

**CENTRAL EUROPEAN UNIVERSITY
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HUMAN RIGHTS**

**ACCOUNTABILITY OF THE POLICING SECTOR IN
KENYA: BORROWING FROM THE SOUTH AFRICAN
AND NORTHERN IRELAND EXPERIENCES**

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EXECUTIVE SUMMARY

The policing function in any society plays a vital role, by ensuring that law and order, as well as protection of human rights is secured. However, in many emerging democracies or societies in transition, the policing function has mostly been associated with systemic and gross human rights violations. Kenya is one of the many nations that has experienced human rights violations that are gross, if not egregious in nature, and the same have been perpetrated by the police. Reforms within the police sector have been nothing but a mirage, with the different political regimes promising to institute effective reform and accountability mechanisms.

This thesis seeks to address the need for effective accountability mechanisms within the Kenyan policing system. The thesis shall borrow best practices from South Africa and Northern Ireland, being two countries that have emerged from conflict, political turmoil and policing systems that were marred with allegations of human rights violations, but have since established independent and effective accountability bodies within their policing systems.

The first part of the thesis shall introduce the theoretical framework and historical background of policing in the jurisdictions under review, as well as giving the normative framework. Chapters three and four shall closely analyse the concept of effective accountability mechanisms and shall conclude by recommending the establishment of the office of the Kenyan Police Ombudsman. This office shall have the sole mandate of investigating all complaints preferred against the police by members of the public.

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The compilation of this thesis would not have been possible without the grace of God and the help of my family and friends. To this I say, *asante sana*. To my parents, siblings and brother-in-law, I love you all and will forever be indebted to you, as you believed in me. I did not think I would have made it without a full scholarship, but you encouraged and financed my studies. To Abby, your smile kept me going.

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To God, your Grace has been and still is sufficient, may all the glory and honour be unto you. I dedicate this thesis to all Kenyan families who have been victims of police brutality.

ABBREVIATIONS AND ACRONYMS

CAT- Convention against Torture

CIPEV- Commission of Inquiry on Post-Election Violence

ECHR- European Convention on Human Rights

ECtHR- European Court on Human Rights

ICD- Independent Complaints Directorate

ICCPR- International Covenant on Civil and Political Rights

IMLU- Independent Medico-Legal Unit

IPID- Independent Police Investigative Directorate

IRA- Irish Republican Army

KNCHR- Kenya National Commission on Human Rights

NHRI- National Human Rights Institution

OPCAT- Optional Protocol on the Convention against Torture

PCSC- Public Complaints Standing Committee

PSNI- Police Service of Northern Ireland

RUC- Royal Ulster Constabulary

TBVC- Self-Governing Territories and Development Regions

UDHR- Universal Declaration on Human Rights.

INTRODUCTION

The security system in many parts of the world is a true reflection of the political regime of its government, and thus, in many instances has been used by the government of the day to propagate their political agenda. In developing countries and other emerging democracies, the security system has been characterised by blatant disregard of human rights principles, due process and the rule of law.¹ The law enforcing agencies ideally are supposed to be at the forefront of upholding the law as well as human rights standards. Experience however, reveals the contrary.

This paper will specifically deal with the policing sector as an essential component of the security system, which on many occasions has been associated with abuse of human rights. The thesis shall be a comparative analysis between Northern Ireland and South Africa on the one hand, and Kenya on the other. This thesis shall highlight the extent of human rights violations experienced in Kenya and propose the most effective model that will ensure that the Kenyan Police uphold the law and respect the internationally recognised human rights standards.

The paper will borrow best practises in the policing sector from both Northern Ireland and South Africa highlighting their reform and accountability mechanisms, and the success of the same in making a human rights compliant policing sector. The paper will argue that the problems in the Kenyan policing sector may best be resolved through the establishment of an independent accountability body, namely, a Police Ombudsman.

¹ HILLS ALICE, *Policing Africa- Internal Security and the Limits of Liberalization* :Lynne Reinner Publishers (2000) -see Preface

The Kenyan security sector comprises of the police, military and paramilitary units. The security sector as a whole has often been associated with blatant abuse and gross violations of human rights meted upon its citizens. A case in point is the atrocities committed by the Kenya Military Force on hundreds of members of a suspected vigilante group in the Mount Elgon region of Kenya, where gross human rights violations were reported. These included extra-judicial killings and disappearances, torture and unlawful detention of the suspects.²

As already mentioned however, this paper shall restrict itself only to the police sector. The Kenya Police have in the past, and specifically towards the end of the year 2007, been associated with systemic gross human rights violations, specifically the extra-judicial killings and disappearances of hundreds of young men in Kenya believed to belong to an outlawed sect known as the ‘*Mungiki*’. The Government’s human rights watchdog and the country’s National Human Rights Institution (NHRI), the Kenya National Commission on Human Rights (KNCHR), together with other local non-governmental organisations conducted investigations and documented some of these atrocities committed against ‘*Mungiki*’. The KNCHR’s report³ entitled ‘*The Cry of Blood: Report on Extra-judicial killings and Disappearances - September 2008*’ confirmed at least **349** deaths of young men suspected to belong to the ‘*Mungiki*’ who

² For a full account of the atrocities committed at the Mount Elgon Region, Kenya, see: “*Double Tragedy*”, Report on Medico-Legal Documentation of Torture and Related Violations in Mount Elgon “*Operation Okoa Maisha*” August 2008- An Investigative Report by the Independent Medico-Legal Unit (IMLU), available at http://www.imlu.org/index.php?option=com_content&task=blogcategory&id=17&Itemid=30 (follow “Report on Medico-Legal Documentation of torture and related violations in Mt. Elgon”

³ See full report of the Kenya National Commission on Human Rights (KNCHR) dubbed “*The Cry of Blood*” : Report on Extra-judicial Killings and Disappearances- September 2008, available at http://www.marskenya.org/pdfs/2009/03/KNCHR_crimes-against-humanity-extra-judicial-killings-by-kenya-police-exposed.pdf.

For an overview of the report, see the KNCHR website : available at <http://www.knchr.org/pidief/overview.pdf>

were reportedly killed or ‘disappeared’ by the Police between 2007 and 2008. Several other human rights activists and informers involved in these related investigations have also died under mysterious circumstances, and these deaths have been attributed to the police.⁴ Further, the report of the Commission of Inquiry on Post- Election Violence (CIPEV)- popularly known as the ‘*Waki Commission of Inquiry*’⁵ established after the post-election violence that occurred in Kenya in 2007-revealed that at least **405** fatalities⁶ were confirmed. These two were attributed to the Kenya Police service.⁷

In a visit by the Special Rapporteur on Extra-judicial, Summary and Arbitrary Executions, Philip Alston, in February 2009, the Rapporteur summarised the acts of the Kenya Police as follows: “killings by the police are widespread. Some killings are opportunistic, reckless or personal. Many others are carefully planned”.⁸

Kenya as a state is bound by international human rights treaties and standards and is a signatory state to, *inter alia*, the African Charter on Human and Peoples’ Rights⁹, the Universal Declaration on Human Rights¹⁰ and the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.¹¹

⁴ See report released by a local organisation- Mars Group Kenya on the assassination of two human rights activists, Mr. Oscar Kamau King’ara and John Paul Oulu, on 6th March 2009, information available at, <http://blog.marsgroupkenya.org/?p=627>

⁵ The Commission of Inquiry into the Post Election Violence (CIPEV) Final Report, available online at <http://www.communication.go.ke/media.asp?id=739>

⁶ *Ibid* at 417

⁷ See *ibid* at 417 and 418, where the excessive use of force by the police has been discussed, leading to the deaths of at least 405 people.

⁸ PHILIP ALSTON *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* - in his Mission to Kenya (16-25 February 2009).

⁹ Kenya ratified the African Charter on Human and Peoples’ Rights (Banjul Charter) on 23 February 1992, see details at <http://rsq.oxfordjournals.org/cgi/reprint/18/1/222.pdf>.

¹⁰ Full text of the Universal Declaration on Human Rights, available online at <http://www.un.org/en/documents/udhr/>

¹¹ Full text of the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment, available online at <http://www.hrweb.org/legal/cat.html>.

The Government of Kenya is cognisant of the problems within its security forces and specifically the police service. Questions of reforms and accountability have been on the Government agenda for many years, and yet no real reform has been experienced to date. The Kenyan Government has on many occasions formed different Commissions, Boards and Inquiries, when excesses of the police force have been reported. However, recommendations proposed from such Inquiries are hardly ever implemented or are partially implemented as shall be discussed in chapter three herein.

This paper will seek to borrow best practise from the post-apartheid South Africa, as the State also experienced problems within its police force and rapid reforms had to be implemented during its post-apartheid reform period. Further, this paper shall also discuss the model adopted in Northern Ireland, with its establishment of the office of the Police Ombudsman.

Generally, this paper will endeavour to answer the following major question: What workable reforms and accountability measures can Kenya adopt in its policing sector? Under this umbrella, the paper shall further seek to respond to the following sub-questions:

- What are the minimum internationally recognised human rights standards that are applicable in the policing sector?
- Whether there are mechanisms in place within the Kenyan policing sector for accountability purposes, and if so, how effective have they been in the past?

- What are the best practices in other jurisdictions that Kenya may need to adopt to make their police service adhere to human right standards?

Chapter one shall deal with theoretical concepts and definitions that relate to policing. It shall further discuss the historical background of policing in the jurisdictions under review, providing reasons that led to the campaign on police sector reform. Further, the problems in the policing sector in Kenya shall be discussed in detail, and the systemic human rights violations perpetrated by the police shall be elaborated. The thesis shall build a case to show that the level of impunity within the police force has continued to go unabated, and hence, there is need for urgent and long-term intervention.

Chapter two shall first discuss the international obligations of policing. It shall also provide the normative framework on policing by highlighting the international and regional legal instruments that govern police actions. Human rights violations commonly violated by the police shall be discussed. The chapter shall through the use of case law, show the development of the policing problem and how the same has been tackled through jurisprudence and the courts.

Chapter three shall introduce the notion of police accountability by discussing accountability mechanisms in the policing sector. It shall discuss the various accountability mechanisms that have been adopted in the jurisdictions under review and discuss their effectiveness. The chapter shall build a case for the establishment of an independent accountability body, the office of the Police Ombudsman in Kenya.

The forth chapter shall have recommendations of best practices to adopt from the South African and Northern Ireland jurisdictions for a reformed, effective and accountable policing sector in Kenya. The paper shall reflect the recent developments in Kenyan Constitutional dispensation and its effects on the policing sector in Kenya, and further build a case based on the recent developments for the establishment of a hybrid body, the office of the Police Ombudsman, which is unique to the special circumstances in Kenya. The paper will conclude with a summary of the recommendations proposed.

CHAPTER 1

THEORETICAL CONCEPT AND BACKGROUND OF POLICING AND HUMAN RIGHTS

1.1 DEFINITIONS AND ROLE OF 'POLICING' IN A DEMOCRATIC SOCIETY

The mention of the word 'police' brings to most peoples' minds unfriendly men in uniform, with guns in their hands and ready to attack if prompted to.¹² However, there has been a campaign in many democratic countries and emerging democracies to re-orient policing goals so as to focus on serving the people in a professional and friendly manner : a shift from a police force to a police service.

Sheptycki¹³, in defining the term 'police' stated that the term has been closely linked with the ancient Roman word 'policy', a word infused with two senses: 'that of *cura promovendi salutem* (concerned with the promotion of safety or the public good) and *cura advertendi mala futura* (concerned to avert future ills).¹⁴ Alice Hills¹⁵ argues that police have generally been associated to be state agents. However, there are privately-owned policing companies, who can be hired by states, such is the case in South Africa, United States of America and the United Kingdom. These companies are

¹² This notion is based on the general belief of many Kenyans that was obtained in interviews held by the author to a few members of the public.

¹³ SHEPTYCKI J.W.E., *In Search of Transnational Policing -Towards a Sociology of Global Policing*, - Aldershot: Ashgate Publishing Company (2002)- citing Radzinowicz Leon : *History of English Criminal Law*.

¹⁴ *Ibid* at 4.

