



UNIVERSITY OF NAIROBI

COLLEGE OF HUMANITIES AND SOCIAL SCIENCES

SCHOOL OF LAW

**CURBING THE USE OF EXCESSIVE FORCE BY THE POLICE IN
KENYA**

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**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF
THE DEGREE OF MASTER OF LAWS**

NOVEMBER 2020

DECLARATION

I, **Nephine Minyiri** of Reg. No. G62/89414/2016 hereby declare that this research paper is my original work and has never been submitted elsewhere for any academic or non-academic purposes. I have duly acknowledged sources of the information contained in this research paper in line with University of Nairobi anti-plagiarism requirements.

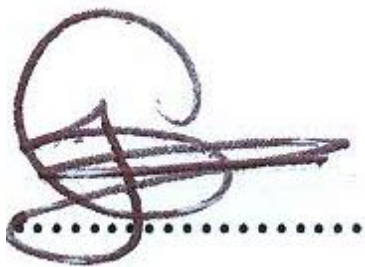
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ACKNOWLEDGMENT

I thank the Almighty God for the gift of life, good health and provision of resources throughout the writing of this project.

I am immensely grateful to my able supervisor, Dr. Evelyne Asala who went out of her way to ensure I complete this research successfully. She provided not just academic support but also moral support.

I am grateful to my parents, William O. Minyiri and Susan W. Achery for the invaluable support that they gave me in writing this research. I am also grateful to my siblings – Anne Minyiri, Philip Minyiri, Robert Minyiri, Toney Minyiri and Lonex Minyiri for their moral support. I would also like to thank my niece Mellanie Margret for proofreading my work.

I would like to thank my boss Virginia Shaw and my friends Grace Mwailemi and Lillian Moraa for moral support.

I am grateful to the University of Nairobi for availing learning facilities.

DEDICATION

I dedicate this research paper to my parents, Mr. William O. Minyiri and Ms. Susan W. Achery who have given me both financial and moral support in undertaking this study. I love you very much, may God bless you abundantly.

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LIST OF ABBREVIATIONS

| | |
|--------|---|
| ACHPR | African Commission on Human and Peoples' Rights |
| AFCHPR | African Charter on Human and Peoples' Rights |
| AG | Attorney General |
| APCOF | African Policing Oversight Forum |
| AU | Africa Union |
| BPUFF | Basic Principles on the Use of Force and Firearms |
| CAJ | Commission on Administrative Justice |
| CRC | Convention on the Rights of the Child |
| ECHR | European Court of Human Rights |
| HRC | Human Rights Committee |
| HRW | Human Rights Watch |
| IACHR | Inter-American Court of Human Rights |
| IAU | Internal Affairs Unit |
| ICCPR | International Covenant for Civil and Political Rights |
| ICJ | International Court of Justice |
| IEBC | Independent Electoral and Boundaries Commission |
| IMLU | Independent Medico-Legal Unit |
| IPOA | Independent Police Oversight Authority |
| TJRC | Truth Justice and Reconciliation Commission |
| KHRC | Kenya Human Rights Commission |
| KNCHR | Kenya National Commission on Human Rights |
| LOLE | Law of Law Enforcement |
| NGOs | Non-Governmental Organizations |

| | |
|-------|--|
| NPSC | National Police Service Commission |
| NPS | National Police Service |
| NPSOs | National Police Standing Orders |
| MSJC | Mathare Social Justice Centre |
| ODPP | Office of the Director of Public Prosecution |
| UDHR | Universal Declaration on Human Rights |
| UN | United Nations |
| USA | United States of America |
| WPA | Witness Protection Agency |

LIST OF CASES

1. African Commission on Human and Peoples' Rights V. Republic of Kenya, App no. 006/2012 (AfCHPR, 26 May 2017).
2. Charles Munyeki Kimiti v Joel Mwenda & 3 others[2010] Eklr
3. I.P. Veronica Gitahi & another v Republic [2017] eKLR
4. Kenya National Commission on Human Rights & another V. Attorney General & 3 others[2014] eKLR
5. Law Society of Kenya & 3 others v Attorney General & 3 others [2016] Eklr
6. Suarez de Guerrero v. Colombia, HRC, Comm no R.11/45 [1981]
7. Nadege Dorzema and others v Dominican Republic (2012) 87 IAmCtHR
8. Republic v Ismail Hussein Ibrahim [2018] eKLR
9. Muwonge vs. Attorney General of Uganda [1967] EA 17
10. Graham V. Connor 490 US 386 [1989] 396
11. Nachova v Bulgaria (2005) 95 ECHR

LIST OF LEGISLATIONS, REGULATIONS, TREATIES AND NON-TREATY LEGAL INSTRUMENTS.

A. Kenyan

1. Constitution of Kenya
2. Penal Code
3. Public Order Act
4. Independent Policing Oversight Authority Act
5. National Police Service Act
6. National Police Service Commission Act
7. Witness Protection Act
8. Criminal Procedure Code
9. National Police Service Standing Orders

B. Non-Kenyan

1. International Covenant for Civil and Political Rights
2. African Charter on Human and Peoples' Rights (Banjul Charter)
3. UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
4. UN Code of Conduct for Law Enforcement Officials
5. Universal Declaration of Human Rights
6. UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.
7. Minnesota Protocol on the Investigation of Potentially Unlawful Death

CHAPTER ONE (1)

INTRODUCTION

1.1 Introduction

The role played by the police in any given society is vital thus the necessity of policing institutions.¹ Primarily, the police are tasked with maintaining order and enforcing the law.² The police also assist in preventing crime and apprehending law breakers amongst other roles.³ In this regard, the police are legally mandated to use force in achieving law enforcement aims.⁴ The necessity for use of force in policing arises from the fact that the police often encounter situations which necessitate the use of force.⁵

Whereas the law empowers the police to use force, this power is often abused by the police resulting in excessive use of force against criminal suspects and innocent bystanders.⁶ The excessive use of force by the police in this regard is arbitrary and often results in fatalities.⁷ Accordingly, and in the pursuit of human rights protection, the power to use force by the police must be subjected to proper checks at all times.⁸ This entails taking appropriate measures such as formulating binding procedures on the use of force and the accountability mechanisms thereof.⁹

The excessive use of force by the police in Kenya has resulted into many injuries and unwarranted deaths.¹⁰ In 2012, Kenya admitted to the United Nations (UN) that arbitrary killings

¹ John Vespucchi, *Education Level and Police Use of Force: The Impact of a College Degree* (Springer 2020) 3

² Seumas Miller, *Shooting to Kill : The Ethics of Police and Military Use of Lethal Force* (Oxford University Press 2016) 7

³ Stuart Casey-Maslen & Sean Connolly, *Police Use of Force Under International Law* (Cambridge University Press 2017) 1

⁴ Ibid

⁵ Seumas (n 2) 7

⁶ Stuart (n 3) 2

⁷ Ibid

⁸ UNDOC, “*Handbook on Police Accountability, Oversight and Integrity*” Criminal Justice Handbook Series, United Nations Publication [2011] 5 Available at

https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf

Accessed 10 April 2020

⁹ UNHRC, “*Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*” [2014] 5 Available at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-36_en.doc accessed 11 July 2019.

¹⁰ Amnesty (Kenya), “*Police Reform in Kenya: A Drop in the Ocean*” [2013] 7 Available at https://www.amnesty.nl/content/uploads/2016/11/kenya_afr_32_001_2013.pdf?x62907 Accessed 10 July 2019 (Amnesty 2013)

occasioned by the police' use of excessive force is indeed a big problem in the country.¹¹ Even though Kenya committed to condemn the arbitrary killings, ensure investigation and punishment of police found guilty of using excessive force, little has been done to honor the said commitment.¹² The UN Human Rights Commission (HRC) has raised concerns on several cases of excessive use of force by the police in Kenya.¹³ Amnesty¹⁴ has also raised similar concerns, adding that Kenyan police officers are infamous for using excessive force.¹⁵

Apart from adverse implication on human rights, the use of excessive force has a negative effect on the policing institution as a whole as it jeopardizes the legitimacy of policing.¹⁶ Police legitimacy is vital as the police need public cooperation in order to execute their mandate effectively.¹⁷ Accordingly, eradication of excessive use of force leads to better policing and safe communities.¹⁸ This study will therefore explore ways of curbing the use of excessive force by the police in Kenya. Even though sometimes policing role is undertaken by other law enforcement officials such as military officers, this study is limited to the use of force by the regular police serving under the National Police Service.

1.2 Background of the study

Excessive use of force by the police has been experienced in Kenya since the colonial era and has continued to date.¹⁹ The use of excessive force has led to many deaths and serious injuries.²⁰ This assertion has been confirmed by a report done by the Truth, Justice and Reconciliation Commission (TJRC) on historical injustices in Kenya.²¹

¹¹ Ibid 8

¹² Ibid

¹³ Ibid 18

¹⁴ Ibid 8

¹⁵ Ibid 27

¹⁶ John Vespucci (n 1) 3

¹⁷ Karen M. Hess, *Introduction to Law Enforcement and Criminal Justice* (Wadsworth Publishing, 9th Edn, 2008)118

¹⁸ UNDOC (n 8) 8

¹⁹ Kenya Human Rights Commission (KHRC), "*Police Brutality in Kenya*" [2017] Available at <<https://www.khrc.or.ke/2015-03-04-10-37-01/blog/603-police-brutality-in-kenya.html>> Accessed 19 July 2019 (KHRC)

²⁰ TJRC Kenya, "*Report of the Truth, Justice and Reconciliation Commission*" [2013] 28 Volume IV Available at <http://knchr.org/Portals/0/Reports/TJRC_Volume_4.pdf> Accessed 10 August 2019 (TJRC Report)

²¹ Ibid

1.2.1 Pre-2010 Constitution era

Excessive use of force in Kenya can be traced back to 1920s after formation of the initial police force which was commonly referred to as “a punitive citizen containment squad.”²² Police brutality was pronounced in the 1950s during *Mau Mau* war when there was an organized group of police tasked with brutalizing and killing *Mau Mau* associates.²³ The *Mau Mau* war period was characterized by torture of civilians by the police.²⁴

In the 1980s, the police used excessive force to silence members of resistance movements, notably *Mwakenya*.²⁵ The police who were accountable to none but the executive, tortured the victims at Nyayo house.²⁶ This period was marked by political killings of government critics by the police.²⁷

During former President Moi’s 24 years regime, many Kenyans especially government critics, experienced police brutality which occasioned serious injuries and death.²⁸

Most of the arbitrary killings during pre-2010 Constitution era were against government critics.²⁹ For instance in 1975, J.M Kariuki³⁰ was picked by the police before his maimed body was found later.³¹ In 1990, the police were accused of aiding the assassination of Robert Ouko; a former minister of foreign affairs.³² The use of excessive force by the police during Moi era was majorly to silence opposition leaders, followers and sympathizers.³³

The use of excessive force by the police continued during Kibaki era. In 2002 for instance, the police unlawfully killed 100 Kenyans as a result of excessive force.³⁴ In 2003, at least 48 Kenyan

²² CHRI & KHRC, “*The Police, the People, the Politics: Police Accountability in Kenya*” [2006] 4 Available at <https://www.humanrightsinitiative.org/publications/police/kenya_country_report_2006.pdf> Accessed 10 July 2019 (CHRI & KHRC)

²³ Ibid

²⁴ Ibid

²⁵ Ibid 6

²⁶ Ibid

²⁷ Ibid

²⁸ John Mwangi & Kenneth Omeje, “*The Challenges of State Policing in Kenya*” [2012] 1 Vol 7, Issue 1 Peace and Conflict Review. Available at < <http://www.review.upeace.org/pdf.cfm?articulo=129&ejemplar=24>> Accessed 18 February 2019 (Mwangi)

²⁹ CHRI & KHRC (n 22)

³⁰ An Assistant Minister at the time and a critic of government’s corrupt dealings.

³¹ CHRI & KHRC (n 22) 5

³² Ibid

³³ Ibid 6

³⁴ Ibid 21

died as a result of excessive use of force by the police.³⁵ In 2004, the police arbitrarily executed 27 people.³⁶ In 2007/2008, there was widespread police brutality especially against protesters of the disputed elections.³⁷ According to a research by Amnesty, the police used excessive force against protesters which resulted into deaths and serious injuries.³⁸

1.2.2 Post the 2010 Constitution

The use of excessive force by the police has continued notwithstanding the promulgation of the new Constitution.³⁹ The 2010 Constitution established a new legal and regulatory framework for policing in Kenya.⁴⁰ However, the implementation of the new laws has been very slow.⁴¹ According to Amnesty, this has been occasioned majorly by lack of training of the police on the new laws.⁴² Accordingly, the police are ignorant of provisions of the new policing laws.⁴³ This position has also been averred by the Kenya Human Rights Commission (KHRC).⁴⁴

1.2.3 Sample statistics of arbitrary killings occasioned by use of excessive force

There is no official database on the number of cases involving excessive use of force by the police but human rights Non-Governmental Organizations (NGOs) frequently document reported cases of police' abusive use of force. According to Human Rights NGOs responsible for the documentation of police' killings arising from excessive use of force, the killings increased from 2013.⁴⁵ According to a report by Mathare Social Justice Centre, 308 cases of arbitrary killings by the police were reported in 2013, 418 cases in 2014 and 77 cases reported in 2015.⁴⁶ Independent Medico-Legal Unit (IMLU) reveals that it documented 792 deaths occasioned by

³⁵ Ibid

³⁶ Ibid

³⁷ Amnesty 2013 (n 10) 7

³⁸ Ibid

³⁹ KHRC (n 19)

⁴⁰ Amnesty 2013 (n 10) 13

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

⁴⁴ KHRC (n 19)

⁴⁵ Human Rights Watch, *'Nairobi Police Executing Suspects : Dozens Killed in Low-Income Areas'* [2019] available at <<https://www.hrw.org/news/2019/07/02/kenya-nairobi-police-executing-suspects>> accessed 26 September 2019 (HRW 2019)

⁴⁶ Mathare Social Justice Centre, *"Who Is Next? A Participatory Action Research Report Against the Normalization of Extrajudicial Executions in Mathare"* [2015] 10 Available at <https://drive.google.com/file/d/0B2NZry_SioNhWEFyQWNuVVBjV2M/view> Accessed 6 August 2019 (MSJC)

police brutality between January 2013 and March 2018.⁴⁷ Kenya National Commission on Human Rights (KNCHR) reveals that 141 Kenyans were arbitrarily executed by the police in 2015, 204 cases in 2016 and 80 cases by mid-2017.⁴⁸ Human Rights Watch (HRW) states that from mid-2018 to mid-2019 in Dandora and Mathare alone, the police unlawfully killed 21 young men.⁴⁹

The Police have however dismissed these statistics, stating that the same have been exaggerated⁵⁰ though they have failed to avail an official database of the alleged police killings. According to the TJRC report, the common State's response to allegations of arbitrary killings is to deny the killings and question the authenticity of the reports.⁵¹

The long history of excessive use of force by the police in Kenya suggests that the vice has become the norm rather than isolated incidents. The impunity surrounding the abusive use of force by the police is worrying. In 2017, African Commission raised a concern about the excessive use of force by the police in Kenya.⁵² The Commission appealed to Kenya to address the increasing incidents of abusive use of force by the police and the impunity occasioned by lack of investigation of the police action.⁵³ This appeal shows that the excessive use of force in Kenya is a matter of concern beyond Kenyan borders thus needs appropriate action.

1.3 Statement of the problem

The excessive use of force by the police has become a culture in Kenya.⁵⁴ In fact, the use of excessive force by the police most of the time happens in broad day light.⁵⁵ The normalization of excessive use of force by the police in Kenya is a great concern as Kenya's governance is

⁴⁷ Independent Medico-Legal Unit (IMLU), "Statement by the Independent Medico-Legal Unit to the chairperson of the Working Group on death penalty and extrajudicial, summary or arbitrary killings in Africa" [2018] 2 Available at < <http://www.imlu.org/index.php/shortcode/reports/typgraphy/send/3-reports/70-imlu-statement-to-the-chairperson-of-the-working-group-on-death-penalty-and-extrajudicial-summary-or-arbitrary-killings-in-africa>> Accessed 27 September 2019

⁴⁸ Kenya National Commission on Human Rights & FIDH, "Kenya's Scorecard on Security and Justice: Broken Promises and unfinished business" (July 2017) 17 available at <<https://www.khrc.or.ke/mobile-publications/civil-political-rights/166-kenya-s-scorecard-on-security-and-justice-broken-promises-and-unfinished-business/file.html>> accessed 10 September 2018. (KNCHR / FIDH)

⁴⁹ HRW 2019 (n 45)

⁵⁰ MSJC (n 46) 10

⁵¹ TJRC Report (n 20) 28

⁵² KNCHR / FIDH (n 48) 17

⁵³ Ibid

⁵⁴ KNCHR / FIDH (n 48) 17

⁵⁵ Ibid

supposedly based on the rule of law. It is widely accepted that Kenya has a progressive set of laws especially on human rights protection. In deed Kenya's Constitution⁵⁶ and the National Police Service (NPS) Act⁵⁷ contain regulations on policing especially as regards the use of force. Furthermore, Kenya has ratified regional⁵⁸ treaties and is also subject to the international law⁵⁹ governing the use of force by the police.

Despite the existing legal framework⁶⁰ on the use of force, instances of excessive use of force by the police are reported on a regular basis.⁶¹ The new Constitution established new policing institutions as means of ensuring police accountability but the excessive use of force by the police has persisted.⁶² This study therefore seeks to explore viable mechanisms of curbing the use of excessive force by the police in Kenya.

1.4 Objectives of the study

This study's main objective is to discover and suggest ways of curbing the use of excessive force by the police in Kenya.

1.4.1 Specific objectives

- a. To find out the existing legal framework governing the use of force by the police in Kenya.
- b. To find out the international standards governing the use of force by police officers.
- c. To outline best practices for controlling the use of excessive force
- d. To suggest viable mechanisms that can be adopted by Kenya to reduce excessive use of force by the police.

1.5 Hypothesis

Kenya's police oversight and accountability system as relates to the use of force is weak.

⁵⁶ Article 244

⁵⁷ The Sixth Schedule, National Police Service Act

⁵⁸ African Charter on Human and Peoples' Rights (Banjul Charter)

⁵⁹ International Law of Law Enforcement (LOLE) that is, International human rights law, International principles of law, the UN Basic Principles on the Use of Force and Firearms by the Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials

⁶⁰ Constitution, National Police Service Act, Banjul Charter and the International law.

⁶¹ KNCHR / FIDH (n 48) 17

⁶² Amnesty 2013 (n 10) 20

1.6 Research question

What are the viable ways of curbing the excessive use of force by the police in Kenya?

1.6.1 Specific questions

- a. What is the legal framework on the use of force by the police in Kenya?
- b. What are the international standards on the use of force by the police?
- c. What are the best practices that can effectively curb the use of excessive force by the police in Kenya?
- e. What are the viable mechanisms that can be adopted by Kenya to reduce excessive use of force by the police?

1.7 Research methodology

This research will be entirely desk-based and thus will involve library and internet research. This approach is best suited for this study as it will majorly involve reviewing of published materials on the use of force by the police. Accordingly, in conducting the literature search, the study will explore relevant academic books, academic journals, human rights agencies' reports, policy papers, newspapers, court decisions and on-line data bases.

This approach will enable application of theoretical knowledge acquired on existing data to answer the study's research questions. This data should enable the study to identify the weaknesses in the existing police oversight and accountability structures on the use of force by the police in Kenya. Additionally, the data will enable the study to identify some of the best practices employed in effectively controlling the use of excessive force by the police. Consequently, the findings will enable the study to suggest viable ways of curbing the excessive use of force by the police in Kenya in line with the suggested best practices.

1.8 Importance of the study

The policing institution is undoubtedly an essential component of every society.⁶³ The use of force comes with the territory of policing.⁶⁴ The excessive use of force is however detrimental to not only the public but also the policing institution as well as it leads to questioning of police

⁶³ Karen (n 17) 116

⁶⁴ John (n 1) 3

legitimacy.⁶⁵ Effective policing which leads to safer communities, can only be achieved where there is police legitimacy.⁶⁶

The apparent impunity surrounding policing in Kenya jeopardizes police legitimacy. The excessive use of force by the police must be addressed urgently to build public confidence in the police. Further the use of excessive force has tainted the image of Kenya in the international community. There is need to adopt corrective action to demonstrate Kenya's commitment in protecting human rights particularly the right to life and the right to liberty and security. In this regard, this study will explore ways of curbing excessive use of force by the police in Kenya.

This study will therefore be beneficial to many entities including: Attorney general's office, parliament, national police service, office of the director of public prosecutions, IPOA, academia community, human rights NGOs and the Public at large.

1.9 Theoretical framework

This research is centered on the legal positivism theory as the study strongly advocates for strict adherence to the laid down legal procedures governing policing particularly the use of force. However, the study will also make reference to natural law theory particularly the principle of self-preservation. This study appreciates that whereas instances of excessive use of force by the police are mostly unjustified, there are exceptional instances where a deliberate use of lethal force may be necessary to protect the lives of police and other people. Even in those exceptional instances, the use of lethal force must be done as per the laid down law.

1.9.1 Legal positivism

The major line of argument in this theory is that law is a set of social facts, distinct from questions of merits.⁶⁷ This theory holds that all laws must be given recognition by the government.⁶⁸ According to this theory, valid norms are only those that have been established by

⁶⁵ Ibid

⁶⁶ Karen (n 17) 118

⁶⁷ John Gardner, "Legal Positivism: 5 ½ Myths" Vol 46, Issue 1 American Journal of Jurisprudence [2001] 199

⁶⁸ Jagdish Chandra Johari, *Contemporary Political Theory: New Dimensions, Basic Concepts and Major Trends* (Sterling Publishers 1987) 204

the sovereign in the constitution.⁶⁹ In this regard, Gardner posits that validity of a norm is based on the source not its morality.⁷⁰

This theory insists that the law must be posited by a sovereign and specifically distinguished from morality, customary dictates and religion.⁷¹ John Austin, one of the leading proponents of positivism insists that the law must be separated from its merits.⁷²

Hobbes argues that law as posited by the sovereign, protects man from living in the condition of nature.⁷³ He contends that without a sovereign's control, a man lives in a war-like environment.⁷⁴ Further, Hobbes submits that in a condition of war, man lives in perpetual fear of death and life is short.⁷⁵ To avoid this state of nature, Hobbes proposes that man transfers his natural right (the right to do as he wishes) to a common power for protection of life.⁷⁶

Proponents of this theory posit that in the absence of the law, man is guided by the rule of the jungle under which every man fights for himself.⁷⁷ This could lead to anarchy. It is therefore necessary in this regard, for man to be guided by a common power/law as suggested by Hobbes for a sense of justice and order to prevail.

