level where no one can easily interfere with its functions and independence without resulting in constitutional mechanisms and processes. Kenya should also consider emulating the two countries as far as they clothe investigators of their policing oversight institutions with legal powers equivalent to those of the Police.

In order to secure police cooperation to IPOA, Kenya should follow the example of South Africa, where the law has explicit stipulations on assigning duties to specific officers which duties the assigned officers must fulfill within specific periods. Further, in South Africa and Northern Ireland, implementation of

the recommendations made by the policing oversight institutions to the police institutions is mandatory, a good lesson that Kenya can draw from these countries to ensure that the Police comply with IPOA's recommendations. Kenya should further draw a lesson from Northern Ireland, which averts possibilities of the Police and the Ombudsman competing or conflicting in investigating the same complaints since the law in Northern Ireland leaves complaints against the Police for OPONI's exclusive investigations.

A lesson for IPOA to draw from Northern Ireland and South Africa concerning enabling easy access to its services and enhancing its public profile is by having regional offices in all Counties as well as engage stakeholders by creating public awareness.

4.4 Conclusion

The present chapter has examined policing oversight in Northern Ireland and in the Republic of South Africa from which we have drawn essential lessons as contained in the preceding part of this chapter. The last chapter of this study will conclude the study findings and proceed to outline possible recommendations for strengthening IPOA.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The present chapter covers the conclusion of the study and the recommendations on the implementation of the institutional and legal framework on policing oversight in Kenya. The chapter also contains an analysis of the hypothesis in line with the study findings.

5.1 Conclusion.

The study examined why IPOA is failing to meet its constitutional and statutory mandate. The study did this by exploring the existing literature on policing oversight institutions and further examined various laws at the international, regional, and local levels touching on policing oversight.

In addressing the study problem, the study addressed several issues as contained in the research questions and as per the corresponding research objectives. The issues included outlining the history of policing that necessitated the call for policing oversight institutions. The examined history revealed four important points. First, at the international, regional and national levels, the necessity of policing accountability mechanisms was brought about by the realization that police officers have enormous powers that are susceptible to police abuse in the course of policing. Second, the idea of establishing policing oversight mechanisms to hold the Police accountable to the members of the public is relatively new. Third, at the international, regional and national levels, the development of the law to help States establish policing oversight institutions that would hold the Police accountable is slow but in the right direction. Lastly, that more efforts and commitments will be required from all the stakeholders at the international, regional and national levels to ensure that all over the world, competent institutions are established to hold the Police accountable for any human rights violations that they perpetrate.

Further, the study examined the efficacy of the legal framework on policing oversight in Kenya and revealed the following: -One, IPOA faces many institutional challenges that hinder it from meeting international standards when it executes its mandate. Two, the legal framework on policing oversight in Kenya is, largely, efficient to deal with the institutional challenges undermining the execution of IPOA's mandate in line with international human rights standards. Three, the legal framework clothes IPOA with powers that enables the institution to contribute to the States fulfilment of her international responsibility. What is remaining is the full implementation of the legal framework for the full realization of IPOA mandate. Three, Parliament needs to make a few amendments to the existing laws to strengthen the independence of IPOA, especially amendments that will elevate the institution to a constitutionally independent office or commission. Other amendments are necessary to make clarity in IPOA Act; particularly have provisions to the effect that IPOA officers have powers equivalent to police powers. That an IPOA officer can take a confession, effect arrests and handle forensic examination of exhibits and scenes of crimes. Four, Parliament needs to review the various legislation relevant to the policing oversight work to clarify the inconsistency or confusion they pose to the application of IPOA Act provisions in the course of execution of IPOA's mandate and powers.

The study also identified lessons that Kenya can learn from best international practice on policing oversight. The study benchmarked IPOA against policing oversight institutions in both South Africa and Northern Ireland where it revealed that Kenya could learn on the importance of extending political goodwill, enough funding and police cooperation to its institution of policing oversight. The study further revealed that Kenya could learn from the two countries on the importance of protecting the independence of a policing oversight institution. Lastly, the study revealed that IPOA could learn from the institutions of policing oversight in both countries on the best way of enhancing public access to the

institution by establishing regional offices in every county as well as providing a toll-free numbers that is operational throughout.

Overall, the study has proved that although Kenya has mandated IPOA to contribute to its fulfilment of the international responsibility to protect, nevertheless, IPOA faces many challenges that compromise its ability to execute its constitutional and statutory mandate in line with international standards. More precisely, this study finds that the Government and the Police leadership resists and impedes IPOA from blossoming to a robust civilian policing oversight institution for the fear that IPOA will break the existing tradition, whereby the police was only accountable to the ruling regime. Besides, the study finds that in Kenya, there exists non-adherence to the rule of law and lack of full implementation of the laws on policing oversight. Further, the study finds that Kenyan laws that relate to evidence, firearms, criminal procedure, amongst others, are not in tandem with IPOA Act thus limiting the scope of execution of IPOA's mandate. Lastly, the study finds that unless the Kenyan Government deals with the institutional and legal challenges that IPOA face, IPOA's contribution to the fulfillment of Kenya's international responsibility to protect will continue to be below the international human rights standards.

5.2 Recommendations

Given the obtaining conclusion, this study makes the following recommendations: -

5.2.1. Short Term Recommendations

IPOA should create public awareness on the importance of policing oversight, its mandate, and its processes. IPOA can engage all the stakeholders in creating public awareness. In addition, IPOA can

have posters in all detention facilities educating detained persons on its mandate and explaining the procedure of lodging a complaint with it.