¹⁵ HILLS ALICE, author of , *Policing Africa- Internal Security and the Limits of Liberalization*, Lynne Reinner Publishers (2000).

however under the direct control of the state officials.¹⁶ Policing has further been given a two-fold meaning by Alice Hills , first that it deals with the manifestation of a State public order, and secondly, it refers to a “*de jure* (if not *de facto*) exclusive monopoly on the use of force within a sovereign authority’s territory.”¹⁷

Ian Loader similarly argues that the traditional notion of policing in the past two centuries has been closely linked to the state, founded on the presumption that derived most immediately from the sociology of Max Weber but with historical background dating back to the political theory of Thomas Hobbes and Jean Bodin, “that the defining feature of the modern sovereign state is its monopoly of legitimate force within given spatial boundaries, a monopoly that is principally vested – with regard to internal threats to security at least – in the dedicated, uniformed body we have come to know as the police.”¹⁸

Policing may further relate to a state’s competence or power seeking to impose regulations and order within its territory. It is said to be a “set of practices that seek to order human populations that inhabit or pass through a given territory by simultaneously maintaining control of the space and of the people who inhabit it”.¹⁹

The notion of policing is relevant in gauging whether or not a government may be termed as democratic. Often, the police reflect the disposition of a political regime. In such situations, the justification and role of the police remains to maintain order, as

¹⁶ *Ibid* at 6.

¹⁷ See *Ibid* at 5-6.

¹⁸ IAN LOADER, *Plural Policing and Democratic Governance*, *Social & Legal Studies* September 2009 , 323-345, available at <http://sls.sagepub.com/cgi/content/abstract/9/3/323> at 325.

¹⁹ SHEPTYCKI J.W.E , *In Search of Transnational Policing -Towards a Sociology of Global Policing* at 7.

defined by the political regime under which they serve..²⁰ In a dictatorial and undemocratic state, the police have often been used as political instruments, used to oppress the citizens through the use of coercive force and other human rights violations. The police force in such a state, is granted excessive power and become a ‘law unto itself’.

Principles or indicators of police legitimacy include the principles of accountability, impartiality, respect of human rights and upholding the rule of law.²¹ Even democratic societies- let alone those in transition- need to regularly reflect on the effectiveness and responsiveness of their policing sector.

In the United States, Levenson, in his Article ‘Police Corruption and New Models for Reform’²², addresses how misconduct among the police adversely affects the lives of all Americans. He states that scandals involving the police have had a wide-scale corrosive effect on the institutions in the justice system. He therefore sought for political will to seek broader reforms within the policing sector.

The Commonwealth Human Rights Initiative rightly stated that one accurate and vital measure of a state’s level of democracy is with how the state police are held to account.²³ They further argue that in a true democratic state, measures need to be put

²⁰ *Ibid* at preface ix.

²¹ MARY O. RAWE, *Human Rights and Police Training in Transitional Societies : Exporting the Lessons of Northern Ireland* –Human Rights Quarterly Vol.27 at 944.

²² LAURIE L. LEVENSON, *Police Corruption and New Models for Reform*, 35 Suffolk U. L. Rev. 1, (2001).

²³ DEVIKA PRASAD and NAVAZ KOTWAL, Navaz Kotwal (Ed.), *Commonwealth Human Rights Initiative, Complaints Authorities: Police Accountability in Action* (2009). Commonwealth Human Rights Initiative, 2009, available online at http://www.humanrightsinitiative.org/publications/police/complaints_authorities_police_accountability_in_action.pdf at 9.

in place to allow for free and effective reporting and processing of complaints against the police, allowing for effective accountability and reform in the policing sector.²⁴

1.2 HUMAN RIGHTS AND THE POLICING SECTOR

As has been discussed herein, one of the ways in which a country may be gauged to adhere to international human rights standards is through its policing sector. However, in many parts of the world, the police sector has for a long period of time been perceived to be a ‘force’, rather than a ‘service’ sector. The police have often been associated with various human rights violations, ranging from arbitrary arrests, extortion, use of force, torture, extra-judicial killings and disappearances. It is however a misconceived perception by many members of the public who believe that it is only criminals who experience the excess and violations of the police, and hence, deserve such treatment.²⁵

The Secretary General for the Organization of Security and Organization in Europe emphasised the vital role the police can play in the social and economic development of a society, by effective accountability for their acts and adherence to internationally recognised human rights principles, taking into consideration the weaker groups in society.²⁶

It is therefore imperative that action be taken by the relevant actors in any Government in two ways. *First*, as a preventive measure to curb the perpetration of

²⁴ *Ibid* at 10.

²⁵ FERENC KOSZEG, *Police In Transition*, Andras Kadar (Ed.) Hungarian Helsinki Committee :Central European University Press (2001) at 4.

²⁶ Organization for Security and Co-operation in Europe Office of the Secretary General Annual Report of the Secretary General on Police-Related Activities in 2006 http://www.osce.org/documents/spmu/2007/07/25639_en.pdf .

these violations by the police either through human rights training or through a complete overhaul of the policing sector. *Second*, through effective accountability mechanisms where police officials involved in abuses of human rights shall be promptly investigated, prosecuted and sentenced, and the victim of police brutality shall receive adequate remedies.

Therefore, it has been proposed that the most effective way to curb the human rights violations perpetrated by the police is through effective accountability measures being put in place and through the involvement of the community in policing, that is, community policing²⁷

1.3 POLICE IN TRANSITION

Transition has generally been defined as “a process or period in which something undergoes a change and passes from one state, stage, form, or activity to another”.²⁸ In this context, ‘police in transition’ may be defined to be a “change from one form of policing to another”²⁹. This may be a change from a police force with authoritarian or dictatorial management to a police service, whose mission is to protect and offer its services to the community. Notions of general police reform, better accountability in the policing sector as well as introduction of community policing may be incorporated in the police in transition.³⁰

²⁷ Full report by the Kenya National Commission on Human Rights - *Mountain of Terror Report - Report on Torture by Military Officers in Kenya* (on file with author) at 5

²⁸ Online Encarta Dictionary: English North America.

²⁹ ISTVAN SZIKINGER, *Police In Transition: The Question of Transition* (Andras Kadar -ed.) Hungarian Helsinki Committee : Central European University Press (2001), at 15

³⁰ *Ibid* at 15 and 16.

Makau wa Mutua, a professor in International human rights, argues that during the apartheid era in South Africa, the South African Security Forces (in particular the South African Police and Defence Forces) were vital bodies in the protection and sustainability of the apartheid state. With the end of apartheid, the process of police reform was at the top of the state's agenda, and the security sector was placed now placed under civilian control which reported directly to parliament, and was further required to adhere to human rights standards.³¹

In Kenya, there was a campaign for the change of the notion of the police from the 'police force' to a 'police service', which is now reflected in its vision to be, "a world-class police service, with a people friendly, responsive and professional workforce".³² The major dilemma is that a campaign towards reform may be introduced, through training, human rights education or introduction of other models of policing such as community policing, but true reform may not take place if those in the Police Sector are not ready to welcome reform, and resist the transition. In such instances, there may be need to gradually overhaul the membership of the whole system, and replace, with properly trained officers who are ready to incorporate reforms. This thesis shall however argue that the Kenyan policing system may not necessarily need an overhaul, but effective accountability mechanisms need to be urgently put in place.

³¹ MAKAU WA MUTUA, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 Harv. Hum. Rts. J. 63 (1997).

³² See the Kenya Police Website, available at <http://www.kenyapolice.go.ke/core%20functions.asp> .

1.4 HISTORICAL BACKGROUND OF POLICING IN NORTHERN IRELAND

1.4.1 Political History and the Establishment of the Royal Ulster Constabulary (RUC)

Northern Ireland, which is a devolved nation of the United Kingdom, may be said to be a state that has emerged from many years of political conflict due to, among other factors, governance issues, sovereignty and religion.³³ The country is divided between Protestant unionists, who form approximately 55 percent of the population and 45 percent Catholics nationalist.³⁴ The conflict lasted for approximately thirty years, between late 1960's to the late 1990's, leading to fatalities numbering over 3,500 people in a "population of only 1.7 million."³⁵ Of the 3,500 fatalities, evidence shows that the paramilitary were responsible for the bulk of the deaths while over 10 percent were killed by the police and the army.³⁶

Northern Ireland's state-governed police service was known as the Royal Ulster Constabulary (RUC). During the conflict, the RUC was heavily involved in the counterinsurgency intervention against the Irish Republican Army (IRA), an insurgency group associated with terrorist activities. The RUC intervention led to a "disproportionate impact of the Catholic and Nationalist community as a whole".³⁷

³³ DAVID H. BAYLEY, *Post-Conflict Police Reform, Is Northern Ireland a Model?* Available online at <http://policing.oxfordjournals.org> at 233-234.

³⁴ According to the 2001 census, Protestants make up 55 percent of the population in Northern Ireland, Catholics 44 percent, and other ethnic minorities almost 1 percent.

³⁵ DAVID H. BAYLEY, *Post-Conflict Police Reform, Is Northern Ireland a Model?* at 233.

³⁶ *Ibid* at 2.

³⁷ GRAHAM ELLISON, *A Blueprint for Democratic Policing Anywhere in the World? Police Reform, Political Transition, and Conflict Resolution in Northern Ireland.*, *Police Quarterly*, Volume 10

The RUC was hence historically viewed by the two ethno-national blocs as “either ‘custodians of nationhood’ (for many unionists and Protestants) or, conversely, ‘symbols of oppression’ (for many nationalists and Catholics).”³⁸

On a brief background of the policing sector in Northern Ireland, the same has been governed by the Royal Ulster Constabulary. The RUC (which in part derived from the ranks of the old Royal Irish Constabulary) was established in 1922 when the Republic of Ireland gained sovereignty and in accordance to the Government of Ireland Act, the Government of Ireland was mandated to maintain law and order within its jurisdiction. The said mandate remained with the Government of Ireland until March 1972, due to political instability in Northern Ireland, the Westminster government took over and controlled, among other functions, the maintenance of law and order.³⁹ This position has however been recently changed with the passing of the Devolution of Policing and Justice Functions) Order 2010, as now the policing functions have reverted to the Northern Ireland Government,⁴⁰ and the naming of the police has since been changed from the RUC to the Police Service of Northern Ireland (PSNI), as shall be discussed hereinafter.⁴¹

Number 3, September 2007 243-269 ,2007 Sage Publications. Available online at <http://pqx.sagepub.com/content/10/3/243>, at 246.

³⁸ *Ibid* at 245.

³⁹ ANDREW HAMILTON, ET AL, *Policing a Divided Society: Issues and Perceptions in Northern Ireland*- Centre for the Study of Conflict, University of Ulster- Coleraine (1995) available at <http://cain.ulst.ac.uk/csc/reports/police.htm>

⁴⁰ See further information available online at the Probation Board for Northern Ireland website: <http://www.pbni.org.uk/site/Content.aspx?x=8hClh9v6Zbg=&y=sfvaRMery/I=>

⁴¹ See information detailing the change of name of the police in Northern Ireland, from the RUC to the PSNI, available online at <http://www.legislation.gov.uk/ukpga/2000/32/contents>

One cannot disassociate the policing issue in Northern Ireland from its politics, as the same was reflected in the community representation among the police force.⁴² Indeed, the policing structure and administration has reflected the division between the two communities. The Unionists and Loyalists viewed these institutions as framework for the preservation of the Constitution at *status quo* and as a defence mechanism against Republican attack whereas the nationalists viewed it as a reflection of the sectarian and biased character of the State.⁴³

With respect to its composition, the RUC had an initial membership of 3,000, who were predominantly male and was not representative of the minority communities.⁴⁴ However, its most striking characteristic was the minimum representation of the Catholic nationalist community. The Protestant unionist community dominated the force, occupying 92 percent of the force's membership.⁴⁵ This was grossly unrepresentative as the population of the unionist to the nationalist was on average 60/40 or 55/45.⁴⁶ This unequal representation was a major source of tension among the police force and the community at large. The police were therefore viewed to be protectors of the state as opposed to being defenders of the law.⁴⁷

⁴² MARY O. RAWE, *Human Rights and Police Training in Transitional Societies : Exporting the Lessons of Northern Ireland* –Human Rights Quarterly Vol.27 at 944

⁴³ ANDREW HAMILTON ET AL, *Policing a Divided Society: Issues and Perceptions in Northern Ireland* at Section 2, The Historical Context.

⁴⁴ See *ibid* generally.

⁴⁵ As elaborated by JOHN MCGARRY AND BRENDAN O'LEARY, *Policing Northern Ireland: Proposals for a New Start* (1999) – that while Catholics comprise 7.5 per cent of the overall RUC, they represent 8.2 per cent of 'regular' RUC officers, 6.9 per cent of the full-time Reserve, and 4.8 per cent of the part-time Reserve, available at <http://cain.ulst.ac.uk/issues/police/docs/mcgarry99.htm>.