Positivism strongly advocates for obedience to enacted laws even if the same are oppressive and/or immoral. This is a key in preventing a state of anarchy which is characterized by violence and a continual threat to the existence of a man. Positivism theory implies that criminal suspects are entitled to the laid down legal procedure of the criminal justice system which includes being tried based on the presumption of innocence. Fair trial rights are guaranteed by the written law and thus must be obeyed. In this regard, Miller opines that as at the point of using force against a suspect, the police should take into consideration the fact that the suspect's guilt is yet to be established through the criminal justice system.⁷⁸ Accordingly, the police should respect suspects'

⁶⁹ Ibid

⁷⁰ Gardner (n 67) 199

⁷¹ Ibid

⁷² John Austin, *The Province of Jurisprudence Determined* (1832) Cambridge University Press (1995) 157s

⁷³ Thomas Hobbes, *Leviathan 1588-1679* (Baltimore: Penguin Books 1968) Chapter xiii

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ ibid

⁷⁸ Seumas (n 2) 134

right to be presumed innocent and to be subjected to fair trial for purposes of establishing their guilt.⁷⁹

1.9.2 Natural law theory

The theory of natural law holds that law, which is universal and eternal, is based on reason consistent with nature.⁸⁰ Michael Perry submits that law in this regard must be in accordance with the nature of man.⁸¹ This theory holds that law is based on a law which is at a higher level and pronounced by reason.⁸² According to this theory, the law, derives from God and He is the enforcer of the law.⁸³ Freeman postulates that laws are moral principles with universal application which are discovered by reason.⁸⁴ Natural law therefore is not necessarily revealed by a divine power as it is based on a man's reasoning.⁸⁵

At the core of natural law is the concept of self-preservation.⁸⁶ Even though natural law prohibits killing, a person may rightfully exercise the right to self defence when his/her life is in danger.⁸⁷ Merriam submits that a man is naturally inclined to protect his life and this is consistent with natural law which advocates for self-preservation.⁸⁸ Self-preservation or self-defense is therefore an essential element of the theory of natural law but should be applied only when one's life is threatened.⁸⁹

According to the police, the victims of police' use of deadly force are often armed with lethal weapons especially a homemade gun and rounds of ammunition.⁹⁰ Seumas argues that the police are morally obligated to use lethal force on the basis of human rights protection.⁹¹ Specifically, he notes that the police may use lethal force to protect themselves and other third parties whose

⁷⁹ Ibid

⁸⁰ John J. Merriam, "Natural Law and Self-Defense." (Military Law Review, Vol. 206 2010) 43

⁸¹ Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford University Press 1998) 6

⁸² Freeman MDA, *Lloyds Introduction to Jurisprudence* (7th Edition, Sweet and Maxwell 2001) 3

⁸³ John Paul Omony, *Key Issues in Jurisprudence: An In-depth Discourse on Jurisprudence Problems* (Law Africa, 2010) 17

⁸⁴ Freeman (n 82) 91

⁸⁵ Robert P. George, "Natural law, the Constitution, and the Theory and Practice of Judicial Review" Fordham Law Review. Volume 69/Issue [2001] 2269 Available

at<<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3727&context=flr>>accessed 01 August 2019

⁸⁶ John J. Merriam (n 80) 50

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Ibid 44.

⁹⁰ MSJC (n 46) 14

⁹¹ Seumas (n 2) 2

lives are in danger.⁹² Seumas opines that the police are entitled to the right to self-defence which he describes as a natural right.⁹³ Additionally, he states that the police have a moral duty to protect the lives of other people.⁹⁴ In this regard, when a police officer or any private citizen kills in self-defense, the act of killing in this sense is morally acceptable as all human beings are entitled to the right to life.⁹⁵

Aquinas argues that natural law compels man to protect good.⁹⁶ Aquinas submits that the highest good is self-preservation thus self-defense is legally permitted under natural law theory.⁹⁷ Even though it is both immoral and a sin to kill, Aquinas appreciates the importance of self-preservation and justifies it as necessary when one has to protect his or her life.⁹⁸ Therefore according to this theory of law, killing to protect life is a good moral action.⁹⁹

At the core of natural law's self-defense is the intention for killing.¹⁰⁰ Killing as a self-defense is only justified where the original the intention was not to kill but to preserve life.¹⁰¹ Further, necessity is also a key consideration in assessing the morality or otherwise of killing in self-defense.¹⁰² According to natural law theory, where killing is occasioned by necessity, liability for the killing should not arise as man has to protect his life first.¹⁰³ Aquinas' view is that in natural law, killing while acting in self-defense is justifiable as one has limited choice in that regard.¹⁰⁴

Natural law's self-defense killing has to be provoked by an instant life threatening circumstance.¹⁰⁵ Even though the police often cite self-defense in cases of arbitrary killing of criminal suspects, reports by human rights organization as shown earlier indicate that the suspects are seldom armed and that weapons are placed on the victims' bodies after the

⁹² Ibid

⁹³ Ibid 4

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Merriam (n 80) 52

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Merriam (n 80) 50

killings.¹⁰⁶ It is therefore inappropriate for the police to rely on the concept of self-defense to justify killing when there is no immediate threat to life.

1.10 Literature Review

1.10.1 Policing and the use of force

Karen¹⁰⁷ describes policing as a set of activities conducted by law enforcement officials to guide or control the conduct or behavior of the public.¹⁰⁸ Miller¹⁰⁹ notes that the essential role played by the police cannot be gainsaid as society can only thrive where there is law and order.¹¹⁰ Apart from maintaining law and order, Stuart *et al* submit that the law enforcement officials are also tasked with controlling crime and arresting suspects amongst other roles.¹¹¹ Karen posits that contrary to the common belief that the role of the police is majorly to fight crime, the police play many other major roles in the society.¹¹² In this regard, Karen observes that the police play an important role in deterring crime and immoral acts which would otherwise lead to breakdown of the society.¹¹³ Karen submits that only law enforcement officials can ensure conformity with the expectations and regulations of a given society.¹¹⁴

Stuart *et al* argue that the nature of law enforcement necessitates the use of force by the police.¹¹⁵ Miller agrees that in deed the use of force by the police can be inevitable given the life threatening situations the police encounter in the day to day execution of their role.¹¹⁶ In deed as observed by the UN, the police often encounter situations which necessitate the use of force.¹¹⁷ Karen asserts that the use of force is an essential component of law enforcement.¹¹⁸ Similarly, John underscores the necessity for use of force by the police in maintaining order in

¹⁰⁶ MSJC (n 46) 14

¹⁰⁷ Karen (n 17) 116

¹⁰⁸ Ibid

¹⁰⁹ Seumas (n 2) 7

¹¹⁰ Ibid

¹¹¹ Stuart (n 3) 1

¹¹² Karen (n 17) 116

¹¹³ Ibid 115

¹¹⁴ Ibid 116

¹¹⁵ Stuart (n 3) 1

¹¹⁶ Seumas (n 2) 7

¹¹⁷ UNHRC (n) 5

¹¹⁸ Karen (n 17) 116

the society.¹¹⁹ Geoffrey and Roger¹²⁰ posit that the use of force by the police is not only necessary but also the “defining characteristic” of policing.¹²¹ While appreciating the need for use of force by the police, Stuart and Sean¹²² emphasize that the police must exercise utmost care and comply with the principles on the use of force especially the proportionality principle.¹²³

1.10.2 Reasonableness of force

John¹²⁴ describes the use of force as any act that could potentially or actually cause physical injury to a suspect.¹²⁵ Whereas Miller admits that the use of force comes with the territory of being a police officer, he posits that often the police use unreasonable force.¹²⁶ John agrees with this assertion and adds that the unreasonable use of force erodes public confidence in the police.¹²⁷

John posits that police officers are granted wide discretion in making decisions on use of force thus it becomes problematic determining the reasonableness of force used in a given situation.¹²⁸ There is controversy on the notion of “reasonable force” that should be applied by the police.¹²⁹ Geoffrey and William¹³⁰ argue that the notion of reasonable force is vague and as such the police should not be expected to apply a vague concept.¹³¹ The writers’ main concern is that police are required to be reasonable in their application of force in the absence of a clarification of situations that go beyond reasonable force needed in the work of a police.¹³² Even though the writers acknowledge that police action must be reasonable, they opine that “reasonable force” should be well-defined.¹³³

¹¹⁹ John (n 1) 3

¹²⁰ Geoffrey P. Alpert & Roger G. Dunham, *Understanding Police Use of Force: Officers, Suspects and Reciprocity* (Cambridge University Press, 2004)

¹²¹ Ibid 18

¹²² Stuart (n 3) 92

¹²³ Ibid

¹²⁴ John (n 1) 1

¹²⁵ Ibid

¹²⁶ Seumas (n 2) 134

¹²⁷ John (n 1) 1

¹²⁸ Ibid

¹²⁹ Geoffrey Alpert & William Smith, “How Reasonable is the Reasonable Man?: Police and Excessive Force.” (Journal of Criminal Law and Criminology, University of South Carolina 1994)

¹³⁰ Ibid

¹³¹ Ibid 481

¹³² Ibid 482

¹³³ Ibid 485

In an attempt to set standards on reasonability of force, John observes that police departments have adopted a use of force continuum which guides police officers on the amount of force suitable for a given situation.¹³⁴ This approach however as admitted by John, creates disharmony as different police departments develop different guidelines concerning same policing scenarios.¹³⁵ John therefore advocates for a universal use of force continuum for adoption by all police departments to create a universal concept of what is reasonable force in a given situation.¹³⁶

In a typical use of force continuum, John notes that the first level of force is the use of lenient strategies such as “control holds and open hand strikes.”¹³⁷ Geoffrey and Roger¹³⁸ submit that the first level also consists of verbal threats and the use of handcuffs.¹³⁹ Where the first level of force is ineffective, the second level of force can be used.¹⁴⁰ The second level of force as argued by John consists of tough strategies such as chemical spray, kicks, punches, tasers and batons.¹⁴¹ John submits that where the first and second levels of force are ineffective, the third level of force which is deadly may then be used.¹⁴² Despite the guidelines, John concludes that there is still a challenge in definitively establishing reasonable force.¹⁴³

The USA Supreme Court in the landmark case of *Graham V. Connor*¹⁴⁴ held that in deciding whether the use of force in a particular situation was reasonable or not, the Courts should be guided by the standard of “objective reasonableness.” In expounding this standard, the Court opined that it is anchored on “the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”¹⁴⁵

Stuart and Sean agree with this standard and argue that the reasonableness of force may be based on the point of view of a reasonable police officer faced with similar situation.¹⁴⁶ This standard

¹³⁴ John (n 1)1

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Ibid 2

¹³⁸ Geoffrey P. Alpert & Roger G. Dunham (n 120)

¹³⁹ Ibid 2

¹⁴⁰ John (n 1) 2

¹⁴¹ Ibid

¹⁴² Ibid

¹⁴³ Ibid 17

¹⁴⁴ *Graham V. Connor* 490 US 386 [1989] 396

¹⁴⁵ Ibid

¹⁴⁶ Stuart (n 3) 177-176

however as argued by John, has attracted a number of criticisms based on the fact that it grants wide discretion to the police in deciding the use and level of force thus open to abuse.¹⁴⁷ Additionally, John argues that the standard is vague, it cannot be measured thus it could lead to many different interpretations and conclusions.¹⁴⁸ Accordingly, John concludes that there is no universal yardstick for measuring the reasonableness of force.¹⁴⁹ Therefore John argues that whether the use of force in a situation is excess or otherwise depends on the situational analysis.¹⁵⁰ This view is also shared by Geoffrey and Roger¹⁵¹ who argue that the measure of force depends on the peculiarities of a given incident.¹⁵²

Cynthia Lee¹⁵³ suggests that the law should provide that lethal force should be used only on necessity basis and only in a proportionate manner.¹⁵⁴ In her proposed model statute to find out whether the police belief and action meets the reasonable man test, she states that the court should focus on assessment on whether the force used was necessary and whether it was used proportionately.¹⁵⁵

1.10.3 The use of force culture in Kenya

Amnesty International¹⁵⁶ observes that Kenyan police officers are notorious in abusive use of force.¹⁵⁷ KNCHR & FIDH¹⁵⁸ submit that Kenya police have been accused on countless occasions, of using excessive force during law enforcement operations.¹⁵⁹ A study by HRW¹⁶⁰ reveals that killings of suspected criminals have become a norm rather than an exception

¹⁴⁷ John (n 1) 17

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Geoffrey P. Alpert & Roger G. Dunham (n 120) 2

¹⁵² Ibid

¹⁵³ Cynthia Lee, “*Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*” (2018) GWU Law School Public Law Research Paper No. 2017-65 Available at <https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2560&context=faculty_publications> accessed 30th July 2019

¹⁵⁴ Ibid 638.

¹⁵⁵ Ibid

¹⁵⁶ Amnesty 2013 (n 10)

¹⁵⁷ Ibid 27

¹⁵⁸ KNCHR / FIDH (n 48) 14

¹⁵⁹ Ibid

¹⁶⁰ HRW 2019 (n 45)

in Kenya.¹⁶¹ Indeed, Amnesty International¹⁶² argues that in Kenya, abusive use of force is witnessed regularly.¹⁶³

KNCHR & FIDH¹⁶⁴ argue that one of the challenges that the police officers have to deal with in Kenya is the high rate of crime especially in the informal settlements.¹⁶⁵ In fact, CHRI & KHRC¹⁶⁶ state that Nairobi has been mentioned as one of the leading cities in the world in terms of crime rate.¹⁶⁷ HRW¹⁶⁸ argues that as a way of dealing with the high rate of crime, the police often take the law into their own hands and use excessive force in a bid to maintain order.¹⁶⁹ According to the TJRC¹⁷⁰ report, it is common for the police to execute criminal suspects without due process of the law.¹⁷¹ HRW¹⁷² submits that the police justify use of lethal force on criminal suspects on the basis that the suspects are armed all the time and that application of force has enabled successful reduction of crime levels.¹⁷³ According to KHRC,¹⁷⁴ the executions are mostly done in broad day light to warn potential law breakers of the fate awaiting them.¹⁷⁵

According to KNCHR & FIDH,¹⁷⁶ the police often respond to protests in Kenya through excessive use of force.¹⁷⁷ John and Kenneth¹⁷⁸ concur and state that the victims are normally unarmed.¹⁷⁹ KHRC¹⁸⁰ argues that while policing assemblies, the police are often armed with

¹⁶¹ Ibid

¹⁶² Amnesty 2013 (n 10)

¹⁶³ Ibid 21

¹⁶⁴ KNCHR / FIDH (n 48) 16 -17

¹⁶⁵ Ibid

¹⁶⁶ CHRI & KHRC (n 22) 9

¹⁶⁷ Ibid

¹⁶⁸ HRW 2019 (n 45)

¹⁶⁹ Ibid

¹⁷⁰ TJRC Report (n 20) 28

¹⁷¹ Ibid

¹⁷² HRW 2019 (n 45)

¹⁷³ Ibid

¹⁷⁴ KHRC, “Police Brutality & Evasive Justice” [2019] Available at < <https://www.khrc.or.ke/2015-03-04-10-37-01/blog/672-police-brutality-evasive-justice.html>> Accessed 12 June 2019

¹⁷⁵ Ibid

¹⁷⁶ KNCHR / FIDH (n 48) 14

¹⁷⁷ Ibid

¹⁷⁸ Mwangi (n 28) 21

¹⁷⁹ Ibid

¹⁸⁰ KHRC (n 19)

lethal weapons and often inflict fatal injuries to the protestors.¹⁸¹ This assertion has also been made by Amnesty International.¹⁸²

Amnesty International¹⁸³ states that police brutality towards protesters was especially pronounced during violence that started in December 2007 where it is alleged that the police occasioned 43% percent of the recorded 1,300 deaths.¹⁸⁴ In this regard, John and Kenneth¹⁸⁵ concur and state that police brutality toward protestors occasioned 405 deaths.¹⁸⁶

ICJ¹⁸⁷ notes that despite the constitutional guarantee of freedom of assembly, the police often unleash unnecessary force on unarmed protestors.¹⁸⁸ Amnesty¹⁸⁹ notes that the disturbing part is that victims of police' use of excessive force during protests are mostly unarmed.¹⁹⁰

Karen posits that while policing assemblies, the police should always keep in mind that their main duty in the circumstance is to maintain order and offer protection to the people.¹⁹¹ Additionally, Karen submits that the police should uphold the protestors' right to peaceful assembly.¹⁹²

1.10.4 Accountability for use of force

CHRI/KHRC argue that the police' use force often violates human rights and as such there should be accountability for use of force by the police in Kenya.¹⁹³ Accountability for arbitrary killings occasioned by abusive use of force in Kenya is however rare in practice as submitted by Amnesty International.¹⁹⁴ Amnesty¹⁹⁵ argues that instead of bringing to book the culprits, there

¹⁸¹ Ibid

¹⁸² Amnesty 2013 (n 10) 27

¹⁸³ Ibid

¹⁸⁴ Amnesty 2013 (n 10) 18

¹⁸⁵ Mwangi (n 28) 21

¹⁸⁶ Ibid

¹⁸⁷ ICJ (Kenyan Section), "*Return to Darkness: Civil Vigilance Necessary To Resist Attacks On The Freedom Of Assembly*" Available at < <https://icj-kenya.org/news/commentary/57-return-to-darkness-civil-vigilance-necessary-to-resist-attacks-on-the-freedom-of-assembly>> Accessed 13 September 2019 (ICJ)

¹⁸⁸ Ibid

¹⁸⁹ Amnesty International / Human Rights Watch, "*Kill Those Criminals: Security Forces Violations in Kenya's August 2017 Elections.*" [2017] 15 Available at <https://www.hrw.org/report/2017/10/15/kill-those-criminals/security-forces-violations-kenyas-august-2017-elections> accessed 05 May 2018 (Amnesty/HRW)

¹⁹⁰ Ibid 15

¹⁹¹ Karen (n 17) 119

¹⁹² Ibid

¹⁹³ CHRI & KHRC (n 22) 32

¹⁹⁴ Amnesty 2013 (n 10)

¹⁹⁵ Ibid 18

have been denials by lack of investigation by government.¹⁹⁶ John and Kenneth concur and state that absence of accountability for abusive use of force in Kenya encourages impunity.¹⁹⁷ In this regard, Gerald and Kennedy¹⁹⁸ argue that the police are not held accountable for arbitrary killings because they serve the interest of the executive.¹⁹⁹ Indeed Amnesty²⁰⁰ notes that lack of accountability by the police is encouraged by government's inaction as relates to prosecution of the perpetrators.²⁰¹

CHRI and KHRC²⁰² insist that accountability by the police is key as it controls policing activities in line with human rights protection.²⁰³ Accordingly, in addition to regulatory framework on policing, the police must be subjected to appropriate accountability measures.²⁰⁴ ICRC²⁰⁵ appreciates that in order for a society to be maintained, policing is vital however policing even in hostile conditions must be based on respect for the legal mechanisms controlling use of force.²⁰⁶

Despite the police accountability mechanisms created by the 2010 Constitution, Anneke Osse²⁰⁷ observes that there has been very little impact on police action.²⁰⁸ Osse attributes the minimal impact of police reforms on mainly executive's thirst to ensure police loyalty so as to silence opponents.²⁰⁹ As such, Osse submits that the executive rarely supports reforms that promote effective and independent policing.²¹⁰

¹⁹⁶ Ibid

¹⁹⁷ Mwangi (n 28) 19

¹⁹⁸ Kennedy Mkutu & Gerald Wandera, "*Policing the Periphery: Opportunities and Challenges for Kenya Police Reserves.*" [2013] Available at < <http://www.smallarmssurvey.org/fileadmin/docs/F-Working-papers/SAS-WP15-Kenya-Policing-the-Periphery.pdf>> Accessed 19 July 2019

¹⁹⁹ Ibid 15

²⁰⁰ Amnesty 2013 (n 10) 19

²⁰¹ Ibid

²⁰² CHRI & KHRC (n 22)

²⁰³ Ibid 1

²⁰⁴ Ibid

²⁰⁵ ICRC, "*International Rules and Standards for Policing*" [2015] Available at <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0809.pdf>> accessed 12 December 2018

²⁰⁶ Ibid 64

²⁰⁷ Anneke Osse, "*Police reform in Kenya: a process of 'meddling through'*" (International Journal of Research and Policy 2016) available at <<https://www.tandfonline.com/doi/pdf/10.1080/10439463.2014.993631?needAccess=true>> accessed 3 August 2019

²⁰⁸ Ibid 919

²⁰⁹ Ibid, 918

²¹⁰ Ibid, 919

Thomas Probert *et al* note that Kenya is not short of legal and institutional framework on police action.²¹¹ It is submitted that the challenges in accountability for police action arise because of “practical gaps” that enable the police to get away with gross violations of human rights.²¹² In this regard, Thomas Probert *et al* argue that despite the constitutional provisions on human rights and the international standards on the use of force, the implementation of the legal framework remains a huge challenge.²¹³

The reviewed literature concur that abusive use of force during law enforcement in Kenya continues to be a major concern. However, the literature is limited to mere documentation of cases involving excessive use of force by the police. The literature merely recommend action to be taken against the officers and submit that there should be accountability for the abusive use of force by the police. The existing literature on the subject does not provide viable comprehensive ways of controlling the use of excessive force in Kenya. This research will therefore seek to seal this gap.

1.11 Chapter breakdown

Chapter One: Introduction

This chapter contains the introduction of the study, the background, statement of the problem, objectives of the research, hypothesis, research questions, methodology, importance of the study, theoretical framework, literature review and chapter breakdown.

Chapter Two: Legal Framework for the Use of Force in Kenya

This chapter will provide the regulatory framework on use of force by the police in Kenya. Specifically, the Chapter will outline constitutional and statutory legal provisions on the use of force. This chapter will also entail a discussion on international standards on the use of force in law enforcement and the regional legal framework.

²¹¹ Thomas Probert et al “*Strengthening Policing Oversight and Investigations in Kenya: Study of IPOA Investigations into Deaths Resulting from Police Action*” Available at < <https://apcof.org/wp-content/uploads/apcof-study-of-ipoa-deaths-from-police-action-kenya-eng-041-3.pdf> > Accessed 10 February 2020

²¹² Ibid

²¹³ Ibid

Chapter Three: Best Practices for Effective Control of Police Use of Excessive Force

This chapter will provide techniques that have been proven to effectively deal with the issue of excessive use of force by the police. These measures include community policing, use of force continuum, effective recruitment and police welfare programs, regular training of police and effective accountability system.

Chapter Four: Towards Eradicating the Use of Excessive Force

This chapter will contain a discussion on the specific ways of controlling excessive use of force in Kenya. The suggested mechanisms include changing the police culture, improving police welfare, improving police-public relationship and strengthening the regulatory framework and accountability structures on the use of force by the police.

Chapter Five: Summary, Conclusion & Recommendations

This chapter will contain the summary of the study, conclusion and recommendations on the strategies that can be adopted by Kenya to effectively curb the use of excessive force by the police.

CHAPTER TWO (2)

LEGAL FRAMEWORK FOR THE USE OF FORCE IN KENYA

2.1 Introduction

It is universally acknowledged that every so often the police are forced to resort to the use of force because of the hostile situations they are confronted with in the day to day execution of their role.²¹⁴

The use of force by the police in Kenya is primarily regulated by the National Police Service Act and supplemented by the National Police Service Standing Orders. The Constitution provides principles that should guide policing generally.²¹⁵ Additionally, the Constitution provides that all the treaties and conventions that Kenya has ratified form part of the laws of Kenya.²¹⁶ Further, the Constitution recognizes general rules of international law as part of Kenyan laws.²¹⁷

This chapter outlines the national, regional and international legal framework governing the use of force by the police in Kenya. The chapter starts by exploring the international legal framework, primarily the international customary law. At the regional level, this chapter will mention provisions of the African Charter on Human and Peoples' Rights as interpreted by the African Commission on Human and Peoples' Rights. Finally, the chapter will outline the national legal framework starting by constitutional provisions and followed by statutory provisions on the use of force by the police.

²¹⁴ UNHRC, “*Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*” [2014] 5 Available at <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-36_en.doc> Accessed 11 July 2019.