Further, IPOA should devise means of providing easy access to its services by members of the public similar to having toll free telephone numbers as well as providing a number that one can call during off-work hours. IPOA can enhance access to its services by having complaint forms in all detention facilities that persons held in detention can access, free of charge, whenever they need to complaint to IPOA. IPOA should collect the completed complaint forms regularly from such detention facilities.

To safeguard the independence of the institution, IPOA should stop employing former police officers to execute its constitutional and statutory mandate.

Also, IPOA should draw its annual budgets to include monies that will ensure that it secures enough funds to sufficiently fund execution of its mandate to a level that meets international human rights standards.

Police leadership and the police institution, in general, should cooperate with IPOA to ensure effective policing oversight, which is beneficial to the police service in two ways. One, policymakers who provide funds for police reform initiative will allocate bigger budgets to the Police Service once they see actual reforms in the Service. Two, effective policing oversight and accountability assists the police leadership in understanding and finding solutions to the challenges they face in dealing with wayward police officers.

Political leadership should accord and extend political goodwill to IPOA for the following reasons: - First, politicians who sit in parliament can appropriate enough funds to the institution if they have such goodwill. Parliament's allocation of enough funds to IPOA will translate to a productive and competent IPOA. Second, political goodwill enables politicians to weigh down on the police institution to cooperate with IPOA in the execution of IPOA's mandate. The political leaders in prevailing on police leadership will ensure that the police do not interfere with evidence in matters that IPOA is investigating or delay relevant information that IPOA may require for conclusive investigations. Third, Political goodwill eliminates any threats to weaken IPOA by amending its constitutive Act. Fourth, given that, political leaders are public opinion shapers; their support for IPOA will enhance public trust, support and cooperation with IPOA in holding the police accountable.

The Attorney General should advise the Government on the need to secure the independence of IPOA in the constitution by elevating IPOA to the level of either constitutional independent office or commission. Elevating IPOA to a constitutional institution will make it difficult to amend the laws that secure the institution's mandate and independence.

5.2.2. Mid-Term Recommendations

Parliament should review and amend IPOA Act regarding the following areas: - One, make it clear that IPOA investigators have powers equivalent to those of police officers. The amended law should clothe IPOA investigators with powers including the power to arrest; conduct identification parades; process scenes of crimes; handle and process forensic evidence, including ballistics and chemical analysis; amongst others. The specific powers will ensure that IPOA will not have to rely on the same police

offices it oversees to carry out some vital steps during investigations, which will immensely contribute to actual and perceived IPOA's independence and impartiality. Two, identify specific police ranks and officers in other institutions to file reports, within stipulated timelines, to advise IPOA on their implementation of IPOA's recommendations on any disciplinary measure they take against police officers. Three, leave complaints against police officers for IPOA's exclusive investigation. Reservation of investigations into police misconduct to IPOA will clear any conflict of interest in matters that might fall within the purview of other institutions similar to the EACC and the DCI. Further, reservation of investigations into police misconduct to IPOA only will clear any confusion, which may arise due to the overlapping mandate where one institution may assume that the other will conduct investigations, and eventually leave the misconduct unaccounted. Moreover, ensuring that neither the police nor any other organization conduct parallel investigations will save public funds. Lastly, repeal Section 26 of IPOA Act. When parliament designates IPOA to investigate police actions exclusively, it will render the section redundant. The DPP will only commence criminal proceedings against a police officer upon IPOA's investigation. Moreover, the study has revealed that civil proceedings are not a bar to the institution of any criminal proceedings.

Parliament should also review and amend the other laws on policing oversight to bring them in tandem with the provisions of IPOA Act. The review and amendment of these laws will ensure that the laws do not hinder the execution of IPOA's mandate or the implementation of IPOA's recommendations. Such laws include the evidence Act provisions touching on confessions and inquests, the firearms Act, the Criminal Procedure Code, amongst other laws.

5.2.3. Long Term recommendations

IPOA should customize key documents including P3 forms, Post Mortem Form, Post- Rape Care forms, amongst other forms. The customization of the forms will provide a one-stop-shop to complainants of police misconduct and avoid sending victims of police misconduct to the same police to obtain these documents, which are vital in, and during, collection and presentation of evidence.

IPOA to gradually phase out police officers it has engaged as staff. In addition, IPOA should periodically conduct integrity tests on the officers to ensure that such officers are objective and do not breach international standards in executing IPOA's mandate.

Parliament should amend the Constitution to elevate IPOA to a constitutional commission or independent office. The amendments will anchor the independence of the institution in the Constitution securing the institution from political interference. In such a case, Parliament and politicians will have to go through a tedious process of initiating a referendum to interfere with IPOA's functions and powers, a process that may discourage them from interfering with the institution's independence.

The Government should gradually increase IPOA's budget allocation to enable the institution to -First, establish offices in all the counties gradually. IPOA's offices in every county will enhance IPOA's overall competence, effectiveness, independence, impartiality, and promptness in the execution of its mandate in line with international human rights standards. Second, acquire enough expert personnel to carry out the Authority's mandate without relying on Police experts. Third, acquire its equipment and facilities including laboratories to enable it to complete its investigations without relying on police facilities. Once IPOA acquires the personnel and equipment, it will be in a position to adhere to international standards while conducting its investigation.

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