⁴⁶ See generally, MAGGIE BEIRNE, *Presentation to the Commonwealth Human Rights Initiative*, 24 March 2000.

⁴⁷ *A New Beginning: Policing in Northern Ireland* – The Report of the Independent Commission on Policing for Northern Ireland at 2.

At the establishment of the RUC, the Government of Northern Ireland, which was being governed by the Unionists, put in measures to counter the threat posed by the Irish Republican Army (IRA). This was done through the training of the RUC, of both their ordinary duties but also paramilitary skills to counter the said IRA.⁴⁸

The RUC was therefore characterised by a highly militarised structure and associated with gross human rights violations. Further, due to their imbalanced representation, the RUC were reported to be partial and discriminatory. This worsened the already volatile political situation in the country which had experienced three decades of conflict.⁴⁹

Policing in Northern Ireland was therefore, in a nutshell, said to be 'contentious, victim and participant in past tragedies, precisely because the polity itself has been contentious.'⁵⁰ One major debate was in the making of the RUC more representative of the Catholic nationalist communities and other minority groups. To achieve this, the Police Authority in its 1997/8 annual report expressed their commitment to attaining a Catholic membership of about 35 percent.⁵¹

Notwithstanding, a time had come for urgent intervention in the reform and accountability process in the Northern Ireland Police force, and this led to the

⁴⁸ See generally ANDREW HAMILTON et al *Policing a Divided Society: Issues and Perceptions in Northern Ireland*.

⁴⁹ See generally, *A New Beginning: Policing in Northern Ireland*.

⁵⁰ *A New Beginning : Policing in Northern Ireland* – The Report of the Independent Commission on Policing for Northern Ireland at 2.

⁵¹ JOHN MCGARRY AND BRENDAN O'LEARY -*Policing Northern Ireland: Proposals for a new start* - (1999)- Blackstaff Press, Belfast See Cain Service website- <http://cain.ulst.ac.uk/issues/police/docs/mcgarry99.htm>

establishment of the Independent Commission on Policing in 1998, as will be discussed hereinafter.

1.4.2 ‘A New Beginning’: The Establishment of the Independent Commission on Policing in Northern Ireland.

Commonly known as the Patten Commission, the Independent Commission on Policing (ICP) was established as part of the Agreement reached in Belfast on 10th April 1998 (also known as the Belfast/ Good Friday Agreement).⁵² The task of the Patten Commission, as set out in the Agreement, was to ensure “... a new beginning to policing in Northern Ireland with a police service capable of attracting and sustaining support from the community as a whole.”⁵³ Graham Ellison⁵⁴ argues that the establishment of the ICP was premised on the “recognition that policing and justice issues were central to the dynamics of conflict, being both part of the problem and part of the solution.”⁵⁵

The members of the Commission viewed their key role to be the restorative of the values of liberty among the Northern Ireland’s police force, by proposing recommendations that would ensure effective reform through accountability both to the law and to the community, inculcating a culture of integrity, the protection of

⁵² For background information and text of the Agreement, see the official website of the Northern Ireland Office : *available online at*

<http://www.nio.gov.uk/index/key-issues/the-agreement.htm?key words=the+belfast+agreement>

⁵³ As stated in the Commission’s report: *A New Beginning: Policing in Northern Ireland* - The Report of The Independent Commission on Policing for Northern Ireland – September 1999 at 1.

⁵⁴ GRAHAM ELLISON, *A Blueprint for Democratic Policing Anywhere in the World? Police Reform, Political Transition, and Conflict Resolution in Northern Ireland*. *Police Quarterly*, Volume 10 Number 3, September 2007 243-269 (2007) Sage Publications.

⁵⁵ *Ibid* at 244.

human rights and most importantly, prevent a repeat of the abuses committed by the police in the past.⁵⁶

The Commission was composed of eight members, drawn from different professions and with vast experience in the relevant fields, and they started their work shortly after their establishment on 3rd June 1998.⁵⁷ In coming up with recommendations, the Commission examined, *inter alia*, the historical context of the initial recruitment of the RUC, its perception among the community members based on its sectarian character, the past atrocities committed by the RUC and the way forward in making the RUC accountable both in law and to the people.⁵⁸

The Commission delivered key recommendations on certain topical issues, including human rights, accountability, policing with the community, public order policing, recommendations on management and personnel, training, education and development and most important, the composition and recruitment of the police service.⁵⁹

On the subject of human rights, the Commission proposed, *inter alia*, that a comprehensive programme of action with a human-rights based approach be implemented. Further, it recommended that awareness of human rights standards be raised to comply with the provisions of the European Convention on Human Rights.⁶⁰

⁵⁶ *A New Beginning: Policing in Northern Ireland* at 5.

⁵⁷ For details on the composition of the Commission, see: *A New Beginning: Policing in Northern Ireland* at 10.

⁵⁸ These have been discussed generally throughout the Report, see *ibid* generally.

⁵⁹ The Patten Report on Policing: Summary of Recommendations, available at <http://cain.ulst.ac.uk/issues/police/patten/recommend.htm>.

⁶⁰ For full report of the recommendations, see *A New Beginning: Policing in Northern Ireland* -The Report of The Independent Commission on Policing for Northern Ireland – September 1999 at 18-21.

On accountability, the Commission dealt with different phases of accountability, namely, ‘democratic accountability; transparency; legal accountability; and financial accountability.’⁶¹ The Commission stated that the police should be accountable on two levels, “subordinate or obedient” sense and the “explanatory and cooperative” sense.⁶² The police are first subordinate to the community, as the community employs them through the paying of tax, and secondly, they are subordinate or under the law, and should therefore uphold the rule of law in the course of their duties. On the ‘explanatory and cooperative sense’, the police must work closely with the community, to ensure effective policing, as the policing duty involves both the police and members of the public.⁶³

The report of the Patten Commission has however been criticised as not addressing the gender imbalance within the RUC and does not deal with the past injustices and human rights violations committed by the RUC⁶⁴ In a nutshell it may be described as providing “a sound foundation upon which to construct the principles of democratic policing in the region.”⁶⁵

1.4.3 Implementation of the Recommendations of the Independent Commission on Policing in Northern Ireland

⁶¹ *A New Beginning: Policing in Northern Ireland* - The Report of The Independent Commission on Policing for Northern Ireland – September 1999 at 26

⁶² *Ibid* at 22.

⁶³ *Ibid* at 22.

⁶⁴ GRAHAM ELLISON, *A Blueprint for Democratic Policing Anywhere in the World? Police Reform, Political Transition, and Conflict Resolution in Northern Ireland*, at 244.

⁶⁵ *Ibid* at 244.

The Patten Commission proposed 175 recommendations with respect to the policing sector.⁶⁶ The following paragraph briefly highlights four of the key recommendations and the implementations subsequently effected. First the Commission made firm measures to ensure that the Chief Constable and the police officers are publicly held democratically answerable to their acts or omissions under democratic accountability. This was to be achieved with the establishment of the Northern Ireland Policing Board which was to replace the Police Authority for Northern Ireland. The Board was to consist of 19 members, 10 of whom are members of the Assembly while the other 9 be drawn from different professional fields.⁶⁷

To decentralise the duties of the Police Authority, the Commission further proposed the establishment of the District Policing Partnership Boards, to allow for constant dialogue between the community and the police.⁶⁸ The establishment of the District Policing Partnership whose mandate is to provide accountability of the police at the district level. Further, the name of the police, Royal Ulster Constabulary was changed to the Police Service of Northern Ireland, and the same name has been retained since.⁶⁹ Finally, the office of the Oversight Commissioner, which was a transient office was established with two main tasks : to ensure that the recommendations in the Patten report would be wholly implemented and second, to give confidence to the members of the public as to the implementation of the report. The term of this office terminated in May 2007.⁷⁰

⁶⁶ See *A New Beginning: Policing in Northern Ireland*, Summary of Recommendations at 107-122.

⁶⁷ Members are to include business, trade unions, voluntary organizations, community groups and the legal profession. See *ibid* at 30.

⁶⁸ For further information about the role of the District Policing Partnership Boards, see, *A New Beginning: Policing in Northern Ireland - The Report of The Independent Commission on Policing for Northern Ireland – September 1999-* at 34-36.

⁶⁹ Information available at <http://www.caj.org.uk/policing/index.php>

⁷⁰ Further information available at www.oversightcommissioner.org.

A further reform and accountability measure put in place was the establishment of a Commission of Inquiry, commonly known as the ‘Cory Inquiry’, which was established following an agreement between the Irish and the British Government at Weston Park in 2001 and was to be chaired by Judge Peter Cory.⁷¹ The investigations which were composed of 6 cases, all demonstrated the involvement of the British and the Irish Police.⁷²

1.5 HISTORICAL BACKGROUND OF THE ROLE OF THE POLICE IN THE APARTHEID SOUTH AFRICA

1.5.1 The Police sector in apartheid South Africa

The history of the South African policing sector cannot be detached from its political apartheid governance. Mark Malan⁷³ discusses that from the year 1910, the South African Police (SAP) was a policing force seeking to enforce the colonial regime, and with the core mandate of “policing race relations”⁷⁴ between the blacks and white communities in apartheid South Africa. The same mandate was extended even in the apartheid regime from the year 1948 onwards as the SAPs “became the enforcement arm of the infamous apartheid regime.”⁷⁵

⁷¹ See Testimony of Elisa Massimino, Human Rights Director, Human Rights First, Hearing on Northern Ireland Human Rights: Update on the Cory Collusion Inquiry Reports before the United States House of Representatives Committee on International Relations Sub-Committee on Africa, Global Human Rights and International operations, March 16, 2005. Available online at http://www.humanrightsfirst.org/defenders/hrd_n_ireland/HIRC-collusion-031605.pdf at 4.

⁷² *Ibid* at 4-5.

⁷³ MARK MALAN, *Police Reform in South Africa: Peace Building Without Peace Keepers*, African Security Review vol.8 No.3 1999.

⁷⁴ *Ibid* at 2.

⁷⁵ *Ibid* at 2.

Prior to 1995 when new South Africa became a democratic state, it was divided into ten Self-Governing Territories and Development Regions (TBVC). Each homeland had its own unique policing system, which was unique in structure and establishing legislation. The old South African policing system was therefore governed by the 10 homeland policing agencies together with the national South African police.⁷⁶

The South African Police and the South African Defence Forces were the main state organs that offered protection and sustainability to the apartheid state. Professor Makau Mutua⁷⁷ states that the South African security forces were instruments of coercion and were characterised with gross human rights violations including torture, causing deaths in police custody and unaccountability of their actions.⁷⁸

1.5.2 Policing in post-apartheid era

The transition period experienced in South Africa in the 1990's was also evidenced with drastic changes within the security sector and specifically the South African police.

A commission of inquiry popularly known as the 'Goldstone Commission',⁷⁹ was set up by the then South African President, President FW de Klerk on 24 October 1991⁸⁰ to investigate the alleged activities of the security forces, private armies and

⁷⁶ See official website of the South African Police Service - Available online at http://www.saps.gov.za/saps_profile/history/history.htm

⁷⁷ MAKAU WA MUTUA, author of, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, Harvard Human Rights Journal 10 Harv. Hum. Rts. J. 63, at 109-114.

⁷⁸ *Ibid* at 109.

⁷⁹ The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, chaired by Mr. Justice Richard Goldstone, see background information available online at <http://www.hurisa.org.za/gold.htm>.

⁸⁰ See general information on the Goldstone Commission available online at <http://www.hurisa.org.za/gold.htm>.

security firms in relation to public violence and intimidation.⁸¹ The Commission conducted a series of investigations within South Africa and ascertained the involvement of SAPs in the violence, as well as strained relations with the community in general. The Commission therefore made recommendations for police reform and improvement of relations between the members of the public and the SAPs.⁸²

The South African Police Service was officially created under the South African Interim Constitution, Act number 200 of 1993 in April 1994, which brought about major reform and accountability measures in policing. Further, it evidenced the merger of the South African Police and the ten ‘homeland’ police services.

The reforms introduced included the streamlining of the police-community interactions as to incorporate the communities that had been marginalised during the apartheid era, changes in the administration, with respect to recruitment of officers as to have balanced representation of the communities and the introduction of human rights standards in policing through training.⁸³

1.6 HISTORICAL BACKGROUND OF THE KENYAN POLICE

SECTOR: ‘A LAW UNTO ITSELF?’