²¹⁵ Article 244

²¹⁶ Article 2(6), Constitution of Kenya

²¹⁷ Article 2(5), Constitution of Kenya

2.2 International Legal Framework

In strict sense, police activities are primarily governed by national laws. However, policing is also regulated by various aspects of the international law especially the standards on the use of force.²¹⁸

This was however not the case prior to world war two as policing was purely a state's internal affair.²¹⁹ Consequently, the Second World War led to the emergence of an international body of regulations governing the conduct of law enforcement officials.²²⁰ This body of international regulations for the police is commonly known as "the international law of law enforcement (LOLE)."²²¹ LOLE primarily consists of international human rights law, general principles of law and the customary international law.²²²

The international human rights law in this regard outlines the basic international legal framework for law enforcement.²²³ This includes basic human rights such as the right to life and the right to liberty and security of a person.²²⁴ The general principles of law include use of force principles that is necessity, proportionality, legality, precaution and non-discrimination.²²⁵ The customary international law in this context include the UN Code of Conduct for Law Enforcement Officials (Code of Conduct) and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF).²²⁶

The customary international law regulating police' use force such as the Code of Conduct and the BPUFF are not treaties.²²⁷ This notwithstanding, their provisions are universally accepted as part of international law with a binding effect.²²⁸ In this regard, the UN has called upon all its

²¹⁸ Stuart Casey-Maslen & Sean Connolly, *Police Use of Force Under International Law* (Cambridge University Press 2017) 1

²¹⁹ Ibid 2

²²⁰ Ibid

²²¹ Ibid

²²² Ibid 79

²²³ UNODC, "Principles of Use of Force in Law Enforcement" (2019) Available at <<https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-4/key-issues/3--the-general-principles-of-use-of-force-in-law-enforcement.html>> Accessed 8 January 2020

²²⁴ Ibid

²²⁵ Ibid

²²⁶ Stuart (n 5) 79

²²⁷ Ibid 80

²²⁸ Ibid

member states to establish appropriate regulations for the use of force by the police in line with the international standards on the use of force (LOLE).²²⁹

Additionally, the international courts on human rights such as the European Court of Human Rights and the Inter-American Court of Human Rights have upheld provisions of Basic Principles on the Use of Force and Firearms by law enforcement officials as binding international law.²³⁰ These Courts have declared that indeed the BPUFF and the Code of Conduct are “authoritative statements of international rules governing use of force in law enforcement.”²³¹ Accordingly, Stuart and Sean argue that international law of law enforcement (LOLE) should be upheld by all state agents carrying out law enforcement role.²³² In this regard, this study’s position is that LOLE is binding on Kenya and further pursuant to Article 2(5) of the Constitution.

2.2.1 International guidelines on the use of force by the police

The police are mandated to maintain law and order among other roles.²³³ In carrying out their mandate, the police are allowed to use force.²³⁴ Such use of force in law enforcement should however be consistent with the principles of necessity, proportionality, and precaution.²³⁵ In this regard, States are obligated to ensure application of these principles during policing operations.²³⁶ The international guidelines on the use of force by the police are outlined below:

²²⁹ UNODC (n 10)

²³⁰ Stuart (n 5) 80

²³¹ UNODC (n 10)

²³² Stuart (n 5) 81

²³³ UNHCR, “*Human Rights and Law Enforcement : A Trainer’s Guide on Human Rights for the Police*” [2002]

38 Available at <<https://www.ohchr.org/Documents/Publications/training5Add2en.pdf>> Accessed 17 May 2019

²³⁴ ICRC, “*International Rules and Standards for Policing*” [2015] 18 Available at <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0809.pdf>> Accessed 12 December 2018

²³⁵ Stuart Cassey Maslen (ed) “*Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council.*” [2016]6 Available at <[https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6 WEB.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6_WEB.pdf)> accessed 18 April 2019

²³⁶ Ibid

2.2.1.1 Preventing the use of excessive force

LOLE obligate States to take the following measures to control abusive use of force and firearms by the police:

2.2.1.1.1 Establishment of rules

States are obligated to implement strict rules governing police' use of force and firearms.²³⁷ Additionally, the authorities are required to keep the regulations under regular review.²³⁸ Moreover, as relates the use of firearms, policing authorities are required to establish regulations that: outline situations where firearms maybe used, provide the use of firearms in a minimum extent, outlaw use of firearms in a unwarranted manner, control the operations of firearms for accountability purposes, provide for identity of officers using firearms and reporting system on use of firearms.²³⁹

2.2.1.1.2 Procurement of appropriate equipment

States are required to establish a variety of means and provide law enforcement officers with a broad range of weapons.²⁴⁰ In this regard, States are required to ensure that the police are equipped with equipment that enhances self-defence for instance bullet proof apparel and vehicles.²⁴¹ This will ensure police operations are conducted in a manner that avoid the use of lethal force and leads to minimum injury risk.²⁴²

Additionally, States are required to secure weapons which are not lethal to be used where appropriate.²⁴³ The non-lethal weapons will reduce the need to use lethal means which often lead to death or serious injuries. Although the impact of less-lethal weapons is not as severe as lethal weapons, they should also be used only in a proportionate way where necessary and with a lot if caution as they can cause substantial harm to the suspects.²⁴⁴ Further, less-lethal weapons should only be used where less harmful methods are ineffective.²⁴⁵

²³⁷ Principle 1, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF)

²³⁸ Ibid

²³⁹ Principle 11, BPUFF

²⁴⁰ Principle 2, BPUFF

²⁴¹ Ibid

²⁴² Stuart (n 5) 6

²⁴³ Principle 2, BPUFF

²⁴⁴ UNHRC "*General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*" [2018]4 Available at

2.2.1.1.3 Recruitment, training and counselling of the police

The State should ensure that during recruitment of potential officers, the applicants are screened appropriately before being admitted as officials.²⁴⁶ Additionally, the potential officers should have physical and mental abilities needed for law enforcement activities.²⁴⁷ Apart from initial training, the admitted officers should undergo continuous training on human rights standards of policing.²⁴⁸ Further, the performance of the officers should be reviewed periodically.²⁴⁹

The government has an obligation to train law enforcement officers on regulations on the use of force.²⁵⁰ In this regard, the State should train law enforcement officers on the use of non-violent means.²⁵¹ Further, firearms should be used by only officers who have undergone special training on use of firearms.²⁵² Additionally, the State should facilitate training of the police on human rights aspects of policing.²⁵³

As the law enforcement officers are exposed to a lot of violent situations, the State should ensure law enforcement officers are counselled on stress management.²⁵⁴

2.2.1.1.4 Non-violent means

Law enforcement officers are required to first exhaust non-violent means before using violent means.²⁵⁵ The officials are encouraged to avoid using firearms unless they are the only effective means available.²⁵⁶ The major non-violent means are: “persuasion, negotiation, and mediation.”²⁵⁷

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23809&LangID=E>> Accessed 17 August 2019 (UNHRC Gen. Comment)

²⁴⁵ Ibid

²⁴⁶ Principle 18, BPUFF

²⁴⁷ Ibid

²⁴⁸ Ibid

²⁴⁹ Ibid

²⁵⁰ Principle 19, BPUFF

²⁵¹ Principles 4 and 20, BPUFF

²⁵² Principle 19, BPUFF

²⁵³ Principle 20, BPUFF

²⁵⁴ Principle 21, BPUFF

²⁵⁵ Principle 4, BPUFF

²⁵⁶ Ibid

²⁵⁷ Stuart (n 5) 6-7

2.2.1.2 Conditions and procedure on the use of force

The use of lethal force is generally prohibited as the police have the option of utilising less-lethal means.²⁵⁸ However, the police may apply lethal force where there is a legitimate cause and in any event only in a proportionate manner.²⁵⁹ Further use of force beyond what is necessary is prohibited.²⁶⁰ Accordingly, law enforcement officials should use only minimum force whenever circumstances necessitate use of force.²⁶¹

The force applied should be consistent with the resistance applied.²⁶² In *Suarez Guerrero v. Colombia*²⁶³ HRC held that police had shot dead suspected criminals yet they had the option of effecting arrest of the said criminals. The Committee held the State liable for failing to protect the suspects' lives.²⁶⁴

Additionally, the police are required to use force in a manner that results into minimum injury and damage especially to third parties.²⁶⁵ Accordingly, mechanisms that limit injury should be established in advance.²⁶⁶ Accordingly, the police should strategize on preventive techniques.²⁶⁷ Therefore, the Court should establish whether measures were adopted to limit injury.²⁶⁸

After the using force, law enforcement officers are obligated to ensure the injured persons are given medical attention as soon as possible.²⁶⁹ Moreover, the officers should inform the family and friends of the victims about the incident.²⁷⁰

LOLE requires the police to avoid using firearms save in extreme situations.²⁷¹ For instance, while pursuing suspects who appear armed, the police should endeavour to arrest instead of

²⁵⁸ Article 3, UN Code of Conduct for Law Enforcement Officials (Code of Conduct)

²⁵⁹ Ibid

²⁶⁰ Ibid

²⁶¹ Ibid

²⁶² Article 3, Code of Conduct and Principle 5, BPUFF

²⁶³ *Suarez de Guerrero v. Colombia*, HRC, Comm no R.11/45 [1981]

²⁶⁴ Ibid

²⁶⁵ Principle 5, BPUFF

²⁶⁶ Stuart (n 5) 10

²⁶⁷ *Nadège Dorzema and others V Dominican Republic* (2012) 87 IAmCtHR

²⁶⁸ Ibid

²⁶⁹ Principle 5, BPUFF

²⁷⁰ Ibid

²⁷¹ Principle 4, BPUFF

killing them.²⁷² Firearms are to be used only in: defence against grave danger, prevention of an offence which is life-threatening and arrest of a person posing threat to life.²⁷³

The police are allowed to use firearms in situations where the use of less-lethal measures has not been effective.²⁷⁴ Additionally, the use of firearms in the above circumstances should be exercised only where there is need to protect life.²⁷⁵ In *Nachova v Bulgaria*,²⁷⁶ the Court opined that the police should not shoot a suspect who is escaping arrest and does not threaten life.²⁷⁷

Moreover, the police are required to not only make their identity known but also warn potential victim of the intention to use firearms.²⁷⁸ After warning, the police are required to allow adequate time for surrender unless allowing time would lead to grave consequences.²⁷⁹ In *Suarez de Guerrero v. Colombia*,²⁸⁰ HRC found that police were guilty of violating the right to life of the suspects as no warning was given of the intention to use firearms.²⁸¹

LOLE allows use of firearms only where an attacker poses grave danger to the lives of the police or third parties.²⁸² Accordingly, in whichever circumstance, the life of an attacker need only be taken away when it is absolutely necessary to protect the life of another person.²⁸³ In this regard, Stuart and Sean submit that the only test that should be considered while assessing the lawfulness of an officer's use of force should be imminence.²⁸⁴

²⁷² Article 3, Code of Conduct

²⁷³ Principle 9, BPUFF

²⁷⁴ Ibid

²⁷⁵ Principle 9, BPUFF

²⁷⁶ *Nachova v Bulgaria* (2005) 95 ECHR

²⁷⁷ Ibid

²⁷⁸ Principle 10, BPUFF

²⁷⁹ Ibid

²⁸⁰ *Suarez de Guerrero V. Colombia*, HRC, Comm no R.11/45 [1981]

²⁸¹ Ibid

²⁸² Stuart (n 5) 98

²⁸³ Ibid 99

²⁸⁴ Ibid 100

2.2.1.3 Policing assemblies

In policing assemblies, the police should essentially uphold human rights by ensuring security.²⁸⁵ The police are required to avert violent behaviour through the use of less-lethal means.²⁸⁶ The police are required to respect and protect the right to peaceful assembly and execute their policing role with full regard to international standards on policing assemblies.²⁸⁷ In this regard, police should use force only to the minimal extent where necessary.²⁸⁸ Accordingly, the police should utilize less lethal weapons to limit injury and damage.²⁸⁹

Firearms may only be used where the meetings exhibit violent tendencies and less-lethal means are either unavailable or ineffective.²⁹⁰ In any event, the use of firearms should be minimized and used only for protection of life.²⁹¹ The police are prohibited from firing into the crowd indiscriminately using firearms.²⁹²

Public assemblies should be governed according to the established national and international legal framework.²⁹³ In this regard, the police must ensure that use of force is necessary, proportionate and done with precaution.²⁹⁴ Further, in case there are conditions to be complied with, the same should have a legal basis and should not be unduly restrictive.²⁹⁵

The police are required to use communication, negotiation and de-escalation methods in controlling crowds.²⁹⁶ The State has a duty to train the police on appropriate communication with assembly organizers and appropriate equipment necessary for managing assemblies.²⁹⁷ Additionally, the State should ensure the police are trained on how to handle protest situations;

²⁸⁵ African Commission on Human and Peoples' Rights (ACHPR), '*Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*' [2017] 10 available at < http://www.achpr.org/files/instruments/policing-assemblies-in-africa/achpr_guidelines_on_policing_assemblies_eng_fre_por_ara.pdf> Accessed 11 January 2019

²⁸⁶ Principles 4 & 13, BPUFF

²⁸⁷ Principle 12, BPUFF

²⁸⁸ Principle 13, BPUFF

²⁸⁹ ICRC (n 7) 37

²⁹⁰ Principle 14, BPUFF

²⁹¹ Principle 9 as read with 14, BPUFF

²⁹² ICRC (n 21) 37

²⁹³ Ibid 23

²⁹⁴ Ibid

²⁹⁵ Ibid

²⁹⁶ Ibid 24

²⁹⁷ Ibid

particularly training on appropriate alternative of controlling crowds so as to limit the use of force.²⁹⁸

2.2.1.4 Accountability for use of force

The power to use force by the police should only be exercised in pursuit of a legitimate objective.²⁹⁹ Therefore the use of force outside legal precincts is unlawful and the offending officials should be held liable.³⁰⁰ The police should be accountable to the whole community.³⁰¹ Additionally, the police should be accountable to all established accountability agencies.³⁰²

The police are obligated to report whenever their use of force and firearms result into injuries and deaths.³⁰³ In this regard, the State is obligated to establish an operational reporting system.³⁰⁴ The State is required to act on the reports and ensure the same are forwarded to the relevant authorities for review.³⁰⁵ LOLE obligates policing authorities to ensure there are investigations where necessary.³⁰⁶ The investigations should be “competent, thorough, prompt, and impartial”³⁰⁷ and conducted in a lawful manner and with due cause.³⁰⁸

LOLE requires that there must be justification whenever the police use force.³⁰⁹ Consequently, the police should demonstrate that the force used was necessitated by the victim’s action or omission and that force was applied proportionately.³¹⁰

²⁹⁸ UNHCHR Guide (n 20) 114

²⁹⁹ UNODC & OHCHR, “*Resource Book on the Use of Force and Firearms in Law Enforcement*” [2017] 1 Office of the United Nations High Commissioner for Human Rights and United Nations Office on Drugs and Crime. Available at <https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf> accessed 11 July 2019

³⁰⁰ Article 3, UN Code of Conduct

³⁰¹ Ibid, preamble

³⁰² ICRC (n 21) 18

³⁰³ Principle 6, BPUFF

³⁰⁴ Principle 22, BPUFF

³⁰⁵ Ibid

³⁰⁶ Principles 6, 11(f), 22 and 23, BPUFF

³⁰⁷ Principle 9, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary And Summary Executions.

³⁰⁸ Article 4, Code of Conduct

³⁰⁹ Stuart (n 5) 8

³¹⁰ OSCE/ODIHR & Venice Commission, “*Guidelines on Freedom of Peaceful Assembly*” [2019] 92 3rd Edition, Available at < [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)017-e)> accessed 17 August 2019

The State has an obligation to establish mechanisms to ensure discipline of law enforcement officers.³¹¹ Additionally, the State is obligated to establish and publicize procedures/provisions for handling complaints by the public against law enforcement officials.³¹² Further, the State should ensure victims of abusive use of force and the kin are made aware of redress mechanisms.³¹³

Furthermore, the State has a duty to penalize all abusive use of force.³¹⁴ Where an investigation report reveals perpetrators, the State should ensure that the said perpetrators are subjected to legal proceedings and sentenced accordingly.³¹⁵

Police superiors must be held liable if their acts of omission or commissions resulted into abusive use of force by officers under their control.³¹⁶ Additionally, the State should ensure it gives immunity to junior officers who disobey unlawful orders by their superiors.³¹⁷ Consequently, junior officers who obey unlawful orders on use of force must be held liable accordingly.³¹⁸

2.3 Regional Legal Framework

Kenya is a member state to the African Charter on Human and Peoples' Rights (Banjul Charter). The Banjul Charter imposes similar obligations as LOLE to its members.

2.3.1 Guidelines on the use of force

Kenya is obligated under the Banjul Charter to adopt measures that protect life and prohibit the use of excessive force by law enforcement officials.³¹⁹ In this regard, Kenya has an obligation to procure protective equipment for the police to reduce excessive use of force.³²⁰ Additionally, the

³¹¹ Principles 22 to 26, BPUFF

³¹² Principle 9, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

³¹³ Principle 23, BPUFF

³¹⁴ Principle 7, BPUFF

³¹⁵ Paragraph 8C Minnesota Protocol on the Investigation of Potentially Unlawful Death [2016]

³¹⁶ Principle 24, BPUFF

³¹⁷ Principle 25, BPUFF

³¹⁸ Principle 26, BPUFF

³¹⁹ ACHPR, "*General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*" [2015] 14 Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held in Gambia.

³²⁰ Ibid

police should be trained appropriately on the use of force.³²¹ Further, police activities should be planned carefully and monitored appropriately in a bid to avoid the use of excessive force.³²²

As a preventive step, Kenya is obligated to establish a comprehensive legal framework on the use of force by the police.³²³ This legal framework should be in line with the international standards on the use of force.³²⁴ Additionally, the framework should be consistent with the international principles on the use of force that it legality, necessity and proportionality.³²⁵

The Charter allows reasonable use of force where there exists imminent danger.³²⁶ However, the use of deadly force is strictly prohibited except where it is necessary to guard life.³²⁷ The use of lethal force must however be proportionate in the circumstance.³²⁸ Additionally, the officer (s) in question must first utilise non-lethal means before using lethal force.³²⁹

2.3.2 Guidelines on policing assemblies

The Banjul Charter guarantees the right to assembly.³³⁰ The Charter prohibits unreasonable restrictions on the right to assembly and provides that the necessary restrictions must be anchored in the law.³³¹

The police should be mindful of their main role while policing assemblies that is ensuring safety of the participants and the public at large.³³² The police are required to uphold and protect human rights of both participants and uninvolved persons.³³³ To help achieve this guideline, states should incorporate the same in the legal and regulatory instruments relating to public order.³³⁴

³²¹ Ibid

³²² Ibid

³²³ Ibid

³²⁴ Ibid

³²⁵ Ibid

³²⁶ Ibid

³²⁷ Ibid

³²⁸ Ibid

³²⁹ Ibid

³³⁰ Article 11

³³¹ Article 11

³³² ACHPR, “*Guidelines for the Policing of Assemblies by Law Enforcement Officials*” (2017) 10 Available at <<https://www.achpr.org/legalinstruments/detail?id=65> > Accessed 19 June 2019

³³³ Ibid

³³⁴ Ibid

The police should be accountable to the relevant entities for their action and those who violate public policing guidelines be subjected to punishment accordingly.³³⁵ In this regard, States should criminalize the use of excessive force.³³⁶ To safeguard fair trial of the police, the criminal justice system and the internal disciplinary mechanisms should be fair in substance and procedure.³³⁷

Force should ordinarily be avoided and used only in limited circumstances.³³⁸ Accordingly, the police should utilize alternative means which do not involve force unless the same are ineffective.³³⁹ The police are also called upon to distinguish assemblies that are peaceful from those that are violent.³⁴⁰ Single violent acts should however not lead to declaration of the whole assembly as violent.³⁴¹

Additionally, in situations where lethal force is necessitated by conduct of the aggressor, the use of lethal force must be done in a way that leads to minimum injury.³⁴² Further, the use of force must respect human rights of all persons and the victims must receive immediate medical care and their family notified accordingly.³⁴³

The use of deadly force is strictly prohibited unless it is necessitated by the need to protect life.³⁴⁴ The force used must be proportionate and necessary in the circumstance.³⁴⁵ The circumstances necessitating the use of force should be based on facts and not baseless fear of injury.³⁴⁶

³³⁵ Ibid 11

³³⁶ Ibid

³³⁷ Ibid

³³⁸ Ibid 21

³³⁹ Ibid

³⁴⁰ Ibid

³⁴¹ Ibid

³⁴² Ibid

³⁴³ Ibid

³⁴⁴ Ibid

³⁴⁵ Ibid

³⁴⁶ Ibid

2.3.3 Accountability for use of force

The member states to Banjul Charter are obligated establish legal and regulatory framework and implement the Charter provisions and the African Commission on Human and Peoples' Rights (ACHPR) guidelines on the use of force by the police.³⁴⁷

The ACHPR acknowledges the need for police accountability and oversight measures and therefore calls upon member states to adopt and implement various forms of measures that provide independent civilian oversight to police action.³⁴⁸ An essential component of these oversight measures should be the civilian component.³⁴⁹

2.4 National Legal Framework

The national legal framework for the use of force by the police includes Constitutional provisions and the provisions of Statutes.

2.4.1 Constitutional provisions

The Constitution of Kenya provides that national security measures must be anchored on the law and uphold human rights.³⁵⁰ In this regard, the Constitution stipulates that the police should be trained on human rights and that National Police Service' operations must respect human rights.³⁵¹ Additionally, the Constitution stipulates that policing should be governed by integrity, professionalism, transparency, discipline, competence, accountability and respect for human rights and freedoms.³⁵² Given the nature of policing in Kenya, the Constitutional principles above are fundamental in ensuring promotion of human rights standards during law enforcement.³⁵³

³⁴⁷ ACHPR, "Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa" (2006) Available at <<https://www.achpr.org/sessions/resolutions?id=111>> Accessed 12 September 2019

³⁴⁸ Ibid

³⁴⁹ Ibid

³⁵⁰ Article 238(2)(b)

³⁵¹ Article 244

³⁵² Article 244, Constitution of Kenya

³⁵³ KNCHR / FIDH, "Kenya's Scorecard on Security and Justice: Broken Promises and unfinished business" (July 2017) 9 available at <<https://www.khrc.or.ke/mobile-publications/civil-political-rights/166-kenya-s-scorecard-on-security-and-justice-broken-promises-and-unfinished-business/file.html>> accessed 10 September 2018. (KNCHR / FIDH 2017 Report)

The Constitution prohibits arbitrary deprivation of life.³⁵⁴ Courts have accordingly emphasized the fundamental nature of the right to life and urged its effective protection.³⁵⁵ The Constitution stipulates that the right to life can only be limited by written laws including the Constitution.³⁵⁶ The Constitution obligates the State to protect and promote the right to life.³⁵⁷ Any death occasioned by use of excessive force by the police is an arbitrary limitation of life.³⁵⁸ Deprivation of life within the law must be necessary and proportionate.³⁵⁹

The Constitution also guarantees the right to peaceful assembly.³⁶⁰ Additionally, the Constitution guarantees the right to human dignity³⁶¹ and the right to freedom and security of a person.³⁶² The Constitution imposes an obligation on all the State agents including the police to promote and protect these rights.³⁶³

2.4.2 Statutory provisions

The main statute governing the use of force by the police is the National Police Service (NPS) Act as supplemented by the National Police Service Standing Orders (NPSSOs) even though other Statutes notably the Criminal Procedure Code (CPC) also have some few provisions on the use of force by the police.³⁶⁴ In making arrest for instance, the CPC permits the police to make physical contact with the suspect's body where necessary.³⁶⁵ Further, the CPC allows the police to use reasonable force to make an arrest if the culprit resists arrest.³⁶⁶ However, the CPC prohibits the use of unreasonable force.³⁶⁷

³⁵⁴ Article 26(3)

³⁵⁵ Kenya National Commission on Human Rights & another V. Attorney General & 3 others[2014] eKLR

³⁵⁶ Article 26(3)

³⁵⁷ Article 21(1) of the Constitution

³⁵⁸ UNCHR, "*Human Rights and Law Enforcement: A manual on Human Rights Training for the Police*" (1997) 88 Geneva Available at < <https://www.un.org/ruleoflaw/blog/document/human-rights-and-law-enforcement-a-manual-on-human-rights-training-for-the-police/>> accessed 9 May 2019

³⁵⁹ UNHRC General Comment (n 31) 3

³⁶⁰ Article 37

³⁶¹ Article 28

³⁶² Article 29

³⁶³ Article 21

³⁶⁴ Section 21

³⁶⁵ Section 21 (1) of the Criminal Procedure Code

³⁶⁶ Section 21 (2) of the Criminal Procedure Code

³⁶⁷ Section 21 (3) of the Criminal Procedure Code

The Independent Policing Oversight Authority (IPOA) Act does not have provisions relating to the use of force but it establishes the Independent Policing Oversight Authority (IPOA) which is tasked with providing overall police accountability by undertaking investigations of complaints made against police officers.³⁶⁸ IPOA is discussed in chapter four of this study as a key institution that needs to be strengthened.