1.6.1 Historical foundation of the Kenya Police

The establishment of the Kenya Police Force can be traced back in the period between 1887-1902 when one businessman Sir William Mc Kinnon sought ways to protect his

⁸¹ See Goldstone Commission Report, 1 October 1992 - 30 September 1993. Available online at http://www.sahistory.org.za/pages/library-resources/official%20docs/1992_goldstone-commission.htm.

⁸² See *Ibid* generally.

⁸³ DAVID BRUCE and RACHEL NEILD, *The Police That we Want*, A Handbook for Oversight of the Police in South Africa, 2005- Centre for the Study of Violence and Reconciliation, Johannesburg.

company, the Imperial British East Africa Company (IBEAC) which was situated along the Kenyan Coastal lines.⁸⁴ This formed the foundation of the organisation of the police, who were commonly referred to as 'Askaris'. The expansion of the police force further inland the country may be attributed to the construction of the Kenya-Uganda Railway. The Police Force was later legally constituted by a Police Ordinance in 1906.⁸⁵

As described in the Kenya Police Strategic Plan 2003-2007⁸⁶, further developments within the Kenya Police included the establishment of the Police Training School, increase in the police personnel, improved administrative structure and provision of housing facilities for the police.⁸⁷

When Kenya gained independence from the British colony on 12th December 1963, drastic restructuring within the police force was made, and the same was marked with the replacement of the white top senior officers with local citizens.⁸⁸

1.6.2 Organisational structure of the present day Kenya Police Service and its functions

⁸⁴ The Kenya Police Service, Strategic Plan 2003-2007, Draft 2, available online at http://www.humanrightsinitiative.org/programs/aj/police/ea/articles/draft_strategic_plan_2003-07.pdf at 1.

⁸⁵ *Ibid* at 1.

⁸⁶ See *ibid* generally.

⁸⁷ See *ibid* at 4. Further, other specialised units were subsequently formed such as, in 1926, the Criminal Intelligence Unit which constituted specialised departments like the finger print bureau and the Criminal Investigating Unit. Also in 1926 the Railway Police Unit was established and the Kenya Police Reserve and Kenya Air Wing were established in 1948 and 1949 respectively.

⁸⁸ The Kenya Police Service, Strategic Plan 2003 – 2007.
http://www.humanrightsinitiative.org/programs/aj/police/ea/articles/draft_strategic_plan_2003-07.pdf

The Kenya Police Service is legally constituted under an Act of Parliament known as the Kenya Police Force, Chapter 84 of the Laws of Kenya. The vision statement of the Kenya Police is *“To be a world-class police service, with a people-friendly, responsive and professional work force”*.⁸⁹

The Kenya Police is headed by the Commissioner of Police who is appointed by the President of the Republic of Kenya. Other than the regular police, the Kenya police is composed of other specialised units such as the Anti-Terrorism Police Unit, the Tourism Police Unit, the Anti-Stock Theft Unit, the Anti-Motor Vehicle Theft Unit, the Anti-Corruption Police Unit and the Presidential Escort Unit.⁹⁰

Contrary to its vision statement however, the Kenya Police Service has been characterised by gross human rights violations which include; police brutality, torture, rape, inaction and assault meted against its citizens. The police are also characterised by allegations of corruption and graft, with many incidences of bribery as a prerequisite for service delivery being reported. Corruption among the police has been reported to grossly undermine the effectiveness and legitimacy of the police in conducting their duties.⁹¹ Many local non-governmental organisations have produced reports and statistics revealing these violations.⁹² The KNCHR, the government human rights watch dog has revealed the extent of the violations and atrocities

⁸⁹ See official website of the Kenya Police Service, <http://www.kenyapolice.go.ke/>

⁹⁰ See information available generally at *ibid*.

⁹¹ The Kenya Police Service, Strategic Plan 2003 – 2007, at 10.

⁹² The Kenya police has been described to be the most corrupt institution, according to the East Africa Bribery Index 2009, prepared by the Transparency International. For more information, see details at http://www.transparency.org/news_room/latest_news/press_releases_nc/2009/2009_07_02_kenya_index.

committed by the Kenyan Police, and have been calling on the government to take such firm measures to ensure reform and accountability.⁹³

The extent of the atrocities committed by the Kenya Police became a matter of international concern between the year 2006 and 2008. In 2006, the Kenya Police were reported to be involved in the extra-judicial killings of hundreds of young men believed to be members of an outlawed sect known as the ‘*mungiki*’. The KNCHR confirmed at least 300 deaths and disappearances of members of the said group and the same could be attributed to the Kenya Police.⁹⁴

Kenya experienced a dark period during the 2007 post-election violence. The Commission of Inquiry into the Post-Election Violence (CIPEV) was established to investigate the reasons for the violence and identify those responsible. The Commission’s mandate included the investigation of acts of commission and omission committed by the security sector in Kenya, and included the role of the Kenya police during the violence. Its investigative findings revealed that the post-election violence claimed more than 1,133 lives, and out of these, 384 had fatal gun shot wounds. A further number of 557 people suffered gunshot injuries. The Commission concluded that there was evidence to prove that there was excessive and unreasonable use of force by the Kenya Police (including the administration police).⁹⁵ Further, the Commission also gathered evidence of criminal conduct by the Police, which included

⁹³ Refer to the Kenya National Commission on Human Rights (KNCHR) dubbed “*The Cry of Blood*”: *Report on Extra-judicial Killings and Disappearances- September 2008*, available at http://www.marskenya.org/pdfs/2009/03/KNCHR_crimes-against-humanity-extra-judicial-killings-by-kenya-police-exposed.pdf.

For overview of the report, see the KNCHR website : available online at <http://www.knchr.org/pidief/overview.pdf> .

⁹⁴ The KNCHR Report, “*The Cry of Blood*”: *Report on Extra-judicial Killings and Disappearances – September 2008* at 6.

⁹⁵ CIPEV Report at 384-386.

murder, looting and sexually-based violence, with extreme cases reported of gang-rapes by the Police.⁹⁶ Further, the police were also accused of gross omissions in the performance of their duties, including failure to avert the occurrence of crimes such as looting by members of the public, failure to conduct effective investigations and prosecution of violent crimes including gender and sexual-based violence by members of the public.⁹⁷

The occurrences of extra-judicial killings of the members of the outlawed '*mingiki*' sect together with that of the post-election violence led to a major public outcry amongst members of the public. Pressure started mounting from the non-governmental organisations and the government-established commissions, which led to the visit to Kenya of the UN Special Rapporteur on Extra-judicial Killings and Disappearances, Philip Alston in February 2009. The Special Rapporteur, in his final report, stated that the police in Kenya are deeply involved in extra-judicial killings and that there is a deeply-entrenched culture of impunity amongst the police, making accountability and reform almost impossible.⁹⁸

These developments pushed the Government of Kenya to form a National Task Force on Police Reforms which was chaired by retired-Justice Philip Ransley. Details of the Task Force shall also be discussed in chapters 3 and 4.

⁹⁶ CIPEV Report at 396, 398.

⁹⁷ CIPEV Report at 399-405.

⁹⁸ PHILIP ALSTON *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* - in his Mission to Kenya (16-25 February 2009).

CHAPTER 2

LEGAL PROVISION AND JURISPRUDENCE ON POLICING

2.1 RELEVANT LAW: INTERNATIONAL AND REGIONAL LEGAL OBLIGATIONS AND STANDARDS RELATED TO POLICING

2.1.1 Policing: Positive and Negative Feature In Human Rights Protection

Policing and the functions of the police have been closely linked with coercion and the use of force, and in effect, the international standards on the right to life by many scholars. Other rights most violated by the police are freedom from torture and inhuman and degrading treatment. International as well as regional legal provisions stipulate these rights and obligate member states to respect and not violate the same.

Whilst discussions on policing often revolve around the human rights violations associated with the police, the police perform a significant positive function in the protection of human rights.

Article 28 of the UDHR provides, “Everyone is entitled to an international and social order in which the rights and freedoms set forth in this Declaration can be fully realised”.⁹⁹ Ralph Crawshaw et al have argued that this provision, at the national level, reflects the idea of the quality in life at the social order. They argue that effective policing at the social order ensures increased security levels and hence, protection of human rights.¹⁰⁰ Further, policing is also centered on the realisation of

⁹⁹ Article 28 of the Universal Declaration on Human Rights.

¹⁰⁰ RALPH CRAWSHAW, STUART CULLEN and TOM WILLIAMSON, *Human Rights and Policing*, Second Revised Edition, Martinus Nijhoff Publishers, 2007 at 20.

rights set forth in other international treaties such as the International Covenant on Civil and Political Rights, through the prevention, detection and investigation of offences created in the treaties, such as the deprivation of the right to life and deprivation of property.¹⁰¹

On the other hand, just as regional and international instruments depict the role of policing as a positive factor, also depict the said role in its negative role. Article 29 (2) of the UDHR is the general rule on limitation of rights, as has been adopted in provisions for qualified rights in Treaties such as the ICCPR and the ECHR. Article 29 (2) states:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose s of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.¹⁰²

From the above, the justifiable reasons for limiting the qualified rights may be seen to be a reflection of the policing function, for securing recognition and respect for rights and freedoms of others, and meeting the just requirements of morality, public order, and general welfare.¹⁰³ Securing the rights of others may be achieved through effective detection and investigation of crimes, which is one of the policing function.

A core function of stipulating how and when rights may be limited is for purposes of restricting the powers of the police. As has been discussed, policing function

¹⁰¹ *Ibid* at 20-21.

¹⁰² Article 29(2) of the Universal Declaration on Human Rights.

¹⁰³ RALPH CRAWSHAW et al, *Human Rights and Policing* at 23.

amasses wide discretion and powers, and there is therefore need to put checks and balances on these powers vis-à-vis the policing function in a society. The police will therefore have to be bound by the justifications provided by law when limiting rights.¹⁰⁴

2.1.2 International obligations of policing

Any State in a democratic society has obligations imposed upon it by international, regional and domestic law with respect to the upholding of human rights standards. Some of these obligations have been delegated by the state to the policing function within its jurisdiction. Ralph Crawshaw et al¹⁰⁵ summarise these obligations vested upon the State and its policing function as the obligation to protect and respect, the obligation to investigate and finally, entitlement.

2.1.2.1 Obligation to protect

This is a positive obligation of the policing function, where the police, as discussed hereinabove, are to ensure the realisation of the rights and freedoms of every individual. This is a reflection of the positive relationship between policing and human rights, as the policing function is crucial in the realisation of many rights recognised internationally.¹⁰⁶

2.1.2.2 Obligation to respect

¹⁰⁴ RALPH CRAWSHAW et al, *Human Rights and Policing* at 26-27.

¹⁰⁵ RALPH CRAWSHAW,STUART CULLEN and TOM WILLIAMSON, authors of *Human Rights and Policing*, Second Revised Edition ,Martinus Nijhoff Publishers, 2007.

¹⁰⁶ *Ibid* at 26.

Many at times police are accused of disrespecting the rights of the citizens they are mandated to protect. Further, police often exceed their powers and do not respect the grounds provided for the limitation of rights, hence, limit rights arbitrarily, disregarding the permissible grounds.¹⁰⁷

2.1.2.3 Obligation to investigate

This is a positive obligation on the policing function that goes hand in hand with the right to an effective remedy. Every individual, once deprived of his right, has a right to effective remedy, as prescribed in many human rights instruments. The policing function is therefore seen to be vital in the delivery of effective remedies, through prompt and effective conducting of investigations. This will be elaborated more hereinafter especially with respect to the right to life.¹⁰⁸

2.1.2.4 Entitlement

Police officers, just like any other citizens of a country, are entitled to have his/her human rights protected by the State. Police officers, as an occupational group, are exposed to many risks and therefore need protection of their rights by the State. Once these rights are well secured, then the police will be better placed to further secure the rights of others members of the society, in accordance to their mandate.¹⁰⁹ It is however unfortunate that in many developing countries like Kenya, police officers enjoy few social benefits and remuneration. Their living conditions are more often than not deplorable, and they are not allowed to be

¹⁰⁷ *Ibid* at 27.

¹⁰⁸ *Ibid* at 27.

¹⁰⁹ *Ibid* at 27.

unionised or have some form of representation as to fight for their conditions.