2.4.2.1 National Police Service Act and National Police Service Standing Orders

The National Police Service (NPS) Act mandates law enforcement officials to use force and firearms in accordance with provisions of the Sixth Schedule.³⁶⁹ Further, the NPS Act is supplemented by the National Police Service Standing Orders (NPSSOs).

2.4.2.1.1 Use of force

NPS Act's Sixth Schedule and the NPSSOs provide the following conditions on use of force:

i. Necessity principle

The NPSOs provide that lawful force may be used in: protection of life and property, prevention of a suspect from custody and in quelling unlawful assembly engaged in commission of crimes.³⁷⁰ The NPSOs caution against using force in arresting a person suspected of committing a petty offence and states that doing so would be unlawful.³⁷¹

ii. Non-violent means

The NPS Act's Sixth Schedule and the NPSOs require the police to utilize non-violent means and only use force where non-violent means are not effective.³⁷² The Courts have also emphasized the need to exhaust non-violent means in the first instance.³⁷³

³⁶⁸ Section 6 of the IPOA Act

³⁶⁹ Section 61

³⁷⁰ Paragraph 1, Chapter 47 of National Police Service Standing Orders

³⁷¹ Ibid, Paragraph 2(1)

³⁷² Paragraph 1, Part A – Sixth Schedule, National Police Service Act and Paragraph 3 Chapter 47, Paragraph 1 of National Police Service Standing Orders

³⁷³ I.P. Veronica Gitahi & another v Republic [2017] eKLR

iii. Proportionality

The Sixth Schedule of the NPS Act emphasizes proportional use of force by the police in accordance with the law enforcement aim and the gravity of the crime.³⁷⁴ In this regard, continued use of excessive force after the attacker ceases to pose danger will be considered excessive and unlawful.³⁷⁵ In *I.P. Veronica Gitahi & another v Republic*³⁷⁶ the Court further emphasized that the police must comply with the proportionality test in circumstances necessitating the use of force.³⁷⁷

iv. Reporting requirement

The NPS Act requires that a report be made to IPOA by the police superiors where police' use of force leads to fatal injuries.³⁷⁸ The NPSSOs obligate the officer involved to make a report to his/her superior giving details of what happened.³⁷⁹ Consequently, the superior is required to assess the justification given and give directions thereof.³⁸⁰ Further, the NPSOs obligate the officer-in-charge to report use of force that results into fatal injuries to another different superior.³⁸¹ In addition to reporting to the superior, the incident must also be reported to IPOA for purposes of investigations.³⁸²

2.4.2.1.2 Use of firearms

NPS Act's Sixth Schedule and the NPSSOs provide the following conditions as relates the use of firearms by the police officers.

i. Necessity

³⁷⁴ Paragraph 2, Schedule 6 of the National Police Service Act and Paragraph 4 Chapter 47, Paragraph 1 of National Police Service Standing Orders

³⁷⁵ Geoffrey Alpert & William Smith, "*How Reasonable is the Reasonable Man?: Police and Excessive Force.*" (Journal of Criminal Law and Criminology, University of South Carolina 1994) 497

³⁷⁶ *I.P. Veronica Gitahi & another V. Republic* [2017] eKLR

³⁷⁷ *Ibid*

³⁷⁸ Schedule 6, National Police Service Act

³⁷⁹ Paragraph 6 Chapter 47, National Police Service Standing Orders

³⁸⁰ *Ibid*

³⁸¹ Paragraph 7 Chapter 47, National Police Service Standing Orders

³⁸² *Ibid*

The Sixth Schedule of the NPS Act stipulates that the use of firearms should be for purposes of protecting life and property and preventing escape of criminal suspects from custody.³⁸³

This provision on use of firearms by the NPS Act is overly permissive and inconsistent with LOLE. LOLE require that firearms be used only for protecting human life; there are no provisions on use of firearms to protect property. Further, the use of firearms to prevent escape of a criminal from lawful custody is prohibited by LOLE unless there is an imminent threat to life.³⁸⁴

The NPSSOs provisions are however consistent with international standards as they limit circumstances where firearms may be used. They specify that firearms may be used only for saving life from life threatening situation.³⁸⁵ The NPSSOs stipulate that the police may use firearms only where there are no less extreme measures.³⁸⁶ In this regard, the Courts have emphasized that firearms should only be used as a last resort.³⁸⁷

Kenyan Courts opine that questions of liability of police officers arising from use of firearms fully depend on the circumstances of a given case.³⁸⁸ In *Muwonge vs. Attorney General of Uganda*,³⁸⁹ the police shot a suspected rioter after running to his house. The Court in allowing compensation for the killing, held that the act of the policeman was unlawful and unjustified in the circumstance.³⁹⁰ Accordingly, there is no standard rule in assessing reasonableness of force used as the assessment will be made based on the peculiar circumstances of a case. The Court may for instance consider the number of gun shots, the proximity of shooting, whether the deceased was armed or otherwise, what prompted the shooting among other factors.³⁹¹

³⁸³ Paragraph 1, Sixth Schedule, Part A – National Police Service Act

³⁸⁴ UNHRC General Comment (n 31) 3

³⁸⁵ Paragraph 13 Chapter 47, National Police Service Standing Orders

³⁸⁶ Ibid

³⁸⁷ I.P. Veronica Gitahi & another V. Republic [2017] eKLR

³⁸⁸ Charles Munyeki Kimiti V. Joel Mwenda & 3 others[2010] eKLR

³⁸⁹ [1967] EA 17

³⁹⁰ Ibid

³⁹¹ Ibid

ii. Identification and warning requirements

The NPSSOs obligate police officers who intend to use firearms to identify themselves.³⁹² The NPSSOs stipulate that the identity mark should be placed in a conspicuous part.³⁹³ During shoot outs by the police however, this provision is often violated.³⁹⁴ For instance, anti-riot police who were responsible for managing anti- Independent Electoral and Boundaries Commission (IEBC) protests in 2016 had no identification tag or number.³⁹⁵ Lack of police identification makes it difficult for witnesses of unlawful killings by the police to single out culpable members of the police service thus resulting to unaccountability for excessive use of force.³⁹⁶

The NPSSOs also obligate police officers to caution the potential victim, allowing adequate time for compliance with the caution.³⁹⁷ However, there are circumstances where warning may not be appropriate, that is: where giving a warning may pose life threatening danger to an officer or any other person and where it would be unreasonable to give the warning.³⁹⁸

iii. Legal investigation requirement

The NPSSOs permit police officers to use firearms if they cannot, using available measures, carry out their law enforcement role.³⁹⁹ The NPSSOs however require that every use of firearms; whether it results to death or otherwise, should be investigated under the law.⁴⁰⁰ This includes even situations where the use of firearm was justified.⁴⁰¹ The NPSSOs stipulate that the firing police officer must justify his or her use of firearms.⁴⁰²

iv. Precaution

The NPSSOs require police officers to generally avoid use of firearms especially on children.⁴⁰³ Further, the NPSSOs caution against the use of firearms where there is a likelihood of injuring an

³⁹² Paragraph 14 Chapter 47, paragraph 1 of National Police Service Standing Orders

³⁹³ Ibid, Paragraph 12

³⁹⁴ KNCHR / FIDH 2017 Report (n 140) 30

³⁹⁵ IPOA, “*Monitoring Report on Police Conduct during Public Protests and Gatherings : A Focus on the Anti-IEBC Demonstrations (April – June 2016)*” [2017] 18 Available at < <http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Anti-IEBC-Report-January-2017.pdf>> Accessed 10 April 2019

³⁹⁶ KNCHR / FIDH 2017 Report (n 140) 30

³⁹⁷ Paragraph 14 Chapter 47, National Police Service Standing Orders

³⁹⁸ Ibid

³⁹⁹ Paragraph 2(3) Chapter 47, National Police Service Standing Orders

⁴⁰⁰ Ibid

⁴⁰¹ Ibid

⁴⁰² Ibid

⁴⁰³ Paragraph 15 Chapter 47, National Police Service Standing Orders

innocent person.⁴⁰⁴ In practice though, deaths from stray bullets occasioned by the police are common occurrences in Kenya.⁴⁰⁵ This is a violation of the principle of precaution.

2.5 Conclusion

The use of force by the police is not only entrenched in legal instruments but also anchored on the morally justified principle of self-defense.⁴⁰⁶ This chapter has outlined the international, regional and national legal framework on the use of force by the police. The international framework (LOLE)'s key provision is that the use of force especially lethal force should be limited to protection of one's life or the life of other people, not in protection of property.⁴⁰⁷ This chapter has argued that at the regional level, the Banjul Charter has similar provisions as LOLE and also emphasizes the need to limit the use of force especially firearms unless strictly necessary to protect life.⁴⁰⁸ This chapter has also outlined the national legal framework on the use of force by the police. This chapter has accordingly highlighted the Constitutional policing values.⁴⁰⁹ This chapter has also explored the statutory provisions on use of force. The focus of this section was the NPS Act and the NPSSOs whose main provisions are the principles on the use of force that is legality, necessity and precaution.⁴¹⁰

The police are required to comply with the national, regional and international standards on the use of force during law enforcement.⁴¹¹ Any limitation of human rights during policing must be anchored on the law.⁴¹² To a large extent, the Kenya national legal framework is consistent with the international and regional legal framework except the provisions on the use of lethal force which allow the use of force for purposes of protecting property and preventing escape of a suspected criminal. These provisions should be amended accordingly to reflect the provisions of LOLE.

⁴⁰⁴ Paragraph 1(2) Chapter 47, National Police Service Standing Orders

⁴⁰⁵ Mohammed Yusuf, "Kenya Police Shootings Kill Hundreds Since 2009, Rights Group Says" VoA News (Nairobi, 7 December 2015) Available at < <https://www.voanews.com/africa/kenya-police-shootings-kill-hundreds-2009-rights-group-says>> Accessed 7 February 2019

⁴⁰⁶ Seumas Miller, *Shooting to Kill : The Ethics of Police and Military Use of Lethal Force* (Oxford University Press 2016) 4

⁴⁰⁷ Ibid 22

⁴⁰⁸ ACHPR (n 72)

⁴⁰⁹ Article 244

⁴¹⁰ Sixth Schedule, the National Police Service Act

⁴¹¹ ICRC (n 7) 7

⁴¹² Article 29, Universal Declaration of Human Rights

CHAPTER THREE (3)

BEST PRACTICES FOR EFFECTIVE CONTROL OF POLICE USE OF EXCESSIVE FORCE

3.1 Introduction

The use of excessive force by the police can be traced to several underlying issues including character trait, selection procedures, training and the general welfare of the police officers.⁴¹³ In sum, the policing institution as a whole heavily influences the manner in which an officer uses force.⁴¹⁴ Accordingly, addressing the issue of excessive use of force involves a paradigm shift in how policing is done both by individual officers and the policing institution as a whole.⁴¹⁵

This chapter discusses best practices that have been proved to be effective in controlling the use of excessive force by the police if successfully implemented. Firstly, the chapter introduces the concept of community policing and the feasibilities thereof. Secondly, the chapter discusses recruitment and improvement of police welfare as mechanisms for reducing the use of excessive force. Thirdly, the chapter builds a case for the adoption of a use of force continuum by the policing authorities. Fourthly, the chapter discusses training as a means of reducing excessive force. Lastly the chapter builds a case for the establishment of internal and external accountability techniques.

3.2 Community policing

Since time immemorial, communities around the world have always devised mechanisms of protecting themselves from danger with or without the formal policing systems.⁴¹⁶ The concept of community policing evolved from this ancient practice with the main aim thereof being the maintenance of peace and order within the community.⁴¹⁷ Community policing is essentially a

⁴¹³ Ellen M. Scrivner, “*Controlling Police Use of Excessive Force : The Role of the Police Psychologist*” (NCJRS 1994) Available at < <https://www.ncjrs.gov/pdffiles1/Digitization/150063NCJRS.pdf>> Accessed 12 December 2019

⁴¹⁴ Ibid

⁴¹⁵ Ibid

⁴¹⁶ Kenneth J. Peak (ed), *Encyclopedia of Community Policing and Problem Solving* (SAGE Publications, Inc 2013)

⁴¹⁷ Ibid

management strategy that involves partnership between the police and members of a given community to help fight crime in order to keep the community safe.⁴¹⁸

There is no universally accepted definition of the term community policing but it has some widely acknowledged common components.⁴¹⁹The major components of community policing are: partnership between the public and the police, departmental restructuring that allows for implementation of community policing and problem solving techniques that address community's problems.⁴²⁰

3.2.1 Police – public partnership

Community policing is anchored on harmony and involves the members of a community working together to eliminate crime from their community.⁴²¹ Cooperation between members of the community and the police is the cornerstone of community policing.⁴²²The public-police partnership entails gathering information by the police as volunteered by the members of the community.⁴²³ The police must thus be actively involved with community projects that bring them closer to the people.⁴²⁴

Partnership entails the police teaming up with different community groups and individuals to realize community policing goals.⁴²⁵ Partnership can be realized by the police through having a good relationship with the community members, engaging the community in finding ways of curbing crime and mobilizing resources with the aim of addressing community problems.⁴²⁶ Identifying underlying community problems can be achieved through direct questioning of members of the community, police participation in community workshops and through public

⁴¹⁸ Ibid, 7

⁴¹⁹ OSCE, “*Good Practices in Building Police-Public Partnerships*” (2008) 21 Available at <osce.org/files/f/documents/8/4/32547.pdf> Accessed 10 June 2020

⁴²⁰ USCCR, “*Police Use of Force: An Examination of Modern Policing Practices*” – United States Commission On Civil Rights November 2018 Available at <usccr.gov/pubs/2018/11-15-Police-Force.pdf> Accessed 12th February 2020. P.97

⁴²¹ Kenneth (n 4)

⁴²² Victor E. Kappeler & Larry K. Gaines, *Community Policing: A Contemporary Perspective* (6th Edition Anderson Publishing 2011)p.4

⁴²³ Kenneth (n 4) 26

⁴²⁴ Ibid

⁴²⁵ Karen M. Hess, *Introduction to Law Enforcement and Criminal Justice* (Wadsworth Publishing, 9th Edn, 2008)236

⁴²⁶ P.Saskia Bayerl (ed) et al, *Community Policing – A European Perspective : Strategies, Best Practices and Guidelines* (Springer International Publishing 2017)11

surveys.⁴²⁷ Solving the identified problems strengthen the relationship between the public and the community leading to safer communities.⁴²⁸ The public responds by keeping away from crime and aiding police' efforts in combating crime.⁴²⁹ The public can also respond by participating in projects that aim to improve security within the community.⁴³⁰

Operationalization in this regard entails vetting of volunteers and training of the selected members of a community.⁴³¹ The police officers involved with community policing should have good interpersonal skills to enable them interact with diverse members of the community.⁴³²

3.2.2 Institutional restructuring

In order to realize police-public partnership, the policing system has to be restructured in a way that ensures implementation of specific measures that improve community policing.⁴³³ Successful implementation of community policing must involve structural changes in the policing and local community administration systems.⁴³⁴ In this regard, the police and community leaders involved in community policing must be trained on how to effectively implement community policing.⁴³⁵ The officers involved must be equipped with good communication and mediation skills.⁴³⁶ These skills will go a long way in gaining public confidence and identifying and solving community problems.⁴³⁷ Additionally, the community members must be enlightened on the importance of community policing and how they can cooperate with the police to successfully implement the program.⁴³⁸

The practical ways of restructuring in this regard include firstly organizing policing physical locations into small administrative units and assigning police officers over those areas.⁴³⁹ Secondly, there has to be improved visibility of police and accessibility of the services offered to

⁴²⁷ USDOJ, “*Police Use of Excessive Force: A Conciliation Handbook for the Police and the Community*” (2002) Available at < <https://www.justice.gov/archive/crs/pubs/pdexcess.htm>> Accessed 12 January 2019

⁴²⁸ Ibid

⁴²⁹ Karen (n 13) 236

⁴³⁰ Ibid

⁴³¹ Kenneth (n 4) 61

⁴³² USDOJ (n 15)

⁴³³ P.Saskia (n 14) 11

⁴³⁴ OSCE (n 7) 13

⁴³⁵ Ibid, 14

⁴³⁶ Ibid

⁴³⁷ Ibid

⁴³⁸ Ibid

⁴³⁹ Ibid, 13

the public.⁴⁴⁰ Thirdly, the police have to focus on majorly offering service to the community.⁴⁴¹ In this regard, the police have to actively engage members of the community and relevant government authorities in identifying and solving community problems.⁴⁴²

The policing authorities should facilitate community policing by ensuring that there are clear communication channels between the police and the public.⁴⁴³ Additionally, the police should put more effort in decreasing the tension in the police-community relationship.⁴⁴⁴ The quality of the services offered by the police should also be looked into to ensure the police are meeting the needs of the community.⁴⁴⁵ Further, the police should endeavor to be accountable to the community in the execution of their role to improve confidence in the police.⁴⁴⁶

3.2.3 Problem solving

Community policing has been suggested by key stakeholders in the security field as a way of preventing crime by dealing with underlying issues in the community.⁴⁴⁷ This shift in focus from crime prevention to addressing underlying issues is what makes community policing different from the formal policing.⁴⁴⁸ This shift in police focus is informed by the assertion that crime cannot be controlled by enforcing the law only.⁴⁴⁹ This does not however mean that the police should do away with traditional crime prevention aim of policing.⁴⁵⁰

The problem solving aspect of community policing compels the police to address not just instances of violation of the law but also the underlying problems that lead to crime.⁴⁵¹ Crime reveals underlying socioeconomic problems in the community and therefore these problems have to be tackled first in order to effectively control crime.⁴⁵² Accordingly, the police have to find out the needs of a given community and address the needs as a part of improving the community's

⁴⁴⁰ Ibid

⁴⁴¹ Ibid

⁴⁴² Ibid

⁴⁴³ P.Saskia (n 14) 16

⁴⁴⁴ Ibid

⁴⁴⁵ Ibid

⁴⁴⁶ Ibid

⁴⁴⁷ OSCE (n 7) 19

⁴⁴⁸ Victor (n 10) 3

⁴⁴⁹ Ibid 10

⁴⁵⁰ John Vespucci, *Education Level and Police Use of Force: The Impact of a College Degree* (Springer 2020) 25

⁴⁵¹ P.Saskia (n 14) 12

⁴⁵² Victor (n 10) 4

quality of life.⁴⁵³ This can be achieved where policing get incorporated into the community through improved visibility of the police and their ability to identify and respond to the needs of the community.⁴⁵⁴

As a way of helping to solve community problems, the police should conduct periodic surveys that aim to identify the problems facing the community and the ways the residents think the problems can be better solved.⁴⁵⁵ Analyzing the problems helps in paving way for their solution.⁴⁵⁶ Additionally, the police should encourage the community members to be the “eyes and ears of the police” as relates to crime reporting for improved safety.⁴⁵⁷ Further, the police should maintain periodic evaluation of their performance with suggestions of how their limitations can be addressed in order to improve policing.⁴⁵⁸ The policing authorities should come up with other suitable strategies for problem identification and analysis for their specific communities.⁴⁵⁹

3.3 Police Recruitment and Welfare

The manner and extent of use of force by an officer can be influenced by among other issues, recruitment process and the general welfare of the police.⁴⁶⁰

3.3.1 Recruitment

During recruitment, most policing authorities focus on physical fitness to the exclusion of appropriate character traits.⁴⁶¹ This is a fundamental omission as character trait of a potential police officer should be a paramount consideration given the powers granted to the officers upon admission.⁴⁶² An officer’s individual character trait may have a huge impact on how he or she uses force against a civilian or a fellow officer.⁴⁶³ An officer’s personality for instance

⁴⁵³ Ibid 12

⁴⁵⁴ OSCE (n 7) 13

⁴⁵⁵ P.Saskia (n 14) 11

⁴⁵⁶ Karen (n 13) 245

⁴⁵⁷ P.Saskia (n 14) 11

⁴⁵⁸ Ibid

⁴⁵⁹ Karen (n 13) 245

⁴⁶⁰ Ellen (n 1)

⁴⁶¹ UNHCHR, “*Human Rights and Law Enforcement: A Trainer’s Guide on Human Rights for the Police*” (Professional Training Series 2002) 112 Available at

< <https://www.ohchr.org/Documents/Publications/training5Add2en.pdf> > Accessed 13 December 2019

⁴⁶² Ibid

⁴⁶³ Ellen (n 1)

authoritarianism may contribute to use of excessive force.⁴⁶⁴ Officers who have violent traits may treat suspects in a violent manner prompting the use of force by the police.⁴⁶⁵

Thorough screening of potential police officers and regular assessments of serving police officers is key in establishing their character which is essential in the execution of their role.⁴⁶⁶ Proper screening of potential police officers may help in identifying violent behavior prior to selection.⁴⁶⁷

Additionally, only officers with high integrity should be selected to serve communities.⁴⁶⁸ This is vital as policing require accountability to various stakeholders for every policing action.⁴⁶⁹ Integrity levels can predict future behavior of the selected officers.⁴⁷⁰ In this regard, the selection of officers should exclude officers who have averse criminal records especially as relates to violence.⁴⁷¹ Similarly, officers who have a record for violation of human rights should also be excluded.⁴⁷² These are preventive steps which could result in the reduction of use of excessive force cases by the police.⁴⁷³

3.3.2 Welfare

3.3.2.1 Psychological support

Policing generally involves a lot of stressful encounters and as such, it is paramount that the police have regular debriefing sessions to help in managing stress emanating from execution of their role.⁴⁷⁴ Good management of stress may significantly reduce the cases involving use of

⁴⁶⁴ Karen (n 13) 138

⁴⁶⁵ Ibid

⁴⁶⁶ ICRC, “*International Rules and Standards for Policing*” [2015] 52 Available at <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0809.pdf>> Accessed 12 December 2018

⁴⁶⁷ Ellen (n 1)

⁴⁶⁸ UNDOC, “*Handbook on Police Accountability, Oversight and Integrity*” Criminal Justice Handbook Series, United Nations Publication [2011] 80 available at

<https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf> Accessed 10 April 2020.

⁴⁶⁹ Ibid

⁴⁷⁰ Ibid

⁴⁷¹ Ibid, 81

⁴⁷² Ibid

⁴⁷³ John (n 38) 13

⁴⁷⁴ Ellen (n 1)

excessive force by the police.⁴⁷⁵ The police officers should also be counselled before and after undertaking major confrontational incidents.⁴⁷⁶

3.3.2.2 Work and living conditions

Policing authorities should respect and uphold the basic human rights of their officers to enable the officers to do the same for the people they serve.⁴⁷⁷ The police officers should be treated with dignity, have good remuneration to sustain their families, live and work in humane conditions and be entitled to pension.⁴⁷⁸ The police' right to a fair trial should also be upheld especially in cases involving misconduct and the use of excessive force.⁴⁷⁹

The policing authorities should as frequent as possible find out the working and living conditions of the police officers and assure them of their care and support.⁴⁸⁰ There should be a deliberate step in taking care of the officers' health and family contingencies as these issues affect the wellbeing of the officers and can lead to poor judgment in the execution of their work especially the use of firearms.⁴⁸¹ Police officers should feel valued and appreciated for their vital work in our communities.⁴⁸² The policing authorities should endeavor to create a conducive working and living environment for the police officers. This may include offering of services such as free medical check-up, physical exercise, therapy sessions for areas of struggle, counselling sessions, house mortgage and other financial aid programs.⁴⁸³

3.3.2.3 Protective apparel and equipment

Given the life threatening conditions the police face every day in the execution of their role, the policing authorities should ensure they supply the officers with defensive gears such as helmets, armored shields, bullet-proof clothing among other defensive apparel.⁴⁸⁴ Additionally, the police should be supplied with a first aid tool box, reflector vests, communication gadgets and armored

⁴⁷⁵ UNHCHR (n 49) 112

⁴⁷⁶ Ibid

⁴⁷⁷ ICRC (n 54) 52

⁴⁷⁸ Ibid

⁴⁷⁹ UNDOC (n 56) 86

⁴⁸⁰ Dwayne Orrick, "*Best Practices Guide: Recruitment, Retention, and Turnover in Law Enforcement*" Available at <<https://www.theiacp.org/sites/default/files/2018-08/BP-Recruitment.pdf>> Accessed 10 December 2019

⁴⁸¹ Ibid

⁴⁸² Ibid

⁴⁸³ Ibid

⁴⁸⁴ UNHCHR (n 49) 112

motor vehicles.⁴⁸⁵ The police are entitled to be adequately equipped before proceeding to dangerous operations as they need to protect their right to life.⁴⁸⁶ The provision of the protective gears certainly reduces the need to use force by the police when having civilian encounters.⁴⁸⁷

3.4 Use of force continuum

A continuum on the use of force is a set of guidelines developed by police institutions that provide a variety of choices available to the police when the need to use force arises.⁴⁸⁸ The use of force continuum appreciates the understanding that different confrontations with civilians may call for varying levels of force.⁴⁸⁹ Apart from the national and international regulations on the use of force by the law enforcement officials, police departments opt to develop guidelines / policies governing the use of force by the police officers.⁴⁹⁰ The continuum on use of force must be subjected to periodic reviews to update the contents in line with emerging best practices and a reflection of the prevailing legal framework on use of force.⁴⁹¹ Typical force options widely used by police departments include:

3.4.1 Police presence

Studies on the control of use of excessive force by the police reveal that the presence of police officers at a scene is a perfect deterrence tool against crime commission.⁴⁹² The presence of police therefore goes a long way in diffusing potential confrontational situations involving the police and civilians.⁴⁹³ Accordingly, police departments should endeavor to employ police presence at all places within their jurisdictions as a general routine exercise and not only as a response to a specific crime committed.⁴⁹⁴

⁴⁸⁵ Ibid

⁴⁸⁶ UNDOC (n 56) 86

⁴⁸⁷ Stuart Casey-Maslen & Sean Connolly, *Police Use of Force Under International Law* (Cambridge University Press) 84

⁴⁸⁸ USCCR (n 8) 11

⁴⁸⁹ Ibid

⁴⁹⁰ USDOJ (n 15)

⁴⁹¹ Ibid

⁴⁹² USCCR (n 8) 11

⁴⁹³ Ibid

⁴⁹⁴ Ibid

3.4.2 Voice authority

The police are encouraged to use their voices in appropriate situations to arrest a potential use of force situation.⁴⁹⁵ The police should use their voice to persuade compliance to avoid using force.⁴⁹⁶ This alternative is effective in situations where the suspects or potential suspects are willing to comply with the commands of the police.⁴⁹⁷ Voice projection by the police has been proven to be an effective remedy in attracting compliance by civilians in many would be potential confrontational situations.⁴⁹⁸ Accordingly, compliance significantly reduces the need for the police to use force.⁴⁹⁹

3.4.3 Police body control

This alternative calls for use of police bodily control to subdue suspected criminals instead of using weapons.⁵⁰⁰ The bodily controls include “control holds and open hand strikes.”⁵⁰¹ The police may involve the use of kicks and may also punch the suspects if the level of resistance increases.⁵⁰² These techniques when skillfully applied, drastically reduces the need to use force by the police.⁵⁰³

3.4.4 Less-lethal means

Where the use of force is unavoidable, the police should employ less-lethal means to arrest a potential confrontational situation.⁵⁰⁴ The varieties of less-lethal means available to the police include: batons, rubber bullets, chemical spray, tear gas, water cannon, tasers and other electronic and energy devices that can be used to safely restrain suspects.⁵⁰⁵ The use of dogs and horses is also considered less-lethal.⁵⁰⁶ The less-lethal means also have the potential to cause grave bodily harm thus the police officers must be trained properly before they are allowed to

⁴⁹⁵ Ibid

⁴⁹⁶ USDOJ (n 15)

⁴⁹⁷ Ibid

⁴⁹⁸ USCCR (n 8) 11

⁴⁹⁹ Ibid

⁵⁰⁰ USCCR (n 8) 11

⁵⁰¹ John (n 38) 2

⁵⁰² USCCR (n 8) 11

⁵⁰³ Ibid

⁵⁰⁴ Ibid

⁵⁰⁵ John (n 38) 2

⁵⁰⁶ Stuart (n 75) 100

use them.⁵⁰⁷ The less-lethal means not only minimize the use of firearms but also lead to minimum injuries.⁵⁰⁸

3.4.5 Lethal means

In line with international guidelines on use of lethal force, the continuum on use of force should provide that lethal force can only be used as a last resort where the lives of officers or other persons are in grave danger.⁵⁰⁹ The use of firearms may be employed where the other means have become ineffective and the risk of death of either the officers or third parties persists.⁵¹⁰

All in all, what determines what alternative an officer pursues in the continuum is the suspect's degree of resistance.⁵¹¹ The officers should ensure that regardless of the alternative they apply, their actions must meet the proportionality test otherwise the use of force will be deemed unreasonable.⁵¹² Proper implementation of the use of force continuum leads to effective control of the use of excessive force by the police.⁵¹³

3.5 Training

Training has been proven to be an effective remedy in addressing excessive use of force by the police.⁵¹⁴ Well trained officers have little to no complaints against them on violation of legal structures on the use of force as they rarely use force against civilians.⁵¹⁵ Good training enables the police officers to assess a use of force situation in a proper manner leading to well-informed strategies employed in approaching force situations.⁵¹⁶ Police training should be conducted both at the induction stage and throughout the service at regular intervals.⁵¹⁷ The in-service training should especially target police superiors who are best placed to shape police culture.⁵¹⁸

⁵⁰⁷ USDOJ (n 15)

⁵⁰⁸ UNODC, *"The Use of "Less-Lethal" weapons"* (2019) Available at < <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-4/key-issues/5--the-use-of-less-lethal-weapons.html>> Accessed 8 January 2020

⁵⁰⁹ USCCR (n 8) 11

⁵¹⁰ John (n 38) 2

⁵¹¹ USCCR (n 8) 12

⁵¹² Ibid

⁵¹³ John (n 38) 2

⁵¹⁴ Ibid, 17

⁵¹⁵ George Wood et al *"Procedural Justice Training Reduces Police Use of Force and Complaints Against Officers"* Princeton University May 2020 available at <pnas.org/content/117/18/9815> Accessed 19 July 2020

⁵¹⁶ John (n 38) 17

⁵¹⁷ UNDOC (n 56) 84

⁵¹⁸ Ibid

3.5.1 Areas of focus

Modern police training should shift focus from primarily how to use firearms to how to employ less-confrontational policing strategies such as persuasion as means of reducing the need to use force.⁵¹⁹ The training in this regard should focus on alternative techniques that do not involve the use of force in dealing with civilians.⁵²⁰

The training should also focus on human rights principles and good ethics which tend to guide moral judgment of the police during conflict situations.⁵²¹ The police must also be trained on the use of force policy and all the national, regional and international laws governing the use of force.⁵²² Additionally, as a preventive means, the officers should be trained on how to make good judgment on force equipment.⁵²³ As far as possible, training on firearms use should simulate real confrontational situations.⁵²⁴ The police should also be trained on the first aid tool box and how to administer first aid to injured officers, suspects and third parties.⁵²⁵ Apart from training on the legal limits on the use of force and human rights standards, the police should be trained on how to interact with the public in respectful ways which lead to reduced conflict.⁵²⁶

3.5.2 De-escalation

De-escalation training has been hailed as one of the most effective remedies in controlling the use of excessive force by the police.⁵²⁷ This training focuses on strategies meant to take control of a potential force situation so as to reduce the threat and the need to use force.⁵²⁸ De-escalation training entails the use of force alternatives such as persuasion, police' presence and warning.⁵²⁹

⁵¹⁹ Ibid, 83

⁵²⁰ George (n 103)

⁵²¹ UNDOC (n 56) 84

⁵²² International Association of Chiefs of Police (IACP) 15 "National Consensus Policy and Discussion Paper on Use of Force" July 2020 Available at <[https://www.theiacp.org/sites/default/files/2020-07/National Consensus Policy On Use Of Force%2007102020%20v3.pdf](https://www.theiacp.org/sites/default/files/2020-07/National%20Consensus%20Policy%20On%20Use%20Of%20Force%2007102020%20v3.pdf)> Accessed 30 July 2020

⁵²³ Ibid

⁵²⁴ Ibid

⁵²⁵ UNHCHR (n 49) 112

⁵²⁶ George (n 103)

⁵²⁷ USCCR (n 8) 113

⁵²⁸ IACP (n 110) 2

⁵²⁹ Ibid

Essentially, de-escalation training is meant to educate the police on how to limit or entirely avoid putting themselves in positions which call for mandatory use of lethal force.⁵³⁰

This training further focuses on how the police can maintain a safe distance from suspects thereby reducing physical contact.⁵³¹ Additionally, de-escalation training focuses on how the police can slow down their emotions in a high stress situation so as to avoid reacting in the heat of the moment which often leads to use of unreasonable force.⁵³² In dealing with stressful situations, the police are trained to first calm down, think of creative ways to approach the suspect peacefully and strategize with other officers on how to handle the situation at hand.⁵³³

3.5.3 Sanctity of life

At the core of the police training should be the concept of sanctity of life.⁵³⁴ The sanctity of life should be emphasized as it may be impactful in limiting the use of lethal force to only unavoidable situations.⁵³⁵ The police authorities should come up with policies that emphasize the right to life and direct officers to uphold the same.⁵³⁶ Additionally, the policies should provide that under no circumstance should the right to life be limited unless as a last resort in order to protect the officer's life or the life of a third party. Further, the policy should direct that police officers whose use of force becomes fatal should make a report justifying the said use of force.⁵³⁷

The respect for sanctity of life has been proven to drastically reduce cases of excessive use of force.⁵³⁸ The heads of policing institutions have to emphasize respect for sanctity of life and ensure compliance through monitoring of relevant administrative measures.⁵³⁹ There is a high probability of compliance when the police leaders emphasize sanctity of life.⁵⁴⁰ The leaders' emphasis in this regard will shape police attitude when the need to use force arises.⁵⁴¹

⁵³⁰ USCCR (n 8) 116

⁵³¹ Ibid, 114

⁵³² Ibid

⁵³³ Ibid

⁵³⁴ USDOJ (n 15)

⁵³⁵ USCCR (n 8) 116

⁵³⁶ Ibid, 118

⁵³⁷ Ibid

⁵³⁸ USDOJ (n 15)

⁵³⁹ Ibid

⁵⁴⁰ Ibid

⁵⁴¹ Ibid

3.5.4 Policing assemblies

Police' handling of mass demonstrations is a huge concern all over the world.⁵⁴² Police officers should be trained on how to respond tactfully to protesters instead of reacting in a volatile manner that may trigger unwarranted confrontations with civilians.⁵⁴³ To this aim, the police should be trained on how to employ peaceful tactics and avoid the use of equipment especially lethal equipment in quelling unruly assemblies.⁵⁴⁴ In particular, training the police on de-escalation of confrontational situations may go a long way in preventing the use of force in managing assemblies.⁵⁴⁵ The police should utilize known de-escalation strategies in dispersing crowds such as “disengagement, area containment, surveillance, waiting out a subject, summoning reinforcements, and calling in specialized units.”⁵⁴⁶

Additionally, the police should be trained on how to employ the following de-escalation techniques in dealing with assemblies: the police' use of verbal warning and peaceful urging instead of force, reduction of force when confrontation reduces, waiting for submission and/or compliance before unleashing force, express prohibition of use of firearms and other lethal equipment unless the officer or other third party's life is at risk, express prohibition of the use of force against civilians who are already subdued and express prohibition against issuing unlawful commands in order to gain compliance.⁵⁴⁷

The police should also be trained on how to apply a human rights-based approach in policing assemblies.⁵⁴⁸ In this regard, the police should be reminded to be mindful of their duty to not only facilitate but also protect the right to freedom of peaceful assembly.⁵⁴⁹ The right approach to policing assemblies requires: information on the participants, how best to facilitate the function and the available channels of communication.⁵⁵⁰

⁵⁴² USCCR (n 8) 116

⁵⁴³ Ibid

⁵⁴⁴ Ibid

⁵⁴⁵ Ibid

⁵⁴⁶ Ibid

⁵⁴⁷ Ibid, 117

⁵⁴⁸ OSCE/ODIHR & Venice Commission, “*Guidelines on Freedom of Peaceful Assembly*” [2019]11 3rd Edition, Available at < [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)017-e)> accessed 17 August 2019

⁵⁴⁹ Ibid

⁵⁵⁰ Ibid

3.6 Accountability for use of force

The power of the police to use force is not absolute and as such, the police must be accountable to their superiors and the public at large on the use of force in the execution of their role.⁵⁵¹ Accountability for use of force in this regard is particularly essential as it tends to improve public confidence in the police.⁵⁵² Accountability is at the core of every policing act as policing has a direct bearing on human rights.⁵⁵³

Accountability in the context of use of force by the police means an arrangement consisting of internal and external checks used to ensure the police use force according to the laid down laws and procedures and are answerable in case of any violation.⁵⁵⁴ Accountability in this regard is majorly for purposes of preventing abuse in the use of force by the police and promoting openness in the execution of policing role.⁵⁵⁵

3.6.1 Internal accountability

Internal accountability involves procedures put in place to check abuse of police powers within the police departments.⁵⁵⁶ Internal accountability may only be effective where the policing authorities commit to discipline officers who abuse the power to use force.⁵⁵⁷ To a large extent, internal accountability is not very effective as police authorities are often inclined to protect the image of the police and are generally averse to divulging the rot in the policing institution.⁵⁵⁸

Additionally, the public tends to have little confidence in the internal mechanisms due to the common belief that the police are often unwilling to punish their colleagues.⁵⁵⁹ Nonetheless, internal accountability mechanisms have to be developed and utilized to avoid overburdening external oversight bodies.⁵⁶⁰ The key internal accountability mechanisms include:

⁵⁵¹ P.Saskia (n 14) 21

⁵⁵² Ibid, 11

⁵⁵³ Ibid, 22

⁵⁵⁴ UNDOC (n 56)

⁵⁵⁵ Ibid

⁵⁵⁶ USDOJ (n 15)

⁵⁵⁷ UNDOC (n 56) 14

⁵⁵⁸ Ibid

⁵⁵⁹ Ibid

⁵⁶⁰ Ibid

3.6.1.1 Reporting

The policing authorities should come up with regulations that require mandatory reporting of all cases involving the use of force.⁵⁶¹ The report should consist of a description of the incident involving the use of force.⁵⁶² All material information should be indicated in the report including justification for the use of force, the force option employed and the nature of injuries inflicted on the victim or suspect.⁵⁶³

Policing authorities should ideally adopt a standard form of reporting requiring details such as the weather conditions, the level of force used, type of weapon used and the magnitude of harm caused.⁵⁶⁴

3.6.1.2 Complaints system

Police departments should publish a complaints procedure and create public awareness on the procedure.⁵⁶⁵ The process should be as transparent as possible to enable the public have confidence in the complaints system.⁵⁶⁶ Filing of the complaints should be free of charge.⁵⁶⁷

Where the complaints procedure is manual, the officer in charge of receiving complaints should have good listening skills and the ability to empathize with the complainants.⁵⁶⁸ Additionally, the officer should explain the process to the complainant and issue advice on the available options and way forward.⁵⁶⁹

The complaints process should be straight forward with minimum requirements so as to encourage the public to file complaints on abusive use of force by the police.⁵⁷⁰ Additionally, there should be an option for filing anonymous complaints where the complainant raises safety

⁵⁶¹ Stuart (n 75) 4

⁵⁶² Geoffrey P. Alpert & Roger G. Dunham, *Understanding Police Use of Force: Officers, Suspects and Reciprocity* (Cambridge University Press, 2004) 25

⁵⁶³ Ibid

⁵⁶⁴ Ibid, 26

⁵⁶⁵ USDOJ (n 15)

⁵⁶⁶ Ibid

⁵⁶⁷ UNDOC (n 56) 34

⁵⁶⁸ USDOJ (n 15)

⁵⁶⁹ Ibid

⁵⁷⁰ UNDOC (n 56) 34

concerns.⁵⁷¹ Further, the complainants should be notified of the progress of their complaints and ultimately the final outcome of the complaints.⁵⁷²

3.6.1.3 Investigations

Any use of force by the police should be investigated to ascertain its lawfulness.⁵⁷³ Cases involving use of force by the police are sensitive and generally attract public and media attention.⁵⁷⁴ It is therefore vital that the police authorities come up with consistent and effective clear guidelines that aid investigation of these cases.⁵⁷⁵ Clear and consistent guidelines will build public and media confidence in handling of such cases by the police and investigative authorities.⁵⁷⁶

Investigative procedures typically include: an investigative body within the police system that specializes in investigating police' use of force, a good organizational structure consisting of the investigation crew with a clear chain of command and an investigative response.⁵⁷⁷

3.6.1.4 Body cameras

Investing in police body cameras is an effective remedy for enhancing police accountability.⁵⁷⁸ Since the body cameras record all happenings in police-civilian encounters, they are perfect accountability tools that are also beneficial to prosecuting authorities and courts as well.⁵⁷⁹

Body cameras also act as supplementary data sources as the records kept by police departments are often incomplete.⁵⁸⁰ Additionally, body cameras enhance public trust and confidence in the police.⁵⁸¹

Successful implementation of body cameras policy leads to significant reduction in the use of force by police.⁵⁸² Additionally, reports on use of body cameras reveal that there is generally

⁵⁷¹ USDOJ (n 15)

⁵⁷² Ibid

⁵⁷³ Ibid

⁵⁷⁴ David E. Hatch, *Officer-Involved Shootings and Use of Force : Practical Investigative Techniques* (CRC Press LLC 2003)

⁵⁷⁵ Ibid

⁵⁷⁶ Ibid

⁵⁷⁷ Ibid

⁵⁷⁸ USCCR (n 8) 63

⁵⁷⁹ Ibid, 64

⁵⁸⁰ Ibid

⁵⁸¹ Ibid

reduced complaints against police officers wearing body cameras thus facilitating internal police accountability.⁵⁸³ Further, civilians are inclined to be well behaved when they are aware that their actions are being recorded.⁵⁸⁴ This in turn drastically reduces the need to use force by the police.

3.6.1.5 Command responsibility

Policing authorities should maintain an effective police chain of command and comply with legal provisions that criminalize unlawful superior orders which may lead to excessive use of force.⁵⁸⁵ Junior officers who receive such unlawful orders have not just the right but also an obligation to defy the same.⁵⁸⁶ Policing authorities should organize training of police officers on such superior orders and how to deal with them.⁵⁸⁷

Superiors should report and review all incidents of use of force.⁵⁸⁸ Superior officials should be held accountable for actions of the police they are commanding if they negligently failed to take preventive measures to avoid the use of excessive force.⁵⁸⁹ Junior police officers who disobey unlawful superior orders should be given immunity.⁵⁹⁰ Consequently, junior officers who fail to comply may be subjected to disciplinary action.⁵⁹¹

Since police supervisors / superiors are accountable for the orders and directions they give to the officers serving under them, they should be aware of the actions to be undertaken by their juniors and issue appropriate directions.⁵⁹² Additionally, police superiors have an obligation to ensure compliance with human rights law by the officers under their command.⁵⁹³ Further, police

⁵⁸² Ibid, 65

⁵⁸³ Ibid

⁵⁸⁴ Ibid

⁵⁸⁵ Principle 2 & 3, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

⁵⁸⁶ ibid

⁵⁸⁷ Ibid

⁵⁸⁸ Principles 6, 11(f), and 22, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

⁵⁸⁹ Ibid, Principle 24

⁵⁹⁰ Ibid, Principle 25

⁵⁹¹ Ibid, Principle 26

⁵⁹² UNDOC (n 56) 11

⁵⁹³ ICRC (n 54) 51

superiors should ensure that police action respects and upholds the principles on the use of force that is legality, proportionality, non-discrimination, necessity and precaution.⁵⁹⁴

3.6.2 External accountability

External police oversight enhances transparency in policing and builds public confidence in the police.⁵⁹⁵ Police oversight entails putting in place measures to ensure the police are accountable in the execution of their role typically through oversight bodies.⁵⁹⁶ External police oversight bodies are majorly civilian and tasked with receiving and processing complaints against the police, disciplining police offenders and generally holding the offenders accountable for violating policing policies.⁵⁹⁷ The oversight bodies should be independent and endowed with capacity and resources to investigate alleged abuses by the police.⁵⁹⁸

The oversight bodies should have the capacity to: investigate and process public complaints against the police, audit police internal accountability procedures, summon witnesses including police officers and ensure compliance with the summons, demand reports from the police on handling of complaints, contribute to police training curriculum and publish periodic reports on handling of complaints.⁵⁹⁹

External accountability involves accountability of the police to the state, public, independent authorities and international entities.⁶⁰⁰

3.6.2.1 State

Police officers should be accountable to the State through the executive, specifically the ministry in charge of policing.⁶⁰¹ The ministry in charge of policing should adopt national guidelines for use of force and ensure compliance.⁶⁰² The police should also be accountable to the auditor general in terms of financial accountability.⁶⁰³ Additionally, the police are accountable to the

⁵⁹⁴ Ibid 51

⁵⁹⁵ USCCR(n 8) 73

⁵⁹⁶ P.Saskia (n 14) 24

⁵⁹⁷ USCCR (n 8) 74

⁵⁹⁸ Ibid

⁵⁹⁹ Ibid, 75

⁶⁰⁰ UNDOC (n 56) 12

⁶⁰¹ Ibid

⁶⁰² Ibid, 99

⁶⁰³ Ibid, 12

State through the judiciary.⁶⁰⁴ Through the criminal justice system, the judiciary holds the officers accountable for abusive use of force.⁶⁰⁵ The officers can be summoned by judges / magistrates to testify in court on their use of force.⁶⁰⁶

Further, the police should also be accountable to the state through parliament.⁶⁰⁷ Parliament provides oversight to police through different subject committees.⁶⁰⁸ For instance, the committee on national security may summon the police to answer to questions relating to widespread use of excessive force by the police.⁶⁰⁹

3.6.2.2 Public

Police accountability to the public is mostly achieved through operationalization of police civilian oversight boards.⁶¹⁰ Public accountability can also be achieved through the boards constituted by policing authorities on implementation of community forums.⁶¹¹ Additionally, this form of accountability can also be achieved through scrutiny by the media.⁶¹² The civil society also plays a major role in providing public oversight primarily through scrutinizing police activities.⁶¹³ Civil societies expose police misconduct and demand the perpetrators to be accountable for their action.⁶¹⁴

Through public accountability, the police are able to know what concerns the public has in relation to police action and how best to involve the public in policing.⁶¹⁵ Additionally, the police are also able to know their ratings in the eye of the public and take appropriate actions to adjust according to the public feedback.⁶¹⁶

⁶⁰⁴ Ibid

⁶⁰⁵ Thomas Probert et al “*Strengthening Policing Oversight and Investigations in Kenya: Study of IPOA Investigations into Deaths Resulting from Police Action*” Available at < <https://apcof.org/wp-content/uploads/apcof-study-of-ipoa-deaths-from-police-action-kenya-eng-041-3.pdf> > Accessed 10 February 2020

⁶⁰⁶ UNDOC (n 56) 121

⁶⁰⁷ Ibid

⁶⁰⁸ Thomas Probert et al (n 193)

⁶⁰⁹ Ibid

⁶¹⁰ UNDOC (n 56) 12

⁶¹¹ Ibid

⁶¹² Ibid

⁶¹³ Thomas Probert et al (n 193)

⁶¹⁴ Ibid

⁶¹⁵ UNDOC (n 56)

⁶¹⁶ Ibid

3.6.2.3 Independent bodies

The police should also be accountable to established independent bodies such as the ombudsman, national human rights commissions, and national police service commissions, national police oversight bodies and human rights non-governmental organizations.⁶¹⁷

There is need for a guarantee of independence of these oversight bodies to ensure effectiveness in the execution of their role.⁶¹⁸ Independence of these bodies promotes confidence by the public.⁶¹⁹ Additionally, these bodies should have the power to carry out investigations on the alleged violations by the police.⁶²⁰ Further the capacity of the bodies should be strengthened through adequate budgetary allocation.⁶²¹ The oversight bodies should be granted power to summon witnesses and the police and power to inspect public and private places.⁶²²

3.6.2.4 Regional and International entities

The policing authorities should be accountable through the State to the international bodies created by international treaties such as the UN Human Rights Committee.⁶²³ Additionally, the police should also be accountable to similar regional bodies created by the regional treaties such as the African Commission on Human and Peoples' Rights.⁶²⁴ The African Policing Oversight Forum for instance was formed to promote the accountability of the police and to enhance good governance in African countries.⁶²⁵

3.7 Conclusion

This chapter has discussed some of the leading strategies in curbing the use of excessive force by the police. At the core of these strategies is the concept of community policing which has been proved to be a leading strategy in controlling the excessive use of force by the police.⁶²⁶ Proper

⁶¹⁷ UNDOC (n 56) 12

⁶¹⁸ UNODC & OHCHR, “*Resource Book on the Use of Force and Firearms in Law Enforcement*” [2017] 172. Available at < https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf > accessed 11 July 2019

⁶¹⁹ Ibid

⁶²⁰ Ibid

⁶²¹ Ibid

⁶²² Ibid

⁶²³ UNDOC (n 56) 12

⁶²⁴ Ibid

⁶²⁵ See the African Policing Oversight Forum website at <https://apcof.org/>

⁶²⁶ OSCE (n 7) 19

selection during recruitment has also been shown to reduce the use of force incidents by retaining only officers with appropriate character. This chapter has also presented a proposal for improvement of the welfare of police as a way of controlling the use of force. This chapter has also built a case for the adoption of a comprehensive use of force continuum to guide the officers in their use of force. Further, this chapter has made an argument for effective training of the police especially de-escalation training as an effective strategy for reducing the use of force by the police. Finally, this chapter has argued for adoption of internal and external accountability mechanisms to check on police action. Successful implementation of the above best practices may significantly reduce the cases of excessive use of force by the police.