This has a negative trickle down effect on their effectiveness and morale.¹¹⁰

2.2 SPECIFIC HUMAN RIGHTS PROVISIONS

2.2.1 *The Right to life*

The most fundamental of these rights is the right to life, as it is a general principle of international law binding on all States. The core purpose of this right is protection from arbitrary killings by the State.¹¹¹ The policing sector has often been associated with cases of extra-judicial killings, that is, deprivation of life arbitrarily and outside the ambit of the law.

Most human rights treaties have characterised this right to be non-derogable, with the International Covenant on Civil and Political Rights¹¹² providing that this right may not be derogated not even “in time of public emergency threatening the life of a nation.”¹¹³

¹¹⁰ The recommendation that members of the police should have some form of representation has been discussed in different forums, for example, see Report on the National Workshop in Kenya on the ILO Guidelines on Social Dialogue in Public Emergency Services in a Changing Environment (Nairobi, 20-21 January 2005), compiled by Shizue Tomoda, Sectoral Activities Department, ILO Geneva, available online at

<http://www.ilo.org/public/english/dialogue/sector/papers/pubserv/kenya-ws-report.pdf> at 12.

¹¹¹ RALPH CRAWSHAW and LEIF HOLMSTROM, *Essential cases on Human Rights for the Police, Reviews and Summaries of International Cases*, Martinus Nijhoff Publishers, Leiden/Boston, at 39.

¹¹² The International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, and entered into force 23 March 1976, in accordance with Article 49. Available online at <http://www2.ohchr.org/english/law/ccpr.htm>

¹¹³ The right to life has been provided under Article 6 of the Covenant, while the non-derogation clause is provided under Article 4.

The *Universal Declaration on Human Rights*¹¹⁴, states simply this right under Article 3 that: ‘Everyone has the right to life, liberty and security of person.’

The *European Convention on Human Rights (ECHR)*¹¹⁵, to which the United Kingdom is a Member State, elaborates the right to life under Article 2 further:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent escape of a person unlawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.¹¹⁶

Other internationally recognised instruments have also set out standards and principles that may guide the police in the performance of their duties, especially when applying use of force.¹¹⁷ The Code of Conduct for Law Enforcement Officials¹¹⁸, the Basic Principles on the use of Force and Firearms by Law Enforcement Officials¹¹⁹, and, at the regional level, the European Code of Police Ethics¹²⁰, all set out minimum requirements on the use of force and professional standards to be adopted by the police with respect to, among other issues, the use of force.¹²¹

¹¹⁴ The Universal Declaration of Human Rights was adopted and Proclaimed by the General Assembly of the United Nations on December 10.

¹¹⁵ The European Convention for the Protection of Human Rights and Fundamental Freedoms : Open for signature by the members of the Council of Europe, in Rome, on 4 November 1950. Entry into force: 3 September 1953. The United Kingdom entered into force on 8/3/1951, available at, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>

¹¹⁶ Article 2 of the European Convention on Human Rights.

¹¹⁷ RALPH CRAWSHAW and LEIF HOLMSTROM, *Essential cases on on Human Rights for the Police, Reviews and Summaries of International Cases* at 40.

¹¹⁸ See Article 3, where police are required to use firearms only when strictly necessary and to the extent required for the purpose.

¹¹⁹ See Principle 9 on the use of firearms.

¹²⁰ See Article 37.

¹²¹ These standards have been briefly discussed in, RALPH CRAWSHAW and LEIF HOLMSTROM, *Essential cases on on Human Rights for the Police, Reviews and Summaries of International Cases* at 40.

Further, the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions is universally recognised to give guidelines on the prevention and effective investigation of deaths caused by State officials.¹²²

2.2.2 Freedom from Torture, Inhuman and Degrading Treatment

Of the human rights violations generally committed by the police, a large percentage involves the use of torture, inhuman and degrading treatment, mostly committed at the places of detention and during interrogations.¹²³ The prohibition against torture has internationally been recognised as non-derogable, and should not be contravened irrespective of the surrounding circumstances.¹²⁴

Normative provisions prohibiting torture have been provided by almost all international treaty instruments and been emphasised by other non-treaty instruments. The *United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*¹²⁵ provides for the definition of torture to be an act of State through a public official. It states under Article 1 that:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted **by or at the instigation of or with the consent or acquiescence of a public official or other**

¹²² RALPH CRAWSHAW and LEIF HOLMSTROM, *Essential cases on Human Rights for the Police, Reviews and Summaries of International Cases* at 40.

¹²³ *Ibid* at 123.

¹²⁴ *Ibid* at 123

¹²⁵ The United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, available online at Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1). Available online at <http://www2.ohchr.org/english/law/cat.htm>

person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹²⁶

Further, it provides under Article 12 that:

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Further, the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT) came into force¹²⁷ and allows for individual complaint procedures from persons in the states that have ratified the Protocol.

The ECHR under Article 3 - Prohibition of Torture provides that, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.¹²⁸

Further, the African (Banjul) Charter on Human and People’s Rights, to which Kenya and South Africa are signatories¹²⁹ also provides for the prohibition on torture, inhuman and degrading treatment under Article 5.¹³⁰

Some international non-treaty instruments that prohibit torture include the Code of Conduct for Law Enforcement Officials, which, under Article 5 prohibits torture and provides that superior orders or other exceptional circumstances may not be invoked by any officer as a justification for torture. Further, the Basic Principles on the use of

¹²⁶ Article 1 of the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Punishment.

¹²⁷ Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. entered into force on 22 June 2006. Available online at <http://www2.ohchr.org/english/law/cat-one.htm>

¹²⁸ As provided under Article 3 of the European Convention on Human Rights.

¹²⁹ Full text of the African (Banjul) Charter on Human and People’s Rights, available online at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf

¹³⁰ Article 5 of the Banjul Charter states as follows: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”.

Force and Firearms by Law Enforcement Officials provides that officials may only use force on detainees only when strictly necessary for maintaining order in the institution or for self-defence.¹³¹

Further, the Principles on the effective investigation on the investigation of torture and other cruel, inhuman and degrading treatment or punishment¹³², commonly known as the '*Istanbul Principles*' provides minimum standards for states to ensure effective and proper documentation of torture cases.

The Constitution of South Africa under Article 12 provides for the prohibition on torture by stating:

- (1) Everyone has the right to freedom and security of the person, which includes the right -
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.¹³³

The Kenyan Penal Code¹³⁴, the Act of Parliament that proscribes crimes in Kenya however does not proscribe for the offence of torture and instead has provision for similar offences such as common assault and assault causing actual bodily harm.¹³⁵

The International Rehabilitation Council for Torture Victims has criticised this omission and has further observed the high rate of torture cases perpetrated by the Kenyan police, especially against journalists and human rights defenders, with the

¹³¹ As provided under principle 15.

¹³² Office of the United Nations High Commissioner for Human Rights Geneva, Istanbul Protocol, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, See Annex 1, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Available online at <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>

¹³³ Article 12 of the Constitution of South Africa.

¹³⁴ The Kenyan Penal Code, Chapter 63 of the Laws of Kenya.

¹³⁵ The Kenyan Penal Code, Chapter 84 of the Laws of Kenya, see chapter XXIV.

culture of impunity being on the rise.¹³⁶ This has however been remedied by the new Constitution of Kenya as it contains in its Bill of Rights under Article 29 the right to freedom and security of person, under which the prohibition against torture, inhuman and degrading treatment are contained.¹³⁷

Kenya has ratified the Convention against Torture (CAT) in 1997 but is yet to ratify the OPCAT.¹³⁸

2. 3 JURISPRUDENCE ON POLICE ACCOUNTABILITY OF TREATY BODIES AND NATIONAL COURTS

At the international and regional level, the issue of police accountability has been discussed and decisions regarding the need for police to be held accountable for their actions and omissions upheld. The European Court on Human Rights¹³⁹ has specifically been leading as a supranational court in this discourse. It has heard and determined matters with respect to cases involving human rights violations perpetrated by the police sector within its member states. This paper shall discuss the jurisprudence with respect to two of the rights most abused by the police, that is, the right to life and freedom from torture, inhuman and degrading treatment, and the

¹³⁶ See further details on <http://www.irc.org/our-project/target-countries/kenya.aspx>

¹³⁷ The Constitution of Kenya was promulgated on the 27th August 2010. The Bill of Rights are contained in Chapter 4 of the said Constitution. Article 29 (d) of the Constitution prohibits any form of torture, whether physical or psychological.

¹³⁸ Kenya ratified CAT on 21 February 1997, see information on status of ratification , available online at http://www.bayefsky.com/pdf/cat_ratif_table.pdf .

¹³⁹ For background information about the European Convention on Human Rights see its official website- <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/>

obligations set out by the Courts and Commissions with respect to the respect, and protection of these rights.

2.3.1 The Right to Life

2.3.1.1 Arbitrary Deprivation of life

This right has been developed in the jurisprudence of many treaty bodies and countries.¹⁴⁰ The Human Rights Committee in its General Comment No. 6 (16)¹⁴¹ has described “the protection against arbitrary deprivation of life as one of paramount importance.”¹⁴² In its communication in the case of ***John Khemraadi Baboeram et al. v Suriname***¹⁴³ the Committee observed that this right as enshrined in under Article 6 (1) of the ICCPR “was the supreme right of the human being and that the deprivation of life by the authorities of the State parties was a matter of utmost gravity.”¹⁴⁴ In this case, following an attempted coup in Paramaribo, capital of Suriname, eight prominent people were arrested by Suriname military police and later found killed. No autopsy nor official investigation was conducted by the State in the matter and the Committee found the State to be in violation of Article 6(1) of the Covenant..

Arbitrary deprivation of life may lead to criminal charges and conviction being preferred against the concerned police officer. This has been demonstrated within the Kenyan jurisprudence. In the Court of Appeal decision of ***Francis Kimtai Rono v***

¹⁴⁰ RALPH CRAWSHAW and LEIF HOLMSTROM, *Essential cases on Human Rights for the Police, Reviews and Summaries of International Cases* at

¹⁴¹ On the General Comment, see United Nations , Official Records of the General Assembly, Thirty Seventh Session , Supplement No. 40 (A/37/40) , annex V, as discussed in RALPH CRAWSHAW and LEIF HOLMSTROM, *Essential cases on Human Rights for the Police, Reviews and Summaries of International Cases* at 42.

¹⁴² *Ibid* at 42.

¹⁴³ *John Khemraadi Baboeram et al v Suriname*, Communication Nos. 146/1983 and 148-54/1983, 10 April 1984, CCPR/C/21/D/146/1983.

¹⁴⁴ As quoted from RALPH CRAWSHAW et al, *Human Rights and Policing* at 124.

*Republic*¹⁴⁵, the appellant, a police sergeant was charged and convicted of murder and sentenced to the death penalty. A brief summary of the facts is that the appellant had entered into a bar and fired at the deceased without justifiable cause, causing him fatal injuries. The Court of Appeal, in upholding the High Court's conviction stated that the Appellant had fired at the deceased while in line of duty without taking due consideration of the fact that his seniors were present and yet he did not even make inquiries.

In another Kenyan Court of Appeal decision of *Anthony Njue Njeru v Republic*,¹⁴⁶ the appellant herein was a Police constable charged with murder but convicted at the lower court for the lesser offence of manslaughter. In its judgement, the Court of Appeal gave guidelines as to the circumstances when it is justifiable to cause death by a police officer. The Court stated that it is justifiable only if the purpose is to avert a felonious attack and should be no greater force than it is necessary. The Court further made reference to circumstances where a police officer may be allowed to use firearm as provided under Section 28 of the Police Act.

Further reference was made by the Court to the Kenya Police Manual of 1980, which, under its Chapter 11, provides for the –‘Use of Force and Firearms by the Police’.

Under clause 3, the manual states:

What is the effect of a police officer's decision to use a firearm? The decision to use a firearm against any person or persons, places a serious legal, as well as moral,

¹⁴⁵ Francis Kimtai Rono v Republic, Criminal Appeal Number 78 of 1997, at the Court of Appeal in Kenya.

¹⁴⁶ Anthony Njue Njeru v Republic, Criminal Appeal Number 77 of 2006, at the Court of Appeal in Kenya.

responsibility on a police officer. Therefore there should be no doubt in his mind of the circumstances in which he is justified in using a firearm.¹⁴⁷

The Manual however goes on to stipulate justifiable instances when a police can use a firearm.¹⁴⁸

In as much as individual police officers are held criminally responsible for acts/omissions while in line of duty, this paper argues that no significant deterrent measure has been put in place to establish the root cause of these systemic human rights violations.