CHAPTER FOUR (4)

TOWARDS ERADICATING THE USE OF EXCESSIVE FORCE IN KENYA

4.1 Introduction

The use of reasonable force by the police in the execution of their role is legally permitted and morally acceptable.⁶²⁷ The police officers are permitted to use force where such use of force is necessary in order to meet a legitimate aim.⁶²⁸ Additionally, the police may rightfully use deadly force to protect their lives and the lives of third parties.⁶²⁹ The use of excessive force is however a gross violation of human rights and also threatens police legitimacy.⁶³⁰ The use of force must therefore be subjected to strict controls.⁶³¹

In Kenya, the excessive use of force by the police has become a culture.⁶³² In fact in 2017, a study on police killings placed Kenya at the top position in a survey of arbitrary killings occasioned by police' use of excessive force in Africa.⁶³³ This chapter therefore discusses the various measures that the policing authorities in Kenya can adopt to realize a reduction of cases involving the use of excessive force by the police. The chapter will firstly argue for the need to change the policing culture. Secondly, the chapter will build a case for the improvement of police welfare. Thirdly, the chapter will present an argument for the need to improve the relationship between the police and the public. Lastly, the chapter will explore ways of strengthening the existing legal and institutional framework regulating the police' use of force in Kenya.

⁶²⁷ Seumas Miller, *Shooting to Kill : The Ethics of Police and Military Use of Lethal Force* (Oxford University Press 2016) 110

⁶²⁸ UNODC & OHCHR, “*Resource Book on the Use of Force and Firearms in Law Enforcement*” [2017]1 Office of the United Nations High Commissioner for Human Rights and United Nations Office on Drugs and Crime. Available at <https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf> accessed 11 July 2019

⁶²⁹ Seumas (n 1) 113

⁶³⁰ Geoffrey P. Alpert & Roger G. Dunham, *Understanding Police Use of Force: Officers, Suspects and Reciprocity* (Cambridge University Press, 2004) 18

⁶³¹ UNODC & OHCHR (n 2) 1

⁶³² Anneke Osse, “*Police reform in Kenya: a process of ‘meddling through’*” [2016] 916 *International Journal of Research and Policy* available at <<https://www.tandfonline.com/doi/pdf/10.1080/10439463.2014.993631?needAccess=true>> accessed 3 August 2019 (Osse)

⁶³³ KHRC, “*Police Brutality & Evasive Justice*” [2019] Available at <<https://www.khrc.or.ke/2015-03-04-10-37-01/blog/672-police-brutality-evasive-justice.html>> Accessed 12 June 2019

4.2 Changing police culture

Police culture connotes the belief system of a policing institution on a given subject.⁶³⁴ Police culture influences how policing operations are done including recruitment, day to day operations, standing orders and other operational procedures and training.⁶³⁵ Further, police culture has a huge impact on how the police carry out their duties including the use of force.⁶³⁶

4.2.1 Beyond defensive policing

The use of force by the police is often as a result of either perceived or real apprehension of bodily harm on the part of the police.⁶³⁷ The fear is inculcated during police induction and all through their employment.⁶³⁸ Police' use of force stems from the police induction training which puts emphasis on the need to ensure safety of the officer as a paramount consideration during policing operations.⁶³⁹ In particular, the belief that every civilian encounter is dangerous is entrenched into the minds of the police officers during induction.⁶⁴⁰ The police primarily focus on how to protect themselves in every civilian encounter rather than how to keep communities safe.⁶⁴¹ In deed the system of police training in Kenya is brutal in nature thus it is not surprising that the police treat civilians in a brutal manner.⁶⁴²

Many of the use of force incidents are driven by fear and very often it emerges that the police pull the triggers before fully analyzing the perceived fear.⁶⁴³ Consequently, in many situations involving the use of force by the police, it is often not provoked by real danger but perceived fear.⁶⁴⁴ Therefore the institutionalized mentality of danger drives the police to use force as a rule of engagement.⁶⁴⁵ This mentality which is reinforced during induction and subsequently through police socialization, results in the use of excessive force by the police in situations where the use

⁶³⁴ USDOJ, “Principles of Good Policing: Avoiding Violence Between Police and Citizens” (2013) 17 Available at < <https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf> > Accessed 28 July 2020

⁶³⁵ Ibid

⁶³⁶ Karen M. Hess, *Introduction to Law Enforcement and Criminal Justice* (Wadsworth Publishing, 9th Edn, 2008)135

⁶³⁷ USCCR, “Police Use of Force: An Examination of Modern Policing Practices” (2018)119 Available at < usccr.gov/pubs/2018/11-15-Police-Force.pdf > Accessed 12th February 2020.

⁶³⁸ Ibid 118 - 119

⁶³⁹ Ibid 118

⁶⁴⁰ Ibid 119

⁶⁴¹ Ibid

⁶⁴² ICJ Kenya, “Police Brutality: Striving for Accountability” (7th July 2020) Available at < <https://www.youtube.com/watch?v=JILN03S4wo0> > Accessed 17 July 2020

⁶⁴³ USCCR (n 11) 119

⁶⁴⁴ Ibid

⁶⁴⁵ Ibid

of force is unnecessary.⁶⁴⁶ The use of force by Kenya police has been institutionalized over the past decades.⁶⁴⁷

Police brutality toward civilians is a normal occurrence during law enforcement in Kenya.⁶⁴⁸

In order to reverse this culture, the police officers should be trained on how to deal with the inherent fear of danger in a manner that reduces the need for use of force.⁶⁴⁹ In this regard, the officers should be trained on the de-escalation strategies as outlined in chapter three of this study. This is necessary as the training focuses on strategies meant to take control of a potential force situation so as to reduce the threat and the need to use force.⁶⁵⁰ Additionally, the police should be trained on the sanctity of life and the need to zealously protect it.⁶⁵¹ Further, instead of focusing on officer safety as the central issue in police induction, the training should focus on how to keep communities safe.⁶⁵²

The police approach of “us versus them” must be eradicated through appropriate socialization as it makes the police to always be on a defensive angle, ready to use force at the slightest provocation.⁶⁵³ Policing authorities should endeavour to change the view of use of force from normal to abnormal.⁶⁵⁴ The use of force must not be accepted as the default response to crime.⁶⁵⁵ This can be achieved through appropriate training and socialization of the police from the beginning of employment.⁶⁵⁶ Where the police view the use of force as abnormal, the cases of

⁶⁴⁶ Ibid

⁶⁴⁷ Kenya Human Rights Commission (KHRC), “*Police Brutality in Kenya*” [2017] Available at <<https://www.khrc.or.ke/2015-03-04-10-37-01/blog/603-police-brutality-in-kenya.html>> Accessed 19 July 2019 (KHRC)

⁶⁴⁸ Ibid

⁶⁴⁹ USCCR (n 11) 119

⁶⁵⁰ International Association of Chiefs of Police (IACP) 2 “*National Consensus Policy and Discussion Paper on Use of Force*” (July 2020) Available at <[https://www.theiacp.org/sites/default/files/2020-07/National Consensus Policy On Use Of Force%2007102020%20v3.pdf](https://www.theiacp.org/sites/default/files/2020-07/National%20Consensus%20Policy%20On%20Use%20Of%20Force%2007102020%20v3.pdf)> Accessed 30 July 2020

⁶⁵¹ USDOJ, “*Police Use of Excessive Force: A Conciliation Handbook for the Police and the Community*” (2002) Available at <<https://www.justice.gov/archive/crs/pubs/pdexcess.htm>> Accessed 12 January 2019

⁶⁵² USCCR (n 11) 119

⁶⁵³ Karen M. Hess (n 10) 134

⁶⁵⁴ USDOJ Handbook (n 25)

⁶⁵⁵ USDOJ (n 8) 17

⁶⁵⁶ USDOJ Handbook (n 25)

abusive use of force reduce and in the rare occasions where force is used, the policing authorities respond swiftly and take appropriate corrective action.⁶⁵⁷

A change in policing culture can be commenced by development and adoption of key values that govern the use of force by the police.⁶⁵⁸ The Constitution of Kenya provides that policing should be governed by integrity, professionalism, transparency, discipline, competence, accountability and respect for human rights and freedoms.⁶⁵⁹ The values should be reflected in all the relevant policies, procedures and training manuals.⁶⁶⁰

At the induction stage, the police officers should be trained that their major role is to serve the public.⁶⁶¹ This mentality can be impactful in limiting the use of force against the members of the public.⁶⁶² The police' attention should be more on how to improve society's safety rather than to enforce the law.⁶⁶³ Ideally, the police ought to view themselves as social service providers, not crime fighters.⁶⁶⁴

4.2.2 Screening and selection process

Recruitment has an impact on how an individual police officer uses force.⁶⁶⁵ Kenya's police recruitment is heavily based on physical traits and academic qualifications to the exclusion of other important factors such as mental health and the ability to relate well with people.⁶⁶⁶ Potential candidates and serving police officers should undergo psychological testing to determine their emotional suitability for policing work.⁶⁶⁷ Candidates who are emotionally unstable should not be recruited into the police service given the nature of policing.⁶⁶⁸

⁶⁵⁷ Ibid

⁶⁵⁸ Ibid

⁶⁵⁹ Article 244, Constitution of Kenya

⁶⁶⁰ USDOJ Handbook (n 25)

⁶⁶¹ Karen M. Hess (n 10) 111

⁶⁶² Ibid 118

⁶⁶³ Ibid 136

⁶⁶⁴ Ibid 116

⁶⁶⁵ Ellen M. Scrivner, "Controlling Police Use of Excessive Force : The Role of the Police Psychologist" (NCJRS 1994) Available at < <https://www.ncjrs.gov/pdffiles1/Digitization/150063NCJRS.pdf>> Accessed 12 December 2019

⁶⁶⁶ ICJ Kenya (n 16)

⁶⁶⁷ USDOJ Handbook (n 25)

⁶⁶⁸ Ibid

Character of individual police officers should be taken into consideration.⁶⁶⁹ This is necessary as an officer's character plays a big in determining whether or not to use force.⁶⁷⁰ Candidates who have violent traits are likely to use excessive force during policing.⁶⁷¹

The selection should aim at only officers with integrity.⁶⁷² In this regard, the selection of officers should exclude officers who have adverse criminal records.⁶⁷³ The selection of right candidates helps in preventing cases of excessive use of force.⁶⁷⁴

Additionally, the National Police Service Commission (NPSC) should also consider selecting candidates with good inter-personal skills as policing involve a lot of interactions with different members of the community.⁶⁷⁵ Further, candidates' ability to solve-problems and manage conflict in a peaceful manner should also be a criterion for selection.⁶⁷⁶

4.2.3 Training

A study by the Human Rights Watch in 2016 revealed that most police officers are not aware of the National Police Service (NPS) Act's provisions on the use of force.⁶⁷⁷ Thomas Probert *et al* also note that the excessive use of force by the police in Kenya has persisted owing to police' ignorance of the regulations on the use of force.⁶⁷⁸ This is attributed to the fact that the police officers are trained on the use of force only during induction.⁶⁷⁹ Further, the training curriculum is

⁶⁶⁹ UNHCHR, "*Human Rights and Law Enforcement: A Trainer's Guide on Human Rights for the Police*" (2002) 112 Available at

< <https://www.ohchr.org/Documents/Publications/training5Add2en.pdf>> Accessed 13 December 2019

⁶⁷⁰ Ellen M. Scrivner (n 39)

⁶⁷¹ Karen M. Hess (n 10) 138

⁶⁷² UNDOC, "*Handbook on Police Accountability, Oversight and Integrity*" Criminal Justice Handbook Series, United Nations Publication [2011] 80 Available at

<https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf> Accessed 10 April 2020.

⁶⁷³ Ibid 81

⁶⁷⁴ John Vespucci, *Education Level and Police Use of Force: The Impact of a College Degree* (Springer 2020) 13

⁶⁷⁵ Douglas L. Kivoi, "*Community Policing in Kenya: Way Forward*" Available at < <https://kippra.or.ke/index.php/resource-centre/blogs/27-community-policing-in-kenya-way-forward>> Accessed 17 July 2020

⁶⁷⁶ Ibid

⁶⁷⁷ HRW, "*Deaths and Disappearances : Abuses in Counterterrorism Operations in Nairobi and in Northeastern Kenya*" [2016]4 available at <https://www.hrw.org/sites/default/files/report_pdf/kenya0716web_1.pdf> accessed 12 April 2019

⁶⁷⁸ Thomas Probert *et al* "*Strengthening Policing Oversight and Investigations in Kenya: Study of IPOA Investigations into Deaths Resulting from Police Action*" Available at < <https://apcof.org/wp-content/uploads/apcof-study-of-ipoa-deaths-from-police-action-kenya-eng-041-3.pdf> > Accessed 10 February 2020

⁶⁷⁹ Ibid

not available to the public for scrutiny therefore it is not easy to know whether the content is based on the national and international legal framework concerning the use of force.⁶⁸⁰

The police are yet to comply with the accountability procedures in the new policing law largely because of ignorance.⁶⁸¹ Regular training and monitoring of police officers on the use of force policies may greatly reduce cases of excessive use of force by the police.⁶⁸² As a preventive measure, Kenya is obligated to ensure training of the police on the regulations on the use of force.⁶⁸³ Additionally, the police must be made aware of human rights and alternative means of controlling unlawful assemblies.⁶⁸⁴ This will contribute to a reduction in cases of abusive use of force.

Consequently, Kenya should invest in special training of the police on use of force. This can be achieved through not only entry-level but also continuous in-service police training.⁶⁸⁵ Firearms should be used by only officers who have undergone special training on use of firearms.⁶⁸⁶ Additionally, Kenya is obligated to train law enforcement officers on the use of non-violent means.⁶⁸⁷

4.3 Improving police welfare

In order to reduce unwarranted use of force by the police, the NPS should endeavor to improve the welfare of the police officers to enable them work with motivation.⁶⁸⁸

4.3.1 Equipment and Protective wear

Proper execution of law enforcement role in Kenya is hindered by lack of appropriate equipment.⁶⁸⁹ Kenya has a legal obligation to provide the police with a broad range of weapons

⁶⁸⁰ Ibid

⁶⁸¹ Osse (n 6) 912

⁶⁸² USDOJ Handbook (n 25)

⁶⁸³ UNHRC “*General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*” [2018]4 Available at <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23809&LangID=E>> Accessed 17 August 2019 (UNHRC General Comment)

⁶⁸⁴ Principle 20, BPUFF

⁶⁸⁵ UNHCHR (n 43) 190

⁶⁸⁶ Principle 19, BPUFF

⁶⁸⁷ Principles 4 and 20, BPUFF

⁶⁸⁸ Osse (n 6) 915

⁶⁸⁹ Amnesty International, “*Police Reform in Kenya: A Drop in the Ocean*” [2013] 7 Available at <https://www.amnesty.nl/content/uploads/2016/11/kenya_afr_32_001_2013.pdf?x62907> Accessed 10 July 2019 (Amnesty 2013)

that limit use of force.⁶⁹⁰ In particular, Kenya should procure less-lethal weapons.⁶⁹¹ The non-lethal weapons will reduce the need to use lethal means which often lead to death or serious injuries.

Additionally, Kenya is obligated to equip the police with bullet-proof apparel and protective equipment to reduce the need to use firearms.⁶⁹² The NPSC should provide the police officers with modern protective clothing and equipment such as armored cars equipped with digital policing gadgets, protective vests, automatic guns, chemical sprays, electronic restraining devices such as tasers, lasers and crime mapping tools.⁶⁹³ This will ensure police operations are conducted in a way that leads to minimum injury risk thereby abiding by the principle of precaution.⁶⁹⁴ For Kenya to facilitate compliance with the principle of precaution, it will entail increasing the budgetary allocation for the NPS for purposes of acquiring protective equipment.

4.3.2 Officers' Mental Health

The police encounter violence in their day to day work and as such they should have regular debriefing sessions to help in managing stress and anxiety associated with their work.⁶⁹⁵ Good management of stress may significantly reduce the cases involving use of excessive force by the police.⁶⁹⁶ The police officers should also be counselled before and after undertaking major confrontational incidents.⁶⁹⁷

Some of the cases involving the use of excessive force by the police have been attributed to police' psychological disorders including mental ailment.⁶⁹⁸ The NPSC should offer free counselling services to prevent development of mental disorders arising from the nature of policing.⁶⁹⁹ In this regard, the NPSC should provide regular debriefing sessions and retain professional counsellors to help improve the officers' mental health.

⁶⁹⁰ Principle 2, BPUFF

⁶⁹¹ Ibid

⁶⁹² Principle 2, BPUFF

⁶⁹³ Karen M. Hess (n 10) 111

⁶⁹⁴ Stuart Casey-Maslen & Sean Connolly, *Police Use of Force Under International Law* (Cambridge University Press 2017) 6

⁶⁹⁵ Ellen M. Scrivner (n 39)

⁶⁹⁶ UNHCHR (n 43) 112

⁶⁹⁷ Ibid

⁶⁹⁸ Thomas Probert *et al* (n 52)

⁶⁹⁹ Ibid

4.3.3 Working and living conditions

In the recent years, there have been efforts by the policing authorities to improve police officers' living and working conditions.⁷⁰⁰ However, the vast portion of the officers' working and living conditions is still in a bad state.⁷⁰¹ In a police survey on the problems faced by police officers, the officers cited low remuneration and poor working conditions as some of the top issues that should be addressed by the NPSC.⁷⁰² The working conditions of the police are generally poor because of inadequate resources.⁷⁰³ As a result, the police officers lack appropriate equipment.⁷⁰⁴ The lack of basic tools of work such as equipment is a big challenge and has led to the use of unwarranted force during policing.⁷⁰⁵ The officers' remuneration is also little coupled with poor working and living conditions.⁷⁰⁶ Little budgetary allocation has a crippling effect on policing as the police officers are unable to work properly.⁷⁰⁷

The NPSC and IPOA should conduct regular visits to the police stations and quarters to find out the working and living conditions of the police officers and assure them of their care and support. The NPS should ensure that a reasonable portion of the police budgetary allocation is used in improving the officers' work and living conditions. The policing authorities should always ensure the police officers' wellbeing is well covered otherwise the officers' performance will be adversely affected.⁷⁰⁸

4.4 Improving police – public relationship

Policing operations can be ineffective where there is a conflict between the police and the communities they serve.⁷⁰⁹ A good public image of the police is vital for proper execution of

⁷⁰⁰ Ibid

⁷⁰¹ Ibid

⁷⁰² Osse (n 6) 915

⁷⁰³ Amnesty 2013 (n 63) 19

⁷⁰⁴ Ibid

⁷⁰⁵ John Mwangi & Kenneth Omeje, "The Challenges of State Policing in Kenya" [2012] 3 Vol 7, Issue 1 Peace and Conflict Review. Available at < <http://www.review.upeace.org/pdf.cfm?articulo=129&ejemplar=24>> Accessed 18 February 2019

⁷⁰⁶ Amnesty 2013 (n 63) 19

⁷⁰⁷ John Mwangi & Kenneth Omeje (n 79) 11

⁷⁰⁸ Dwayne Orrick, "Best Practices Guide: Recruitment, Retention, and Turnover in Law Enforcement" Available at <<https://www.theiacp.org/sites/default/files/2018-08/BP-Recruitment.pdf>> Accessed 10 December 2019

⁷⁰⁹ USDOJ Handbook (n 25)

policing role.⁷¹⁰ This is majorly due to the fact that policing is centered on responding to complaints filed by members of the public.⁷¹¹ Further, the police need the assistance of the public in providing vital information that is helpful in combating crime.⁷¹² The public can only cooperate with the police in an atmosphere of trust and where there's police legitimacy.⁷¹³ Accordingly, public support is an essential ingredient in policing.⁷¹⁴

The use of excessive force by the police is often linked to poor relationship between the police and the public.⁷¹⁵ The cases of excessive use of force by the police in Kenya are on the rise since the relationship between the police and the public is poor.⁷¹⁶ There's widespread distrust of the police among Kenyan communities and this has caused a lot of tensions between the police and the public.⁷¹⁷ The government has accordingly initiated implementation of community policing in Kenya in an attempt to build the relationship between the police and the public.⁷¹⁸

4.4.1 Community Policing in Kenya

Community policing helps to strengthen the relationship between the police and the public thereby contributing to improved safety within the communities.⁷¹⁹ Community policing has been recognized by the Constitution of Kenya and the NPS Act.⁷²⁰ The NPS Act provides different objectives of community policing key among them to promote partnership and communication between the police and the community.⁷²¹ The NPS Act creates county policing authority which is tasked with implementing community policing programs at the county.⁷²²

⁷¹⁰ Karen M. Hess (n 10) 118

⁷¹¹ Ibid

⁷¹² UNDOC (n 46) 8

⁷¹³ Ibid

⁷¹⁴ Ibid

⁷¹⁵ USDOJ Handbook (n 25)

⁷¹⁶ ICJ Kenya (n 16)

⁷¹⁷ Ibid

⁷¹⁸ National Police Service, "*Community Policing Information Booklet: Building Safer Communities Together*" (2017) Available at <<http://www.nationalpolice.go.ke/downloads/category/20-nps-community-policing-information-booklet.html?>> Accessed 11 May 2020

⁷¹⁹ Karen M. Hess (n 10) 251

⁷²⁰ See Article 244(e) and Section 10(k) of the National Police Service Act

⁷²¹ National Police Service Act, Section 96

⁷²² National Police Service Act, Section 97

The policing authority is further supplemented by community policing committees which are also tasked with implementing community policing within specific areas.⁷²³

As a way of implementing community policing, the government of Kenya runs an initiative dubbed “*Nyumba kumi*.” The National Police Service describes the initiative as a “strategy of anchoring community policing at the household level or any other generic cluster.”⁷²⁴ The policing units in this regard include a cluster of houses within communities.⁷²⁵

The government’s initiative is a commendable step as community policing has been proven to be an effective strategy in curbing the use of excessive force by the police.⁷²⁶ The implementation of community policing concept in Kenya is however threatened by lack of trust between the police and the public.⁷²⁷ The public’s lack of trust in this regard is fueled by the police’s brutal handling of the public and the lack of accountability for gross human rights violations by the police.⁷²⁸ Additionally, there is public misunderstanding of the concept of community policing thereby threatening the public’s participation in the program.⁷²⁹ There is a widespread misconception of community policing with communities linking the program to vigilante groups.⁷³⁰ Further, some members of the community tasked with implementing community policing fail to appreciate the voluntary nature of the program thus complicating the implementation by demanding salaries and police’s tools of work such as guns and uniforms.⁷³¹

Implementation of the initiative is also hindered by inadequate institutional capacity.⁷³² Inadequate funding for the program has hindered its success.⁷³³ Additionally, the police officers are yet to fully embrace and implement the program as it is mostly viewed as a

⁷²³ National Police Service Act, Section 98 - 99

⁷²⁴ National Police Service (n 92)

⁷²⁵ Ibid

⁷²⁶ OSCE, “*Good Practices in Building Police-Public Partnerships*” (2008) 19 Available at <osce.org/files/f/documents/8/4/32547.pdf> Accessed 10 June 2020

⁷²⁷ Douglas L. Kivoi (n 49)

⁷²⁸ Ibid

⁷²⁹ National Police Service (n 92) 15

⁷³⁰ Douglas L. Kivoi,

⁷³¹ ICJ Kenya (n 16)

⁷³² Douglas L. Kivoi (n 49)

⁷³³ Ibid

foreign concept.⁷³⁴ Further, the police are not given any incentive for implementing the program thereby there is reduced motivation.⁷³⁵

In order to realize the success of community policing in Kenya, the police leadership has to increase the budget for community policing, create public awareness of the program (also within police departments), adopt clear procedures on the working of community policing and make the improvement of police – public relationship a top priority.⁷³⁶ As a way motivating the police officers to implement the program, the NPSC should offer them incentives.⁷³⁷

4.4.2 Data for public scrutiny

Scanty and incomplete data on instances of police use of force contributes to distrust of the police by the public.⁷³⁸ The lack of confidence in the police leads to unsafe communities as members of the public are unlikely to report crimes in an atmosphere of distrust.⁷³⁹ Accordingly, it is necessary for the police to be transparent and accountable in the execution of their role by providing sufficient and accurate data on the use of force for public scrutiny.⁷⁴⁰

The data should go beyond providing basic information relating to the incident and include all relevant information for instance whether or not the victim was armed.⁷⁴¹ Further, the data should state the extent of danger the victim posed to the police.⁷⁴²

Public data on all incidents of use of force by the police will to a large extent curb the increasing deaths arising from excessive use of force by the police.⁷⁴³ Very often, only the media and non-

⁷³⁴ Douglas L. Kivoi (n 49)

⁷³⁵ Ibid

⁷³⁶ Ibid

⁷³⁷ Thomas Probert *et al* (n 52)

⁷³⁸ USCCR (n 11) 2

⁷³⁹ Ibid

⁷⁴⁰ Thomas Probert *et al* (n 52)

⁷⁴¹ USCCR (n 11) 16

⁷⁴² Ibid

⁷⁴³ ICJ Kenya (n 16)

governmental organizations provide data on use of force incidents.⁷⁴⁴ The NPS and IPOA also once in a while release scanty details of police' use of excessive force.⁷⁴⁵

The absence of a national database of use of force incidents in Kenya is one of the major factors contributing to continued instances of excessive use of force by the police.⁷⁴⁶ The lack of comprehensive data on use of force hampers attempts by policy makers and other stakeholders in understanding the scope of the problem and searching for solutions to the menace.⁷⁴⁷ The NPS should accordingly establish and maintain a comprehensive national database on all cases of use of excessive force by the police to promote public confidence and also police' accountability.

4.5 Strengthening the legal and institutional framework

4.5.1 Legal framework

Kenya's laws and regulations on the use of lethal force by the police are overly liberal thereby giving the police unwarranted wide discretion in the use of force.⁷⁴⁸ The use of force by the police should be as per international standards which require that force be used only where necessary and be applied in a proportionate manner with minimal potential injury.⁷⁴⁹

4.5.1.1 Regulations on the use of force and firearms

The NPSSOs give only a basic outline on use of force and firearms as per the NPS Act. The NPSSOs exclude specific guidelines especially on use of firearms which should include handling of firearms and accountability for every bullet issued. In line with international standards⁷⁵⁰ and

⁷⁴⁴ Ibid

⁷⁴⁵ Thomas Probert *et al* (n 52)

⁷⁴⁶ Ibid

⁷⁴⁷ ICJ Kenya (n 16)

⁷⁴⁸ UNHRC, "*Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: mission to Kenya*" [2009] 7 Available at <www.un.org/documents/ga/docs/51/plenary/a51-457> Accessed 19 November 2016 (Alston Report).

⁷⁴⁹ Stuart Cassey Maslen (ed) "*Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council.*" [2016]6 Geneva Academy of International Humanitarian Law and Human Rights. Available at <https://www.geneva-academy.ch/joomlatools-files/docman-files/in-brief6_WEB.pdf> accessed 18 April 2019 (Stuart)

⁷⁵⁰ Principle 1 and 11, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF)

the NPS Act⁷⁵¹ the government should establish specific regulations to control excessive use of force and firearms.

On use of force, the NPS should make sure that regulations on the following are adopted and published: an outline of permitted means for use of force, provisions on police training and reporting procedures.⁷⁵²

As relates the use of firearms, the NPS should adopt and implement regulations: that outline situations where firearms maybe used, provisions prohibiting unreasonable use of firearms, provisions on warning before firing, provisions controlling issuance and storage of firearms, provisions on training of police on use of firearms, provisions on firearms use' testing and provisions on reporting procedures.⁷⁵³

Adoption of the above regulations especially those that control issuance and use of firearms⁷⁵⁴ will go a long way in enhancing accountability for use of firearms thus reducing abusive use of firearms by the police. Further, regulations on reporting system on use of firearms will also substantially reduce instances of unreasonable use of firearms.

4.5.1.2 Restriction on the use of lethal force

4.5.1.2.1 National Police Service (NPS) Act

The Sixth Schedule of the NPS Act stipulates that the use of firearms should be for purposes of protecting life and property and preventing escape of a criminal suspect from custody.⁷⁵⁵ This provision on use of firearms by the NPS Act is overly permissive and inconsistent with LOLE⁷⁵⁶ which requires that firearms be used only for protecting human life; there are no provisions on use of firearms to protect property.⁷⁵⁷ Further, as per international standards, the use of firearms to prevent escape of a criminal from lawful custody is prohibited unless there is an imminent

⁷⁵¹ Sixth Schedule, National Police Service Act

⁷⁵² Paragraph 12, Part A of the Sixth Schedule of the National Police Service Act.

⁷⁵³ Section 125 of the National Police Service Act, Paragraph 8, Part B of the Sixth Schedule of the National Police Service Act and Principle 11, BPUFF

⁷⁵⁴ Principle 11d, BPUFF

⁷⁵⁵ Paragraph 1, Sixth Schedule, Part A – National Police Service Act

⁷⁵⁶ Principle 9, BPUFF

⁷⁵⁷ Thomas Probert *et al* (n 52)

threat to life.⁷⁵⁸ LOLE emphasizes that using lethal force should only be in pursuit of protection of one's life or the life of other people but not in protection of property.⁷⁵⁹

The provision on use of firearms for protection of property has led to police' firing into looters indiscriminately instead of using reasonable force to immobilize the suspects for purposes of arrest.⁷⁶⁰ Many Kenyans, especially looters have been shot dead by the police.⁷⁶¹ Reports on arbitrary killings by the police in Kenya reveal that the police often shoot unarmed criminal suspects where there is no sensible apprehension of danger posed by the suspects.⁷⁶² NPS Act's provision on use of firearms to protect property must therefore be removed as it fuels excessive use of force by the police.

4.5.1.2.2 Public Order Act

Despite the Constitutional, statutory and international legal protection of freedom of assembly, the police often shoot protesters who are unarmed and who do not pose a threat to life.⁷⁶³ Osse submits that the police in Kenya not only unreasonably limit the right to assembly but also often quell peaceful protests with excessive force.⁷⁶⁴

Kenya's Public Order Act allows undue use of force by the police during maintenance of public order as it gives wide discretion to the police.⁷⁶⁵ The Act allows use of force during assemblies so long as such force is proportional and does not jeopardize third parties.⁷⁶⁶ The Act does not specify the circumstances and purposes for use of firearms.⁷⁶⁷

⁷⁵⁸ UNHRC (n 57) 3

⁷⁵⁹ Seumas Miller (N 1) 22

⁷⁶⁰ Mathare Social Justice Centre, "Who Is Next? A Participatory Action Research Report Against the Normalization of Extrajudicial Executions in Mathare" [2015] 10 Available at <https://drive.google.com/file/d/0B2NZry_SioNhWEFyQWNuVVBjV2M/view> Accessed 6 August 2019 (MSJC)

⁷⁶¹ Ibid

⁷⁶² Amnesty International / Human Rights Watch, "Kill Those Criminals: Security Forces Violations in Kenya's August 2017 Elections." [2017] 15 Available at <https://www.hrw.org/report/2017/10/15/kill-those-criminals/security-forces-violations-kenyas-august-2017-elections> accessed 05 May 2018 (Amnesty/HRW)

⁷⁶³ Ibid

⁷⁶⁴ Osse (n 6) 918

⁷⁶⁵ Thomas Probert *et al* (n 52)

⁷⁶⁶ Section 14 (1) Public Order Act

⁷⁶⁷ Thomas Probert *et al* (n 52)

The legal provisions on the use of force during assemblies should be consistent with international human rights standards so as to regulate discretion of law enforcement officials.⁷⁶⁸ International standards require that the use of firearms in public assemblies be only for purposes of protecting life.⁷⁶⁹ Accordingly, the provision on use of firearms against rioters should be removed from the Act to prevent excessive use of force by the police during protests. Specifically, the Public Order Act should be amended to provide that firearms shall not be used in policing assemblies but may be applied only where there is need to protect life.

4.5.2 Strengthening the institutional framework

Improving accountability structures does not necessarily entail creating a new accountability entity.⁷⁷⁰ It may entail strengthening the existing accountability structures in terms of capacity and the general ability to hold the police accountable for their acts.⁷⁷¹ Kenya has sufficient accountability structures but the same are to a large extent weak.⁷⁷² A study by the Human Rights Watch Kenya revealed that most cases of excessive use of force by the police often go unaccounted for as the accountability mechanisms in place are ineffective.⁷⁷³ Accordingly, unaccountability for use of excessive force has led to high levels of impunity.⁷⁷⁴ The accountability structures in this regard must be strengthened to reduce the cases of excessive use of force.⁷⁷⁵

There are various national accountability bodies that offer police accountability. These bodies include: the IAU, IPOA, KNCHR, the NPSC, the Office of the Director of Public Prosecutions, Commission on Administrative Justice, human rights NGOs among other entities. This study looks at only the IAU and the IPOA as the entities are the ones tasked with primary

⁷⁶⁸ OSCE/ODIHR & Venice Commission, “*Guidelines on Freedom of Peaceful Assembly*” [2019]10 3rd Edition, Available at < [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)017-e)> accessed 17 August 2019

⁷⁶⁹ Principles 9 and 14 of BPUFF

⁷⁷⁰ UNDOC (n 46) 16

⁷⁷¹ Ibid

⁷⁷² Mikewa Ogada, “*Deepening Police Reforms in Kenya Post-National Accord: Policy Implications*” (July 2016) 4 Available at <<https://www.chrips.or.ke/wp-content/uploads/2017/09/deepening-police-reforms-in-kenya.pdf>> Accessed 18 August 2019

⁷⁷³ HRW, “*Kenya Should Address Unlawful Killings by Police : Inspector General of Police Needs to Push for More Accountability*” [2019] Available at < <https://www.hrw.org/news/2019/07/18/kenya-should-address-unlawful-killings-police>> Accessed 29 August 2019

⁷⁷⁴ Ibid

⁷⁷⁵ Mikewa Ogada (n 146) 4

responsibility of providing internal and external police accountability and oversight. Additionally, the study will also make reference to the Witness Protection Agency (WPA) as the effectiveness of IAU and IPOA's investigations is tied to WPA.

4.5.2.1 Internal police accountability system

4.5.2.1.1 Internal Affairs Unit

The Internal Affairs Unit (IAU) is established by the NPS Act. Its major function is receiving and investigating complaints lodged against NPS staff.⁷⁷⁶ The IAU is also concerned with promoting discipline and keeping records of complaints made against the police.⁷⁷⁷ The IAU is under statutory obligation to work with and report to IPOA among other related bodies.⁷⁷⁸ The IAU has so far registered about 7,909 complaints against the police since its operations started in 2013.⁷⁷⁹

The internal accountability processes within the police departments include:

4.5.2.1.1.1 Identification and Warning

The NPSSOs stipulate that that the police should have visible identification marks.⁷⁸⁰ The NPSSOs also obligate police officers to give caution of intention to the use of firearms, allowing ample time for compliance with the caution.⁷⁸¹ These provisions are however rarely complied with, especially during shoot outs.⁷⁸² Lack of police identification makes it difficult for witnesses of unlawful killings by the police to single out culpable members of the police service thus resulting into unaccountability for excessive use of force.⁷⁸³

In this regard, the NPS through IAU should adopt regulations meant to ensure of strict compliance with these requirements. Successful implementation of these requirements will enhance reduction of cases of abusive use of firearms by the police.

⁷⁷⁶ Section 87 (2) of the National Police Service Act

⁷⁷⁷ Ibid

⁷⁷⁸ Section 87(10)

⁷⁷⁹ Available at the National Police Service website available at <<http://www.nationalpolice.go.ke/2015-09-08-17-56-33/news/279-a-robust-internal-affairs-unit.html>>

⁷⁸⁰ Paragraph 12 Chapter 47, National Police Service Standing Orders

⁷⁸¹ Paragraph 14 Chapter 47, National Police Service Standing Orders

⁷⁸² Kenya National Commission on Human Rights & FIDH, "Kenya's Scorecard on Security and Justice: Broken Promises and unfinished business" (July 2017) 30 available at <<https://www.khrc.or.ke/mobile-publications/civil-political-rights/166-kenya-s-scorecard-on-security-and-justice-broken-promises-and-unfinished-business/file.html>> accessed 10 September 2018. (KNCHR / FIDH)

⁷⁸³ ICJ Kenya (n 16)

4.5.2.1.1.2 Reporting

The NPS Act requires that a report be made to IPOA by the police superiors where police' use of force leads to fatal injuries.⁷⁸⁴ The NPSSOs however require a report for any use of force.⁷⁸⁵ The NPSSOs obligate the officer involved to make a report to his/her superior giving details of what happened.⁷⁸⁶ Further, the NPSSOs obligate the officer-in-charge to report use of force that results into fatal injuries to another different superior.⁷⁸⁷ Thereafter, the superior is required to assess the justification given and give directions thereof.⁷⁸⁸ Additionally, the police superiors are required to send the report to IPOA for purposes of investigations.⁷⁸⁹

In practice however, the police rarely comply with these reporting requirements.⁷⁹⁰ In order to ensure reporting requirement is complied with, reporting procedures should be provided in formal regulations backed with hefty penalties in the event of non-compliance. This will help in achieving IAU and IPOA's mandate. Additionally, the reporting requirements have not been complied with largely because the timelines and procedures are yet to be established by the policing authorities.⁷⁹¹ Accordingly, NPS should adopt the required procedures to enable compliance by the police.⁷⁹²

The IAU is currently facing a number of challenges that have implications in the delivery of its mandate. The challenges include: inadequate staff, inadequate funds, logistical challenges, poor complaints administration and feedback system on cases referred to it and limited working space.⁷⁹³ In a nutshell, the unit submits that funds inadequacy has obstructed implementation of its mandate.⁷⁹⁴ This study therefore proposes an increased budgetary allocation to enable the IAU execute its mandate effectively.

⁷⁸⁴ Schedule 6, National Police Service Act

⁷⁸⁵ Paragraph 6 Chapter 47, National Police Service Standing Orders

⁷⁸⁶ Paragraph 6 Chapter 47, National Police Service Standing Orders

⁷⁸⁷ Paragraph 7 Chapter 47, National Police Service Standing Orders

⁷⁸⁸ Paragraph 6 Chapter 47, National Police Service Standing Orders

⁷⁸⁹ Paragraph 7 Chapter 47, National Police Service Standing Orders

⁷⁹⁰ HRW (n 147)

⁷⁹¹ ICJ Kenya (n 16)

⁷⁹² Ibid

⁷⁹³ National Police Service, "*Internal Affairs Unit (IAU) Annual Report*" [2018] 31 available at <<http://www.iau.go.ke/wp-content/uploads/2019/07/IAU-ANNUAL-REPORT-2018.pdf>> Accessed 10 August 2019

⁷⁹⁴ Ibid

4.5.2.2 External Police Accountability system

4.5.2.2.1 Independent Policing Oversight Authority (IPOA)

The IPOA is established under the IPOA Act.⁷⁹⁵ IPOA's main objective is to provide police accountability in the overall performance of their role.⁷⁹⁶ IPOA's main function among others is to undertake investigations of complaints against police officers received by any person or entity.⁷⁹⁷ IPOA is also mandated to initiate investigations of police officers out of its own motion.⁷⁹⁸ After investigations, IPOA is mandated to recommend prosecution of the officer in question, compensation of the victim and disciplinary action against the officer in question.⁷⁹⁹ For effective execution of its role, IPOA is mandated to work closely with the IAU specifically by monitoring, reviewing and auditing any investigation done by IAU.⁸⁰⁰

IPOA has not been effective in carrying out its main mandate that is investigating police action because of majorly low budgetary allocation and non-cooperation by stakeholders especially the police.⁸⁰¹ Inadequate funding has crippled implementation of IPOA's mandate.⁸⁰² The UN recommends that police oversight bodies should be funded adequately to enable them execute their mandate effectively.⁸⁰³ Accordingly, this study advocates for an increased budgetary allocation for IPOA strengthen its capacity.

Regarding non-cooperation by stakeholders, IPOA states that police officers not only fail to avail required information but also ignore summons to appear before court thus hampering IPOA's investigations.⁸⁰⁴ A report by HRW notes that the police have deliberately undermined IPOA's work.⁸⁰⁵ IPOA confirms this assertion and state that the police have been very hostile to its

⁷⁹⁵ Section 3, IPOA Act

⁷⁹⁶ Section 5, IPOA Act

⁷⁹⁷ Section 6, IPOA Act.

⁷⁹⁸ Ibid

⁷⁹⁹ Ibid

⁸⁰⁰ Ibid

⁸⁰¹ IPOA, "*Strategic plan: 2019 – 2024*" [2019] 16 Available at <<http://www.ipoa.go.ke/wp-content/uploads/2019/05/IPOA-Draft-Strategic-Plan-2019-24.pdf>> accessed 30 September 2019 (IPOA)

⁸⁰² Ibid 16

⁸⁰³ UNODC & OHCHR (n 2) 172

⁸⁰⁴ IPOA, "*Performance Report: January – June 2018*" (2018) 13 Available at <<http://www.ipoa.go.ke/wp-content/uploads/2019/05/IPOA-Performance-Report-Jan-Jun-2018.pdf>> Accessed 01 October 2019

⁸⁰⁵ Human Rights Watch, '*Nairobi Police Executing Suspects : Dozens Killed in Low-Income Areas*' [2019] available at <<https://www.hrw.org/news/2019/07/02/kenya-nairobi-police-executing-suspects>> accessed 26 September 2019

officials.⁸⁰⁶ This assertion has also been upheld by the Courts.⁸⁰⁷ In one instance, the Court found that the Police had frustrated IPOA's investigation of a police officer who had shot a complainant.⁸⁰⁸ According to IPOA chairman, the non-cooperation by police range from giving false evidence to ignoring IPOA summons.⁸⁰⁹ The non-cooperation by the police has adversely affected IPOA's operations.⁸¹⁰ In deed a recent report reveals that since its inception, IPOA has managed only five convictions.⁸¹¹ The implementation of the authority's mandate has been very slow.⁸¹²

This study therefore proposes adoption of regulations by the NPS that penalize police' non-cooperation with IPOA under the Act. Additionally, there should be a policy statement by the NPS requiring full cooperation with IPOA and other investigative authorities.

Non-cooperation by the victim's family and/or witnesses also hinders IPOA in its pursuit of accountability for excessive use of force by the police.⁸¹³ In majority of the cases being investigated by IPOA, witnesses and victims have been unwilling to give evidence because of fear of reprisal by the police.⁸¹⁴ For instance, a report by HRW reveals that in a case involving arbitrary killings in Dandora, witnesses were intimidated by the police.⁸¹⁵ The government needs to strengthen the Witness Protection Agency as suggested in the below section.

4.5.2.2.2 Witness Protection Agency (WPA)

Kenya's Witness Protection Agency through the Witness Protection Programme is mandated to take necessary action to ensure protection of witnesses' safety and welfare.⁸¹⁶ The action to be taken include providing bodily protection and altering of witnesses' identity.⁸¹⁷

⁸⁰⁶ IPOA (n 175) 9

⁸⁰⁷ Law Society of Kenya & 3 others v Attorney General & 3 others [2016] eKLR

⁸⁰⁸ Ibid

⁸⁰⁹ Osse (n 6) 915

⁸¹⁰ IPOA (n 175) 9

⁸¹¹ Human Rights Watch (n 179)

⁸¹² MSJC (n 134) 38

⁸¹³ KNCHR / FIDH (n 156) 31

⁸¹⁴ Ibid

⁸¹⁵ HRW (n 179)

⁸¹⁶ Section 4(1), Witness Protection Act

⁸¹⁷ Section 4(2), Witness Protection Act

One of the agency's major challenge is insufficient staffing capability.⁸¹⁸ The Witness Protection Agency has inadequate staffing capacity due to a constrained budget.⁸¹⁹ The small budgetary allocation constrains the agency to take a small number of witnesses.⁸²⁰ In this regard, the government should improve the budgetary allocation of the agency to enable it offer adequate protection to vulnerable witnesses.

Continuing actual threats against by witnesses from released suspects is another challenge facing the agency.⁸²¹ The agency states that many criminal suspects who are released from custody by courts threaten and kill witnesses in avenge missions.⁸²² Improved budgetary allocation will go a long way in offering full protection to witnesses.

The Witness Protection Act excludes provisions on protection of witnesses during investigations. According to the Act, the beneficiaries of the state's protection are only those who have already written down statements in criminal proceedings or agreed to testify in court or any related forum of inquiry.⁸²³ The Act should be amended to include provisions on witness protection during investigations as witnesses are generally vulnerable even at the investigation stage.

Witness protection is key in improving police accountability for excessive use of force by the police thus it is essential for the Witness Protection Agency to be strengthened as proposed above.

4.6 Conclusion

The excessive use of force by the police in Kenya is a continuing policing challenge which has persisted for many years.⁸²⁴ This chapter has discussed viable ways of controlling the use of excessive force by the police. This chapter has built a case for a change in policing culture specifically the need to change the view of use of force from normal to abnormal and the need to

⁸¹⁸ Wilson Kiprono, "*Challenges Facing Implementation of Witness Protection Program in Kenya*" (A PhD Thesis, Egerton University 2016) 81

⁸¹⁹ Witness Protection Agency, "*The role of Kenya's Witness Protection Agency explained*" [2016] 1 Available at <http://www.wpa.go.ke/wp-content/uploads/2016/10/capital_fm.pdf> Accessed 23 May 2019

⁸²⁰ Ibid 3

⁸²¹ Witness Protection Agency, "*New Bill to boost witness protection agency*" [2016] Available at <<http://www.wpa.go.ke/wp-content/uploads/2016/09/New-Bill-to-boost.pdf>> Accessed 23 May 2019

⁸²² Ibid

⁸²³ Section 2, Witness Protection Act

⁸²⁴ Thomas Probert *et al* (n 52)

change from aggressive policing to compassionate policing through training and socialization. This chapter has also argued for the need to improve police' welfare primarily by improving the working and living conditions of the police. Further, this chapter has made a case for the necessity of improving police-public relationship by implementing community policing through *nyumba kumi* initiative. Lastly, this chapter has illustrated how the existing legal and institutional framework on the use of force by the police can be strengthened.