2.3.1.2 Necessity and Proportionality

From the normative provisions discussed herein, it is clear that use of force by the police is allowed only in exceptional circumstances, when it is strictly necessary and the force should not be disproportionately applied.

In this respect, the European Commission on Human Rights interpreted the meaning of the term ‘*absolutely necessary*’ as has been used in Article 2 of the ECHR by stating in the case of *Stewart v the United Kingdom*¹⁴⁹, that “paragraph 2 did not primarily define situations where it was permitted intentionally to kill an individual, but it defined situations where it is permissible to use force which might result, as the unintended outcome of the use of force, in the deprivation of life.”¹⁵⁰ The same

¹⁴⁷ *Ibid* at 10.

¹⁴⁸ For further information on the manual and use of firearms, see *ibid* at 10-11.

¹⁴⁹ *Kathleen Stewart v The United Kingdom*, Application no. 10044/82, decision of 10 July 1984 on the admissibility of the application.

¹⁵⁰ As quoted from RALPH CRAWSHAW et al, *Human Rights and Policing* at 126. See also preliminary remarks concerning the interpretation of Article 2, available at p 8-10 of the judgement.

principle has been applied by the ECtHR where a stricter and more compelling test is applied, in determining whether the circumstances were ‘absolutely necessary’.¹⁵¹

The ECtHR dealt with the issue of proportionality in the case of *Gulec v Turkey*¹⁵² where a fifteen year old boy was killed by security forces while attempting to quell demonstrations. It held that there was need to strike a balance between aim pursued and means employed to achieve it, and in the instant case, the lack of equipment by the security forces that would have been used to adopt a more proportionate response amounted to a violation of Article 2, ECHR.¹⁵³

2.3.1.3 Command and Control on police operations

The jurisprudence of treaty bodies have extended to the liability of police officers for lack of proper command and control on police operations. This is primarily based on command responsibility where those in command ought to be in control of their teams, especially in cases where use of force is employed.

In this respect, the case of *Mc Cann et al. v United Kingdom*¹⁵⁴ has been a landmark case where the ECtHR emphasised the need for proper planning, commanding and controlling of operations that involve the use of force by the authorities. The case involved the killing of three terrorist suspects by four soldiers of the British Army on 6th March 1988. Although this matter involved army officials, the principles laid down by the Court in its judgement are also relevant to police operations. The Court

¹⁵¹ As discussed hereinafter.

¹⁵² Case of *Güleç v Turkey*, Application no. 54/1997/838/1044, Judgement delivered on 27 July 1998.

¹⁵³ See *Ibid*, para 71 and 83 of the judgement.

¹⁵⁴ *Mc Cann And Others v United Kingdom*, Series A , No.324, Application No. 18984/91 (1995)

emphasised that a high degree of caution must be employed by the authorities before instructing the use of fire arms to be used.¹⁵⁵

2.3.1.4 Investigations into deaths caused by police officials and need for the establishment of independent bodies.

The year 2001 saw a landmark in the jurisprudence on police accountability in Europe as the European Court on Human Rights decided four cases simultaneously, that touched on various issues on the right to life and use of force, but more importantly, that set standards on how investigations into police shootings need to be conducted..¹⁵⁶ The said cases were, *Hugh Jordan v The United Kingdom*,¹⁵⁷ *Shanaghan v The United Kingdom*,¹⁵⁸ *Kelly and Others v. the United Kingdom*¹⁵⁹ and *Mc Kerr v The United Kingdom*.¹⁶⁰ All of these cases involved the fatal killings of Northern Ireland nationals by the RUC officers between the years 1982- 1992.

In the ECtHR case of *Hugh Jordan v The United Kingdom*¹⁶¹, the applicant alleged that his son Pearse Jordan, 22 had been unlawfully fatally shot by an officer of the Royal Ulster Constabulary on 25th November 1992, and that the Government of the United Kingdom had failed and neglected to cause proper investigations to be conducted. He further claims that the government had not offered him any remedy

¹⁵⁵ *Ibid*, see paragraph 212 of the judgement.

¹⁵⁶ See the judgements of the cases herein.

¹⁵⁷ Hugh Jordan v The United Kingdom: Application no. 24746/94, Strasbourg Judgement, 4 May 2001.

¹⁵⁸ Shanaghan v The United Kingdom : Application Number 37715/97: Strasbourg Judgement 4 May 2001

¹⁵⁹ Kelly And Other v The United Kingdom: Application number 30054/96, Strasbourg Judgement, 4 May 2001

¹⁶⁰ Mc Kerr v The United Kingdom : Application Number 28883/95, Strasbourg Judgement 4 May 2001.

¹⁶¹ Hugh Jordan v The United Kingdom: Application Number 24746/94, Strasbourg Judgement 4 May 2001

since the death of his son. He invoked provisions of the ECHR, namely, Articles 2, 6, 13 and 14 . The Court in deciding the matter came up with the following reasoning and judgement, which shall form a basis for this discourse:

- That Article 2 and 3 of the Convention on the right to life and freedom from torture are among the most fundamental provisions in the Convention and enshrine the basic values of the democratic societies making up the Council of Europe.
- That the obligation to protect the right to life read together with the State's general duty under Article 1 impliedly mandates the State to perform effective official investigation when individuals are killed as a result of the use of force.
- The main purpose of such investigation is to ensure accountability for deaths occurring under the responsibility of State agents or bodies, and the State must therefore establish an independent, effective and allow for some sufficient element of public scrutiny of its investigation or its results.
- That the Court reaffirms the need for a fully independent investigating agency would help to overcome the lack of confidence in the system which exists in England and Wales, as was the recommendation of the Committee on the Prevention of Torture.

The other aforementioned cases were decided on the same day as the ***Hugh Jordan case***, and they all raised the same issues with respect to accountability of the police. They all quoted the European Committee for the Prevention of Torture report on its visit to the United Kingdom and the Isle of Man¹⁶² which stated at paragraph 55:

¹⁶² The judgement in SHANAGHAN V THE UNITED KINGDOM case cites under paragraph 75 the report of the European Committee for the Prevention of Torture that was published on 13 January 2000.

[...]In the view of the CPT, the creation of a fully-fledged independent investigating agency would be a most welcome development. Such a body should certainly, like the PCA, have the power to direct that disciplinary proceedings be instigated against police officers. Further, in the interests of bolstering public confidence, it might also be thought appropriate that such a body be invested with the power to remit a case directly to the CPS for consideration of whether or not criminal proceedings should be brought [...]¹⁶³

The United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65¹⁶⁴, (UN Principles on Extra-Legal Executions) provides under paragraph 9 that:

There shall be a thorough, prompt and impartial investigation of all suspected cases of extra legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances [...]¹⁶⁵

In the House of Lords, Court of Appeals decision of *Regina v Police Complaints Authority ex parte Green (FC)*¹⁶⁶, Lord Rodger, in giving the need for independent police investigation and hence the role of the then Police Authority, stated that ‘out of misplaced sense of loyalty’, police officers are likely to cover up wrongful or criminal acts of omission or commission of their colleagues when such acts are reported by members of the public. Investigations on such complaints are likely not be effectively investigated.

¹⁶³ See paragraph 55 of the European Committee for the Prevention of Torture as quoted at paragraph 75 of the SHANAGHAN V THE UNITED KINGDOM judgement , at 16.

¹⁶⁴ Excerpt from the HUGH JORDAN v THE UNITED KINGDOM case, *paragraph 90*

¹⁶⁵ Paragraph 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions

¹⁶⁶ *Regina v Police Complaints Authority Ex Parte Green (FC)* [2004] UKHL 6

2.3.2 Prohibition on Torture

Cases dealing with torture have been decided by the various treaty bodies and courts. The Human Rights Committee, in one of its cases, *Albert Womah Mukong v Cameroon*,¹⁶⁷ the author of the communication was a Cameroonian journalist who claimed that due to his political affiliations, he was arrested and detained on two occasions.¹⁶⁸ He claimed the conditions of detention, death threats and incommunicado detention were in violation of Article 7 of the ICCPR. The Committee, in referring to the Standard Minimum Rules for the Treatment of Prisoners, found that the author had been subjected to cruel, inhuman and degrading treatment in contravention of Article 7 of the Covenant.¹⁶⁹

The African Commission on Human and Peoples' Rights considered a case against the Government of Kenya in the *John D. Ouko v Kenya*¹⁷⁰ where the complainant, a student unions' leader was forced to flee the country after being detained for over 10 months in some secret cells. He was detained *incommunicado* in a 2x3 metre room with a 250-watt bulb switched on the entire period.¹⁷¹ The Commission found that the Government of Kenya had violated the complainant's inherent dignity to the human person and the right to inhuman and degrading treatment contrary to the minimum standards contained in the Principles for the Protection of All Persons under any Form of Detention or Imprisonment.¹⁷²

¹⁶⁷ *Albert Womah Mukong v Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

¹⁶⁸ The periods of the alleged detention were 16 June 1988- 5 May 1989 and between 26 February 1990 – 23 March 1990.

¹⁶⁹ See generally paragraphs 9.3-10 of the *Albert Womah Mukong v Cameroon* judgement. This case has been highlighted by RALPH CRAWSHAW and LEIF HOLMSTROM, *Essential cases on Human Rights for the Police, Reviews and Summaries of International Cases* at 129.

¹⁷⁰ *John D. Ouko v Kenya*, African Commission On Human and Peoples' Rights, Comm. No. 232/99 (2000).

¹⁷¹ See *ibid* paragraph 5.

¹⁷² See *ibid* paragraphs 23 and 24.

The Kenya National Commission on Human Rights has also been instrumental in dealing with torture cases against security agents in Kenya, especially as against the police.¹⁷³ This is in contrast with the very minimal number of torture cases lodged with the judicial system.¹⁷⁴ The Commission, which was established by an Act of Parliament, Act number 9 of 2002¹⁷⁵, has its functions stipulated under Section 16 of its constitutive Act, to be, *inter alia*, investigate *suo moto* or upon a complaint lodged by any person, the violation of human rights. Its Legal Services Program- Complaints and Investigations department, has, since the establishment of the Commission in 2002, received hundreds of complaints against the police, ranging from police shooting, abuse of office, torture and harassment while in police custody. In the period 2006-2008, the KNCHR received a total of 236 complaints against the police, and this figure excludes complaints related to the extra-judicial executions related to members of the aforesaid 'Mungiki' sect.¹⁷⁶

The KNCHR's Complaints Hearing Panel, has been established under chapter V of the Kenya National Commission (complaints procedure) Regulations 2005. The panel hears and determines complaints on human rights violations, giving appropriate remedies where necessary.

¹⁷³ See generally the mandate of the Kenya National Commission on Human Rights, and its workings, at the official website, <http://www.knchr.org/>

¹⁷⁴ This is based on personal research conducted at the Kenya Law Reports Database, available online at <http://www.kenyalaw.org/update/index.php>

¹⁷⁵ The Kenya National Commission on Human Rights Act, Act Number 9 of 2002.

¹⁷⁶ Information sourced from the KNCHR's computerised Information System and has been quoted in the Brief on Extrajudicial Executions in Kenya prior to and after the Mission to Kenya by the United Nations Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions between 16-25 February 2009, Information Presented by the Kenya National Commission on Human Rights to the Human Rights Council, 11th Session, Item 3 of the agenda, 22 May 2009 at 6.

In the Hearing Panel's case of *Peter Makori v The Attorney General, the Commissioner of Police and others*,¹⁷⁷ the complaint was lodged by the applicant on 20 December 2009 claiming that he was a journalist arrested by the police while trying to cover some reports of killings in Suneka town and charged with the said murders. That while in custody, the complainant was tortured by the Flying Squad members of the Kenya Police and subjected to other human rights violations. He was forced to strip naked and strapped by a rope and beaten repeatedly by the police officers. He further reported continuous victimisation by the police for a period of over ten years for allegedly reporting certain issues through the media. The complainant therefore sought damages for, inter alia, unlawful and malicious arrest, prosecution and confinement, physical and psychological torture. In its decision, the Complaints Hearing Panel found the Attorney General, the Commissioner of Police and one Chief Inspector Benjamin Mak' Adwor jointly and severally liable for the various counts of malicious prosecution, torture and special damages amounting to a total sum of Ksh. 5,053, 671.¹⁷⁸ The matter was however appealed against by the state and the appeal is yet to be concluded.¹⁷⁹

¹⁷⁷ *Peter Makori v The Attorney General And 10 Others*, Kenya National Commission on Human Rights, Complaints Hearing Panel, Complaint Number KNCHR/CHP/1/2006, available online at http://www.knchr.org/dmdocuments/Peter_Makori_Ruling.pdf.

¹⁷⁸ See details of the judgement at paragraph 65, at 17.

¹⁷⁹ This information was revealed by the Kenya National Commission on Human Rights officials on 25th October 2010.

CHAPTER 3

CREATING NEED FOR REFORM AND ACCOUNTABILITY

[...]Every member of the force must remember that his (sic) duty is to protect and help members of the public, no less than to apprehend guilty persons. Consequently, whilst prompt to prevent crime and arrest criminals, he must look upon himself as the servant and guardian of the general public and treat all law abiding citizens, irrespective of their social position, with unfailing patience, courtesy and good humour.” Charles Rowan and Richard Mayne (1829)¹⁸⁰

3.1 THE MEANING AND CONCEPT OF THE TERM ‘ACCOUNTABILITY’ IN POLICING

The term ‘accountability’ has been defined to mean, “a set of normative prescriptions about who should be required to give account to whom, when, how and about what”.¹⁸¹ Anneke Osse¹⁸² states that ‘accountability requires the availability of effective complaints and redress procedures to members of the public who have been victimised by police abuse or negligence’.¹⁸³ The requirement for proper accountability mechanisms within the police is premised on the fact that police misconduct is not “accidental, incidental, or inevitable”,¹⁸⁴ but is instead “systemic, arising out of departmental deficiencies that undermine officer adherence to legal rules.”¹⁸⁵

¹⁸⁰ Quote from the First Commissioners of the Metropolitan Police, CHARLES ROWAN and RICHARD MAYNE when referring to the primary object of an efficient police. As quoted in : *A New Beginning : Policing in Northern Ireland – The Report of the Independent Commission on Policing for Northern Ireland* at 8 para 1.16

¹⁸¹ STENNING, as quoted in Anneke Osse, *Understanding Policing* at 185.

¹⁸² ANNEKE OSSE, author of *Understanding Policing- A Resource for Human Rights Activists*.

¹⁸³ *Ibid* at 185.

¹⁸⁴ RACHEL A. HARMON , *Promoting Civil Rights Through Proactive Policing Reform*, Stanford Law Review, 62 STNLR 1, December, 2009 at 2.

¹⁸⁵ *Ibid* at 2.

The Patten Commission, while discussing the need for accountability of the police, recognised two senses or modes with which accountability may be referred to: the “subordinate or obedient” sense and the “explanatory and cooperative” sense.¹⁸⁶ Further, accountability may be either external or internal in nature¹⁸⁷ with states coming up with various accountability mechanisms to ensure the effective accountability of their policing sector.¹⁸⁸

Doctors Mawby and Wright¹⁸⁹ have highlighted the need for police accountability on four grounds: *first*, is the “paradox of police governance”¹⁹⁰ which is based on the wide discretion enjoyed by the police in the use of coercive force and the need to check this discretion; *second*, is premised on the fact that “policing is political”¹⁹¹, and a regime may empower the police with unwarranted powers. The *third* is based on financial accountability and *lastly*, accountability is vital for the legitimacy of the police by members of the public.¹⁹²

Accountability of the police may therefore involve the liability of the individual police officer, his superior officers through the principle of command responsibility and lastly, the liability of the police agency as a whole.¹⁹³

¹⁸⁶ MARSHALL, G, *Police Accountability revisited*, Butler, D. and Halsey, A.H. (eds) *Policing and Politics*, Macmillan, London 1978. Marshall refers to these as the two “modes” of accountability, as quoted in *A New Beginning in Policing for Northern Ireland*, September 1999 at 22.

¹⁸⁷ *The Police, The People, The Politics*, Police accountability in Ghana, 2007, Commonwealth Human Rights Initiative.

¹⁸⁸ See *Ibid* generally at 34.

¹⁸⁹ DR ROB MAWBY and DR ALAN WRIGHT, *Police Accountability in the United Kingdom*, written for the Commonwealth Human Rights Initiative, January 2005.

¹⁹⁰ *Ibid* at 2.

¹⁹¹ *Ibid* at 2.

¹⁹² *Ibid* at 2 and 3.

¹⁹³ ANNEKE OSSE, *Understanding Policing* at 186.

3.2 TYPES OF ACCOUNTABILITY MECHANISMS AND CONTROL

There are generally four types or areas of accountability mechanisms; internal control; state control, which involves the three branches of government- the executive, legislature and judiciary; independent external oversight and lastly, social or public accountability.¹⁹⁴ These classification has however been said not to be clear cut but in practice, the four types of control overlap and complement each other.¹⁹⁵

3.2.1 Internal accountability mechanisms

The Commonwealth Human Rights Initiative¹⁹⁶ have defined internal accountability mechanisms are those systems put in place within a policing system that can be built up to “*monitor performance, maintain discipline, investigate public complaints against the police, investigate allegations of abuse of power or outright corrupt and criminal behaviour and manage any resulting disciplinary procedures.*”¹⁹⁷

3.2.2 External accountability mechanisms

On the other hand, external accountability mechanisms have been defined as “*the systems, processes and means by which the police, as individuals and as an institution, can be made responsible for their actions. The mechanisms operate outside the police and complement internal procedures.*”¹⁹⁸

3.2.3 State control

¹⁹⁴ *Ibid* at 189.

¹⁹⁵ *Ibid* at 189.

¹⁹⁶ The Commonwealth Human Rights Initiative, authors of the *The Police, The People, The Politics, Police accountability in Ghana, 2007*

¹⁹⁷ *The Police, The People, The Politics, Police accountability in Ghana, 2007*, Commonwealth Human Rights Initiative at 38.

¹⁹⁸ *Ibid* at 50.

Accountability of the police to the state through its branches of government is one mechanism that has been adopted in many states as a control mechanism of police accountability.¹⁹⁹ In many countries, the police force/service is part of a government ministry²⁰⁰, mostly the ministry of Interior or Justice.²⁰¹ Other government bodies also exercise control over the police, such as the offices of the auditor-general and service commissions.²⁰² In Kenya, the police service is under the Ministry of Internal Security and Provincial Administration which is under the Office of the President²⁰³. South Africa's Constitution provides, under Article 206 (1)²⁰⁴ that the Minister responsible for policing shall, ²⁰⁵ "determine the national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces."²⁰⁶

In Northern Ireland on the other hand, the police law outlines the "institutional arrangements for supervision and control,"²⁰⁷ by clearly assigning of "responsibility between the Executive, police leadership (represented by the Chief Constable) and the Policing Board."²⁰⁸

¹⁹⁹ See ANNEKE OSSE, *Understanding Policing*, at 189.

²⁰⁰ *Police Accountability: Too Important to Neglect, Too Urgent to Delay*, Commonwealth Human Rights Initiative, 2005 Report at 37.

²⁰¹ ANNEKE OSSE, *Understanding Policing*, at 190.

²⁰² *The Police, The People, The Politics, Police accountability in Ghana, 2007*, Commonwealth Human Rights Initiative at 34.

²⁰³ Information available under the official website of the Ministry of State for Provincial Administration and Internal Security, available online at <http://www.provincialadministration.go.ke/detail.php?op=3003>

²⁰⁴ Article 206 (1), *The Constitution of the Republic of South Africa, 1996* (Act 108 of 1996)

²⁰⁵ *Police Accountability: Too Important to Neglect, Too Urgent to Delay*, Commonwealth Human Rights Initiative, 2005 Report at 41.

²⁰⁶ Excerpt from Article 206 (1), *The Constitution of the Republic of South Africa, 1996* (Act 108 of 1996) as quoted in *Police Accountability: Too Important to Neglect, Too Urgent to Delay*, Commonwealth Human Rights Initiative, 2005 Report at 41.

²⁰⁷ *Police Accountability: Too Important to Neglect, Too Urgent to Delay*, Commonwealth Human Rights Initiative, 2005 Report at 41.

²⁰⁸ *Ibid* at 41.

The relevant ministries therefore exercise control over the police through different mechanisms such as, *inter alia*, setting out strategies and plans for the police, formulation of disciplinary codes of conduct, fiscal control in allocation of funds and monitoring and evaluation of police conduct.²⁰⁹ Legal accountability through the law and the judiciary play a vital role in the control and accountability of the police.²¹⁰ The law, notably through the Police Act, Criminal Procedure Act and other statutory regulations provide legal framework within which the police should act.²¹¹ Further, the police are bound by judicial pronouncements which may regulate their conduct, failure to which they shall be held in breach of the law.²¹² Finally, under the state control mechanism is the legislative control, where members of parliament as a house or through select committees are involved in police accountability through different ways, *inter alia*, the passing of legislation that regulates police conduct, fiscal control, through tasking police officials or relevant ministers by way of questions as to the conduct of the police.²¹³

3.2.4 Public control

In a democratic society, ordinary members of the public or representative groups such as the media and community-based and non-governmental organisations, and academics are actively involved in the accountability of the police.²¹⁴ This is done through exposing, documenting and reporting on human rights violations perpetrated by the police, as well as conducting independent evaluation of police performance.

²⁰⁹ ANNEKE OSSE, *Understanding Policing*, at 222.

²¹⁰ *Ibid* at 207.

²¹¹ *Ibid* at 190.

²¹² See *The Police, The People, The Politics, Police accountability in Ghana, 2007* at 57.

²¹³ STEPHEN CLARKE, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 CLMJLSP 1, Fall 2009 at 5. Also see ANNEKE OSSE, *Understanding Policing*, at 222.

²¹⁴ *The Police, The People, The Politics, Police accountability in Ghana, 2007*, Commonwealth Human Rights Initiative at 34.

3.2.5 Independent external accountability mechanisms- police oversight

bodies and ombudsman

States have established, through the legal framework, *ad hoc* or permanent autonomous and self-regulating statutory bodies which have the mandate of checking police conduct and discretion.²¹⁵ These independent bodies are also known as ‘civilian oversight’ and may be defined to as “governmental institutions that empower individuals who are not sworn police officers to influence how police departments formulate policies and dispose of complaints against police officers.”²¹⁶

Most of these bodies form part of the National Human Rights Institutes such as the office of the Ombudsman and the Human Rights Commissions. Other external monitoring mechanisms also include Independent Police Complaints Agencies and Independent Auditors. A democratic society should therefore establish at least one of these organs, which should be independent, transparent, have adequate powers and be sufficiently resourced. This will improve on accountability as well as increase its legitimacy in the eyes of the public.²¹⁷ The mandate of these external bodies include, the independent monitoring and investigation of complaints against the police, investigating and documenting cases of human rights violations by the police,

²¹⁵ ANNEKE OSSE, *Understanding Policing*, at 190.

²¹⁶ STEPHEN CLARKE, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, at 2.

²¹⁷ *The Police, The People , The Politics, Police accountability in Ghana, 2007*, Commonwealth Human Rights Initiative at 36.

advising of the government and parliament on ways of effecting changes and improvements of the police service.²¹⁸

3.3 THE KENYAN EXPERIENCE IN POLICE ACCOUNTABILITY

The police service in Kenya has for many years been associated with negative perceptions of criminality, which take different forms- “corruption both in terms of bribery, as well as the perversion of the criminal process, illegal use of force and abuse of due process.”²¹⁹ Thus, the Kenya Police conceded in its 2004-2008 Strategic Plan that “the chief enemy to accountability is impunity - a state of affairs in which police officers can engage in misconduct, crime and violation of human rights and be confident that they will not be disciplined or held to account for their actions.”²²⁰

The UN Special Rapporteur on extra-judicial, summary and arbitrary executions in his mission to Kenya in February 2009,²²¹ confirmed that there was rampant and systemic acts of extra-judicial killings perpetrated by the Kenya police and that the culture of impunity²²² amongst them has been fuelled by lack of effective accountability mechanisms, and “absence of effective internal or external investigation or oversight mechanisms.”²²³ The call for proper accountability mechanisms has been echoed by

²¹⁸ ANNEKE OSSE, *Understanding Policing*, at 222.

²¹⁹ *The Police, The People, The Politics: Police Accountability in Kenya*, A Joint Report by the Commonwealth Human Rights Initiative and the Kenya Human Rights Commission, at 19.

²²⁰ As quoted in a Press Statement made by the then Vice Chair of the Kenya National Commission on Human Rights, HASSAN OMAR HASSAN, dubbed Kenya Needs an Independent and Effective Police Oversight Board, released on 12th September 2008, at 1.