The key problem is lack of accountability for the abusive use of force by the police in Kenya.⁸²⁵ Accountability has been hindered by inadequate institutional capacity in the entities tasked with providing police accountability and oversight.⁸²⁶ The State and the policing authorities should adopt the above proposals as the same can drastically reduce the use of excessive force by the police if implemented fully.

⁸²⁵ Kennedy Mkutu & Gerald Wandera, "*Policing the Periphery: Opportunities and Challenges for Kenya Police Reserves.*" [2013] 15 Available at < <http://www.smallarmssurvey.org/fileadmin/docs/F-Working-papers/SAS-WP15-Kenya-Policing-the-Periphery.pdf>> Accessed 19 July 2019

⁸²⁶ Ibid

CHAPTER FIVE (5)

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary

The policing role is essential for the existence of any given society.⁸²⁷ Apart from the conventional policing role of maintaining law and order and enforcing the law, the police also play an important role in promoting democracy and human rights protection.⁸²⁸ The use of force is part and parcel of policing as it enables the police to effectively uphold the law.⁸²⁹

This study's main objective was to discover and suggest ways of curbing the use of excessive force by the police in Kenya. Chapter one outlined the introduction to the study. A brief background on the use of excessive force by the police was highlighted covering pre-2010 Constitution era and post-2010 Constitution era. The background of the study revealed that the use of excessive force by the police in Kenya continues to be a culture in the police institution even after promulgation of the 2010 Constitution.⁸³⁰

Prior to the 2010 Constitution, the Police force was marked with high levels of impunity occasioned by lack of accountability.⁸³¹ The Court⁸³² has raised doubt whether police reforms occasioned by Kenya's 2010 Constitution have had any significant effect on the work of the police.⁸³³ In deed a report by KNHRC reveals that Kenyan police are rarely required to give an account for their use of force and the offenders are rarely brought to book despite the new policing accountability structures occasioned by the 2010 Constitution.⁸³⁴ This study has shown

⁸²⁷ ACHPR, “*Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa*” (2006) Available at < <https://www.achpr.org/sessions/resolutions?id=111>> Accessed 12 September 2019

⁸²⁸ Ibid

⁸²⁹ Seumas Miller, *Shooting to Kill : The Ethics of Police and Military Use of Lethal Force* (Oxford University Press 2016) 2

⁸³⁰ Amnesty International, “*Police Reform in Kenya: A Drop in the Ocean*” [2013] Available at < https://www.amnesty.nl/content/uploads/2016/11/kenya_afr_32_001_2013.pdf?x62907> Accessed 10 July 2019 (Amnesty 2013)

⁸³¹ Law Society of Kenya & 3 others V. Attorney General & 3 others [2016] eKLR

⁸³² Ibid

⁸³³ Ibid

⁸³⁴ Kenya National Commission on Human Rights & FIDH, “*Kenya's Scorecard on Security and Justice: Broken Promises and unfinished business*” (July 2017) 13 available at < <https://www.khrc.or.ke/mobile-publications/civil-political-rights/166-kenya-s-scorecard-on-security-and-justice-broken-promises-and-unfinished-business/file.html>> accessed 10 September 2018. (KNCHR / FIDH)

that indeed cases of excessive use of force by the police keep rising despite the existence of a legal framework regulating the use of force.⁸³⁵

The legal framework on the use of force was discussed in chapter two of this study. It involves international, regional and national laws governing the use of force by the police. At the international level, LOLE⁸³⁶ governs the use of force. LOLE is composed of international human rights law, general principles of law and the customary international law.⁸³⁷ This study established that the key component of LOLE is a general prohibition of the use of force, especially lethal force.⁸³⁸ LOLE emphasizes that using lethal force should only be in pursuit of protection of one's life or the life of other people but not in protection of property.⁸³⁹ LOLE stipulates that the power to use force by the police should only be exercised in pursuit of a legitimate objective.⁸⁴⁰ Therefore use of force outside legal precincts is unlawful and the offending officials should be held liable.⁸⁴¹

As a means of preventing the use of excessive force by the police, LOLE requires States to implement strict rules governing police' use of force and firearms.⁸⁴² States are also required to ensure that the police are equipped with equipment that enhance self-defence for instance bullet proof apparel and vehicles.⁸⁴³ LOLE also obligates the State to ensure that during recruitment of potential officers, the applicants are screened appropriately before being admitted as officials.⁸⁴⁴ LOLE further requires that potential officers possess physical and mental abilities needed for law enforcement activities.⁸⁴⁵ Further, LOLE stipulates that apart from initial training, the admitted officers should undergo continuous training on human rights standards of policing.⁸⁴⁶

⁸³⁵ Ibid 17

⁸³⁶ The Law of Law Enforcement

⁸³⁷ Stuart Casey-Maslen & Sean Connolly, *Police Use of Force Under International Law* (Cambridge University Press) 79

⁸³⁸ UNODC & OHCHR, "*Resource Book on the Use of Force and Firearms in Law Enforcement*" [2017]1 Office of the United Nations High Commissioner for Human Rights and United Nations Office on Drugs and Crime. Available at <https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf> accessed 11 July 2019

⁸³⁹ Seumas Miller (n 3) 22

⁸⁴⁰ UNODC & OHCHR (n 12) 1

⁸⁴¹ Article 3, UN Code of Conduct for Law Enforcement Officials

⁸⁴² Principle 1, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF)

⁸⁴³ Principle 2, BPUFF

⁸⁴⁴ Principle 18, BPUFF

⁸⁴⁵ Principle 18, BPUFF

⁸⁴⁶ Ibid

Additionally, LOLE stipulates that the police should be accountable to all established accountability agencies.⁸⁴⁷ As a means of accountability, LOLE obligates the State to establish an operational reporting system.⁸⁴⁸ The State is required to act on the reports and ensure the same are forwarded to the relevant authorities for review.⁸⁴⁹ Further, LOLE obligates law enforcement officials to undertake impartial investigations in cases involving the use of force.⁸⁵⁰

At the regional level, the use of force is governed by the Banjul Charter. The Banjul Charter has similar provisions as LOLE on the use of force by the police. In fact, the ACHPR has urged its member states to ensure their legal framework on the use of force is consistent with the international standards.⁸⁵¹

At the national level, the study established that the Constitution gives general policing guidelines and guarantees key human rights which all state agents should respect and protect including the right to life and the right to liberty and security of the person.⁸⁵² The study noted that the Constitution is supplemented by the provisions of policing statutes key among them the NPS Act which has direct provisions on the use of force by the police.⁸⁵³ The study further established that the NPS Act is supplemented by the NPSSOs which provide further operational details regarding the use of force. The NPS Act and the NPSSOs provide the principles on the use of force that is necessity, legality, precaution and proportionality.⁸⁵⁴ Additionally, the NPS Act creates accountability processes such as reporting, identification and warning requirements.⁸⁵⁵

Chapter three of this study outlined the best practices for controlling the use of excessive force by the police. Firstly, community policing was discussed as a top strategy for reducing the use of excessive force.⁸⁵⁶ The study highlighted the major components of community policing which

⁸⁴⁷ ICRC, “*International Rules and Standards for Policing*” [2015] 18 Available at <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0809.pdf>> Accessed 12 December 2018

⁸⁴⁸ Principle 22, BPUFF

⁸⁴⁹ Principle 22, BPUFF

⁸⁵⁰ Principles 6, 11(f), 22 and 23, BPUFF

⁸⁵¹ ACHPR, “*General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)*” [2015] 14 Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held in Gambia.

⁸⁵² Article 238(2)(b), Article 244, Article 26 and Article 29

⁸⁵³ Schedule 6, National Police Service Act

⁸⁵⁴ Ibid

⁸⁵⁵ Ibid

⁸⁵⁶ Victor E. Kappeler & Larry K. Gaines, *Community Policing: A Contemporary Perspective* (6th Edition Anderson Publishing 2011) 4

are partnership between the public and the police, departmental restructuring that allows for implementation of community policing and problem solving techniques that address community's problems.⁸⁵⁷ The study noted that a successful community policing program should realize improved social cohesion in the community.⁸⁵⁸ In this regard, the study concluded that the implementation of community policing improves police-community relationship therefore drastically reduces the need for use of force by the police.⁸⁵⁹

Improving the welfare of the police especially the working and living conditions was also argued as a strategy for reducing the use of excessive force by the police.⁸⁶⁰ The study also presented a case for adoption of a continuum on the use of force setting out guidelines on a variety of choices available to the police when the need to use force arises.⁸⁶¹ In this regard, the study identified the typical force options widely used by police departments: police presence, voice authority, police body control, less-lethal means and lethal means.⁸⁶²

The study also made a case for effective training of the police on the use of force as an effective remedy in controlling the use of excessive force.⁸⁶³ The study established that well trained officers have little to no complaints against them on violation of legal structures on the use of force.⁸⁶⁴

The study also identified internal and external accountability processes and structures in chapter three. The study noted that accountability is essential for preventing abuse in the use of force by the police and promoting openness in the execution of policing role.⁸⁶⁵ The study highlighted reporting, complaints system, investigations, body cameras and command responsibility as some

⁸⁵⁷ USCCR, “*Police Use of Force: An Examination of Modern Policing Practices*” (2018) 97 Available at <usccr.gov/pubs/2018/11-15-Police-Force.pdf> Accessed 12th February 2020

⁸⁵⁸ P.Saskia Bayerl (ed) *et al*, *Community Policing – A European Perspective : Strategies, Best Practices and Guidelines* (Springer International Publishing 2017) 11

⁸⁵⁹ Victor E. Kappeler & Larry K. Gaines (n 30) 4

⁸⁶⁰ Dwayne Orrick, “*Best Practices Guide: Recruitment, Retention, and Turnover in Law Enforcement*” Available at <<https://www.theiacp.org/sites/default/files/2018-08/BP-Recruitment.pdf>> Accessed 10 December 2019

⁸⁶¹ USCCR (n 31) 11

⁸⁶² Ibid

⁸⁶³ John Vespucci, *Education Level and Police Use of Force: The Impact of a College Degree* (Springer 2020) 17

⁸⁶⁴ George Wood et al “*Procedural Justice Training Reduces Police Use of Force and Complaints Against Officers*” Princeton University May 2020 Available at <pnas.org/content/117/18/9815> Accessed 19 July 2020

⁸⁶⁵ UNDOC, “*Handbook on Police Accountability, Oversight and Integrity*” Criminal Justice Handbook Series, United Nations Publication [2011] available at <https://www.unodc.org/pdf/criminal_justice/Handbook_on_police_Accountability_Oversight_and_Integrity.pdf> Accessed 10 April 2020.

of the internal mechanisms and processes that police departments should adopt.⁸⁶⁶ In addition to internal accountability, the study made a case for police' external accountability to the state through the executive, judiciary and parliament.⁸⁶⁷ Additionally, the study also made a case for external accountability of the police to the public, independent bodies, regional and international bodies.⁸⁶⁸

Chapter four discussed ways of eradicating the use of excessive force in Kenya. Firstly, the study argued that the NPS should start by changing the police culture through appropriate training and socialization of the police. The study particularly underscored the need to change the view of use of force in policing from normal to abnormal. Additionally, the study advocated for a change in policing style from aggressive to compassionate policing. The chapter further noted that apart from academic and physical fitness requirements, the NPSC should also consider integrity, criminal record and psychological fitness of the police applicants. Additionally, the chapter emphasized the need for effective and regular training of the police on the use of force.

The chapter also made an argument for improvement of the living conditions and working environment of the police officers to enable them work with motivation.⁸⁶⁹

Additionally, the chapter also argued for the improvement of police – public relationship as a way of eradicating the use of excessive force in Kenya. The study argued that a good public image of the police is vital for proper execution of the policing role.⁸⁷⁰ In this regard, the study established that the use of excessive force by the police is often linked to poor relationship between the police and the public.⁸⁷¹ Accordingly, the study argued that the need for use of force by the police is drastically decreased in environments where the police and the public relate well.⁸⁷² The study presented a case for the implementation of the “*Nyumba kumi*” initiative by the government as a way of improving the relationship between the police and the communities

⁸⁶⁶ USCCR (n 31)

⁸⁶⁷ Ibid

⁸⁶⁸ Ibid

⁸⁶⁹ Anneke Osse, “*Police reform in Kenya: A Process of ‘Meddling Through’*” [2016] 915 International Journal of Research and Policy available at <

<https://www.tandfonline.com/doi/pdf/10.1080/10439463.2014.993631?needAccess=true>> accessed 3 August 2019

⁸⁷⁰ Karen M. Hess, *Introduction to Law Enforcement and Criminal Justice* (Wadsworth Publishing, 9th Edn, 2008)118

⁸⁷¹ USDOJ, “*Police Use of Excessive Force: A Conciliation Handbook for the Police and the Community*” (2002) Available at < <https://www.justice.gov/archive/crs/pubs/pdexcess.htm>> Accessed 12 January 2019

⁸⁷² Ibid

they serve. The study identified some key challenges that threaten the implementation of the initiative. These include lack of trust between the police and the public,⁸⁷³ inadequate funds to fully implement the program⁸⁷⁴ and public misunderstanding of the concept of community policing.⁸⁷⁵ In this regard, the study advocated for an increase in the budget for community policing, public awareness of the initiative, adoption of clear procedures on the working of community policing and making the improvement of police – public relationship a top priority.⁸⁷⁶

The study also established that scanty and incomplete data on instances of police’ use of force contributes to distrust of the police by the public.⁸⁷⁷ Accordingly, the study advocated for transparency and accountability in policing through establishment of a comprehensive national data base for all incidents of use of force by the police.⁸⁷⁸ The study argued that public data on all incidents of use of force by the police will to a large extent curb the increasing cases of use of excessive force by the police.

Lastly, chapter four of the study made an argument for strengthening the existing legal and institutional framework on the use of force to help in reducing the excessive use of force by the police. Regarding the legal framework, the study recommended adoption of rules on the use of force as per the requirement of the Sixth Schedule of the NPS Act. As relates the use of firearms, the study proposed the adoption and implementation of regulations: that outline situations where firearms maybe used, provisions prohibiting unreasonable use of firearms, provisions on warning before firing, provisions controlling issuance and storage of firearms, provisions on training of police on use of firearms, provisions on firearms use’ testing and provisions on reporting

⁸⁷³Douglas L. Kivoi, “Community Policing in Kenya: Way Forward” Available at <<https://kippra.or.ke/index.php/resource-centre/blogs/27-community-policing-in-kenya-way-forward>> Accessed 17 July 2020

⁸⁷⁴ Ibid

⁸⁷⁵ National Police Service, “Community Policing Information Booklet: Building Safer Communities Together” (2017) 15 Available at <<http://www.nationalpolice.go.ke/downloads/category/20-nps-community-policing-information-booklet.html?>> Accessed 11 May 2020

⁸⁷⁶ Ibid

⁸⁷⁷ USCCR (n 31) 2

⁸⁷⁸ Ibid 4

procedures.⁸⁷⁹ Additionally, the study made a case for amendment of the NPS Act and Public Order Act to provide that the use of lethal force should be only for purposes of protecting life.

As regards strengthening of the institutional framework, the study proposed that reporting, identification and warning requirements within the internal accountability system should be made mandatory with hefty penalties upon default to improve compliance levels.

The study established that the IAU is hindered in its internal investigative role by inadequate funding. In deed the study found out that inadequate funding has obstructed implementation of IAU mandate.⁸⁸⁰ The study therefore proposed an increased budgetary allocation to enable the IAU execute its mandate effectively.

Further, the study established that IPOA has not been effective in investigating excessive use of force by the police because of majorly low budgetary allocation and non-cooperation by stakeholders especially the police.⁸⁸¹ Indeed the study established that inadequate funding has crippled implementation of IPOA's mandate.⁸⁸² Accordingly, the study advocated for an increased budgetary allocation for IPOA to enable it carry out its duties effectively.

Regarding non-cooperation by the police, the study advocated for adoption of regulations that penalize police' non-cooperation with IPOA. Additionally, the study advocated for adoption by the NPSC of a policy statement requiring full cooperation with IPOA. Regarding non-cooperation by witnesses, the study proposed increased budgetary allocation for the Witness Protection Agency as the study established that inadequate funding hinders its ability to protect witnesses.⁸⁸³ The study also made a case for amendment of the Witness Protection Act to include provisions on protection of witnesses during investigations to encourage witnesses who are not engaged in criminal proceedings to volunteer information to IPOA.

⁸⁷⁹ Section 125 of the National Police Service Act, Paragraph 8, Part B of the Sixth Schedule of the National Police Service Act and Principle 11, BPUFF

⁸⁸⁰ National Police Service, "*Internal Affairs Unit (IAU) Annual Report*" [2018] 31 Available at <<http://www.iau.go.ke/wp-content/uploads/2019/07/IAU-ANNUAL-REPORT-2018.pdf>> Accessed 10 August 2019

⁸⁸¹ IPOA, "*Strategic plan: 2019 – 2024*" [2019] 16 Available at <<http://www.ipoa.go.ke/wp-content/uploads/2019/05/IPOA-Draft-Strategic-Plan-2019-24.pdf>> accessed 30 September 2019 (IPOA)

⁸⁸² Ibid

⁸⁸³ Witness Protection Agency, "*The role of Kenya's Witness Protection Agency explained*" [2016] 1 Available at <http://www.wpa.go.ke/wp-content/uploads/2016/10/capital_fm.pdf> Accessed 23 May 2019

5.2 Conclusion

The police play a crucial role in maintaining law and order which is vital for the existence of any given society.⁸⁸⁴ The use of force is undeniably essential for the achievement of policing aims.⁸⁸⁵

In deed in cases involving the use of force by the police, Courts take full regard of the dangerous circumstances the police often find themselves in while executing their role.⁸⁸⁶ The Courts however insist that force must be used reasonably and proportionately.⁸⁸⁷ The use of unreasonable force / excessive force must be abolished by all legal means possible.⁸⁸⁸ This is because the impact of excessive use of force goes beyond the involved officer and the victim.⁸⁸⁹ Excessive use of force jeopardizes the legitimacy of the policing institution and destroys the relationship between the police and the public.⁸⁹⁰ Police legitimacy is key in policing as the police rely heavily on public cooperation in the execution of their role.⁸⁹¹ Addressing the police' use of excessive force therefore serves the interest of both the police and the public.⁸⁹²

Controlling the use of force by the police is one of the most notable challenges facing policing authorities globally.⁸⁹³ The correct policing approach involves striking the right balance in serving the interest of the nation, protecting the society and acting with high levels of professionalism and discipline.⁸⁹⁴ Achieving this critical balance is a daunting task as the police often encounter resistance from hostile and uncooperative civilians.⁸⁹⁵ Regardless of the policing situations, the police officers should find a way of carrying out their law enforcement role without jeopardizing their safety and the safety of third parties and the public at large.⁸⁹⁶

⁸⁸⁴ USCCR (n 31) 3

⁸⁸⁵ John Vespucci (37) 3

⁸⁸⁶ Charles Munyeki Kimiti V. Joel Mwenda & 3 others[2010] eKLR

⁸⁸⁷ Ibid

⁸⁸⁸ John Vespucci (n 37) 3

⁸⁸⁹ Ibid

⁸⁹⁰ Ibid

⁸⁹¹ Karen M. Hess (n 44) 118

⁸⁹² UNDOC (n 39) 8

⁸⁹³ International Association of Chiefs of Police (IACP) "*National Consensus Policy and Discussion Paper on Use of Force*" (2020)5 Available at < https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf> Accessed 30 July 2020

⁸⁹⁴ UNDOC (n 39) 6

⁸⁹⁵ International Association of Chiefs of Police (IACP) (n 67) 5

⁸⁹⁶ Geoffrey P. Alpert & Roger G. Dunham, *Understanding Police Use of Force: Officers, Suspects and Reciprocity* (Cambridge University Press, 2004) 18

In carrying out police duty of crime detection and prevention, the police should always uphold human rights of all parties including suspects.⁸⁹⁷ Police accountability and oversight helps in building public trust in the police and induces the police to undertake policing action with discipline and professionalism while having regard to human rights.⁸⁹⁸ Effective accountability of policing action leads to a healthy relationship between the police and the public thereby contributing to overall safety of communities.⁸⁹⁹

Policing is an up-hill task by its nature; however compliance with legal, professional and ethical standards must be pursued.⁹⁰⁰ The prevention of excessive use of force can be achieved if effective accountability strategies are maintained by the government.⁹⁰¹ A deliberate step in implementing the best practices discussed in chapter three of this study and the specific proposals outlined in chapter four will lead to a significant drop in the number of cases involving the use of excessive force by the police in Kenya. This will create public trust in the police and ultimately the police will achieve civilian cooperation in combating crime thereby leading to safe communities.

5.3 Recommendations

This study proposes the following recommendations in a bid to curb the use of excessive force by the police in Kenya.

5.3.1 To Government of Kenya

- a. Increase budgetary allocation for institutions and agencies tasked with exercising police oversight especially IPOA, IAU and Witness Protection Agency.
- b. Increase budgetary allocation for NPS to enable it fully implement community policing
- c. Increase budgetary allocation for NPSC to enable it improve the living and working conditions of the police and to conduct regular training of the police

⁸⁹⁷ ICRC (n 21) 20

⁸⁹⁸ ACHPR (n 1)

⁸⁹⁹ Ibid

⁹⁰⁰ ICRC (n 21) 64

⁹⁰¹ Ibid 22

5.3.2 To Parliament and the Office of the Attorney General

- a. Review provisions on use of firearms in the National Police Service Act and the Public Order Act and limit their use to protection of human life.
- b. Review provisions of the Witness Protection Act to include protection of witnesses during investigations as well.

5.3.3 To the National Police Service

- a. In conjunction with the A.G's office, establish regulations on the use of force and firearms as per the Sixth Schedule of the National Police Service Act
- b. In conjunction with the A.G's office, establish procedures and regulations requiring mandatory compliance with reporting, identification and warning requirements on the use of force
- c. In conjunction with the A.G's office, establish regulations requiring police' mandatory cooperation with IPOA with specific penalties upon failure to honor IPOA's summons for questioning and production of relevant documents
- d. Create awareness on community policing within the police institution and also within the communities
- e. Dedicate a reasonable budget for implementation of community policing programs
- f. Train and socialize new and serving police officers on the abnormality of use of force
- g. Raise awareness among the police on human rights standards
- h. Inculcate constitutional policing principles of integrity, professionalism, transparency, discipline, competence, accountability and respect for human rights and freedoms
- i. Establish a national data-base on incidents involving police' use of force
- j. Review and update Service Standing Orders on purposes for use of firearms to align them with international standards.
- k. Establish a use of force continuum
- l. Finalize and implement the draft Police Code of Conduct
- m. Establish programs that bring the police and the communities they serve together to foster police-public relationship.

5.3.4 To the National Police Service Commission

- a. Update the police' recruitment and screening criteria to include psychological fitness and integrity requirements.
- b. Conduct regular training of the police officers on the use of force and particularly de-escalation techniques.
- c. Publicize the police training curricula for scrutiny
- d. Dedicate a reasonable police budget towards the improvement of police' living and working conditions.
- e. Discipline offenders in a way that acts as a deterrence to potential offenders
- f. Procure appropriate protective equipment and clothing for the police to reduce the need to use force.

5.3.5 To IPOA and IAU

- a. Solicit funds from donors to supplement government funds
- b. Ensure the capacity of staff is strengthened through regular training of staff
- c. Create public awareness about IPOA and IAU and the complaints procedure

5.3.6 TO KNHCR and Human Rights NGOs

- a. Investigate and document the use of excessive force by the police and put IPOA and IAU to task over accountability for the police action
- b. Cooperate with IPOA and IAU to bring to book the culprits

5.3.7 To the media

- a. Create public awareness about the existing complaints procedures on police use of excessive force
- b. Document and report incidents involving police' use of excessive force by the police to enhance police accountability

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