²²¹ The UN Special Rapporteur on extra-judicial, summary and arbitrary executions, Professor Phillip Alston conducted a mission to Kenya on 16-25 February 2009 over alleged reports of systemic extra-judicial killings in Kenya. Report of his mission available online at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.6.pdf>

²²² PHILIP ALSTON, UN General Assembly Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum- Mission to Kenya, 16-25 February 2009. Available online at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.6.pdf> See summary at 2.

²²³ *Ibid* summary at 2.

the country's NHRI, the Kenya National Commission on Human Rights in its various reports²²⁴. The KNCHR has called for the establishment of an independent oversight body as lack of the same has been attributed to the culture of impunity in the country.²²⁵

The normative framework has put mechanisms that provide for accountability. The Kenyan Police Act²²⁶ has provided for the conduct of its officers by setting up “institutions and regulations within the police force that handle discipline of wayward officers.”²²⁷ Further, the Act provides for the formulation of the Force Standing Orders²²⁸ which provide a comprehensive version of disciplinary proceedings among the police officers.²²⁹

Independent accountability mechanisms have not been effectively implemented, with human rights watchdog and civil society taking the lead in monitoring and investigating police conduct. Campaigns on police accountability and reform intensified after the 2007 post-election violence that rocked the country “prompting the government to constitute a task force on police reform pursuant to the proposed items of the Kenya National Dialogue and Reconciliation Agreement brokered by

²²⁴ See full report of the Kenya National Commission on Human Rights (KNCHR) dubbed “*The Cry of Blood*” : *Report on Extra-judicial Killings and Disappearances- September 2008*, available at http://www.marskenya.org/pdfs/2009/03/KNCHR_crimes-against-humanity-extra-judicial-killings-by-kenya-police-exposed.pdf.

²²⁵ Brief on Extrajudicial Executions in Kenya prior to and after the Mission to Kenya by the United Nations Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions between 16-25 February 2009, Information Presented by the Kenya National Commission on Human Rights to the Human Rights Council, 11th Session, Item 3 of the agenda, 22 May 2009 at 6.

²²⁶ The Police Act, Chapter 84 of the Laws of Kenya

²²⁷ VINCENT OCHIENG KODONGO, *Police Accountability in Kenya*, Presentation made at a Roundtable facilitated by Commonwealth Human Rights Initiative in collaboration with the East Africa Law Society, 12 -13 June 2006 ,Impala Hotel, Arusha, Tanzania.
http://www.humanrightsinitiative.org/programs/aj/police/ea/conference_2006/police_accountability_in_kenya_vincent_kodongo.pdf at 1.

²²⁸ See Brief on Extra-judicial Executions in Kenya prior to and after the Mission to Kenya by the United Nations Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions at 6.

²²⁹ VINCENT OCHIENG KODONGO, *Police Accountability in Kenya*, at 1.

former UN Secretary General Koffi Annan in February 2008.²³⁰ Further, the KNCHR and the Waki Commission²³¹ also made recommendations for the establishment of an Independent Oversight Body and of the Independent Police Conduct Authority respectively.²³²

3.3.1 Public Complaints Standing Committee (PCSC) and Ombudsman

The PCSC was established *vide* a Gazette Notice dated 29th June 2007²³³ and its mandate was set out to receive complaints from members of the public against civil servants, included are the police.²³⁴ The PCSC was however held to be ineffective as it did not have any investigatory powers and could therefore only refer matters to the relevant authorities.²³⁵ The PCSC has since been replaced by the office of the Ombudsman and performs the same functions as the PCSC.²³⁶

3.3.2 Establishment of the Police Oversight Board

Due to the pressure mounted on the Kenyan Government from the aforesaid commissions investigating the 2007 post-election violence, the Government, through

²³⁰ Brief on Extra-judicial Executions in Kenya by the Kenya National Commission on Human Rights to the Human Rights Council, at 3.

²³¹ The Waki Commission was established after the 2007 post-election violence to investigate the cause of the violence and make appropriate recommendations to the Government. See brief background information at the Human Rights Watch website at <http://www.hrw.org/en/news/2009/03/25/establishing-special-tribunal-kenya-and-role-international-criminal-court>

²³² Brief on Extra-judicial Executions in Kenya by the Kenya National Commission on Human Rights to the Human Rights Council, at 6.

²³³ The Kenya Gazette, “Public Complaints Standing Committee Establishment”, Gazette Notice No 5826, 29 June 2007.

²³⁴ See *ibid* generally.

²³⁵ See critique of the PCSC by PHILIP ALSTON, in the report UN General Assembly Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum- Mission to Kenya, 16-25 February 2009 at 17

²³⁶ See generally the duties of the Ombudsman, at <http://www.locate-a-ombudsman.com/KenyaOmbudsman.html>

the Minister of Internal Security, established the Police Oversight Board constituting of 10 members vide a Legal Notice on 4th September 2008.²³⁷

The Board received a lot of criticism from its inception, with the KNCHR arguing that its establishment *vide* a Legal Notice in the Kenya Gazette as opposed to it being statutory or Constitutional and lacks “formal and operation independence since its secretariat is headed by serving police officers and it reports to the Minister.”²³⁸ The Special Rapporteur on Extra-judicial Killings, Prof. Alston²³⁹ described the Board as doing “no more than make recommendations to the Commissioner of Police, and has no authority to enforce its recommendations, make any binding decisions, or impose disciplinary measures on police officers.”²⁴⁰

3.3.3 Establishment of the Independent Policing Oversight Authority

A Task force on police reform was established by the President of Kenya, Hon. Mwai Kibaki on 7th May 2009 and was chaired by Judge Phillip Ransley²⁴¹ against a backdrop of increased pressure and call for police reform and accountability. This was as a result of the exposure of extra-judicial killings by the police²⁴². The task force made recommendations which may be broadly classified into four groups, namely,

²³⁷ Kenya Gazette Notice Number 8144 of 4th September 2008.

²³⁸ Brief on Extrajudicial Executions in Kenya prior to and after the Mission to Kenya by the United Nations Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions between 16-25 February 2009 at p 24.

²³⁹ The Special Rapporteur on Extra-Judicial, Arbitrary and Summary Executions, Professor Philip Alston.

²⁴⁰ See report of PHILIP ALSTON UN General Assembly Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum- Mission to Kenya, 16-25 February 2009 at 37.

²⁴¹ See information available online at local dailies, <http://www.nation.co.ke/News/-/1056/599556/-/u6ahv3/-/index.html>

²⁴² The task force was established as a result of the recommendations of the Commission of Inquiry into Post Election Violence (CIPEV) ‘Waki Commission’ and the Independent Review Commission (IREC) ‘Kriegler’s Commission’ which called for the overhaul of the police force. See Brief on Extrajudicial Executions in Kenya by the Kenya National Commission on Human Rights to the Human Rights Council, at 5.

police accountability, professionalism, operational and administrative reforms and institutional policy and legislative reforms. Further recommendations submitted by the aforesaid taskforce with respect to accountability include, *inter alia*, the “establishment of the Independent Policing Oversight Authority charged with investigations on all public complaints against the police service.”²⁴³ The Board is to be chaired by a person of the rank of a judge of the High Court and will be composed of different stakeholders drawn from a variety of professions. It shall have the mandate of investigating the police independently upon receipt of complaints from members of the public.²⁴⁴ As at the time of compiling this thesis in October 2010, the said authority had not yet been established, nor has its enabling Act been introduced in Parliament for deliberation and passing.

3.4 THE CASE OF NORTHERN IRELAND

The need for effective reform and accountability mechanisms within the Northern Ireland’s police was premised on its historical and political context.²⁴⁵ David Bayley²⁴⁶ states that the police in Northern Ireland, as the result of the Good Friday agreement, have undergone substantial reform and may be used as a role model for

²⁴³ See the KNCHR National Conference on Security Sector Reform, brief by the Minister of State for Provincial Administration and Internal Security, Prof. George Saitoti, dated 19th July 2010, as was published at the Kenyan local dailies, the Daily Nation Newspaper, of July 19, 2010.

²⁴⁴ As has been discussed by Commissioner Hassan Omar of the Kenya National Commission on Human Rights- See media brief on the same at the Daily Nation Newspaper of November 2, 2010. Available online at <http://www.nation.co.ke/News/New%20Bill%20gives%20civilians%20power%20over%20Kenya%20police%20/-/1056/1043742/-/hk18pfz/-/>

²⁴⁵ MARY O’RAWE and LINDA MOORE, *Accountability and Police Complaints in Northern Ireland: Leaving the Past Behind?* in ANDREW GOLDSMITH and COLLEEN LEWIS (Ed), *Civilian Oversight of Policing ; Governance , Democracy and Human Rights* at 266.

²⁴⁶ DAVID H. BAYLEY, *Post- Conflict Police Reform: Is Northern Ireland a Model?* Available online at <http://policing.oxfordjournals.org> at University of Stirling on March 26, 2010.

states that are emerging from conflict.²⁴⁷ Indeed the accountability mechanism put in place in Northern Ireland has been described to be the “most closely observed police service in the world today”.²⁴⁸ Following is a brief account of the various bodies established in Northern Ireland to ensure effective reform and accountability of the policing service.

3.4.1 The Independent Commission for Police Complaints

Established in all the devolved states of the United Kingdom, the ICPC in Northern Ireland was created in February 1988 and its mandate was to receive complaints from members of the public against the police and pass them to the Chief Constable.²⁴⁹ Due to the weaknesses in its establishing legislation, the ICPC was rendered ineffective. O’Rawe and Moore²⁵⁰ have highlighted some weaknesses of the ICPC to include, *inter alia*, its failure to initiate cases *suo moto*, the fact that complaints have to be forwarded to the Chief Constable who determines whether the matter constitutes a complaint or not, and if does, it is upon a branch of his office (the Complaints and Discipline branch of the RUC) to investigate, hence, no independent investigation is conducted.²⁵¹ The standard of proof required in such complaints was held to be unreasonably high and hence is an impediment in the processing of the cases.²⁵² Lack of public confidence in the system and ineffective accountability of the police called

²⁴⁷ *Ibid* at 233.

²⁴⁸ ANNEKE OSSE, *Understanding Policing*, at 218.

²⁴⁹ MARY O’RAWE and LINDA MOORE, *Accountability and Police Complaints in Northern Ireland: Leaving the Past Behind?* at 276.

²⁵⁰ MARY O’RAWE and LINDA MOORE, *Accountability and Police Complaints in Northern Ireland: Leaving the Past Behind?* in ANDREW GOLDSMITH and COLLEEN LEWIS (Ed), *Civilian Oversight of Policing ; Governance , Democracy and Human Rights*.

²⁵¹ *Ibid* at 276.

²⁵² *Ibid* at 276.

for more radical changes to be implemented within the Northern Ireland policing sector.²⁵³

3.4.2 Northern Ireland Police Authority and Policing Board

The Northern Ireland's Policing Board was established as a result of the recommendations of the report of the 'Independent Commission on Policing in Northern Ireland', commonly known as the 'Patten Report'.²⁵⁴ The Board was established to replace the then existing Police Authority²⁵⁵ and its primary mandate, as set out in the report is to "[...] hold the Chief Constable and the police service publicly to account".²⁵⁶ It consists of 19 members, 10 being representative members of the Assembly, while 9 being independent members from a variety of fields stipulated in the report.²⁵⁷ The Commonwealth Human Rights Initiative has describe this Board to be among the most effective and powerful as it is "not only responsible for delivering an efficient police service, but is also mandated to help the police fulfil the statutory obligations in the Human Rights Act 1998,"²⁵⁸ as it can initiate inquiries *suo moto* without necessarily seeking the consent of the Police Constable.²⁵⁹

²⁵³ MARY O'RAWE and LINDA MOORE, *Accountability and Police Complaints in Northern Ireland: Leaving the Past Behind?* at 281.

²⁵⁴ See, *A New Beginning: Policing in Northern Ireland. The Report of the Independent Commission on Policing in Northern Ireland*, at 28.

²⁵⁵ For information about the establishment of the Police Authority and its weaknesses, see *A New Beginning: Policing in Northern Ireland. The Report of the Independent Commission on Policing in Northern Ireland*, at 22-23.

²⁵⁶ *A New Beginning: Policing in Northern Ireland* at 28.

²⁵⁷ *Ibid*, at 30.

²⁵⁸ Commonwealth Human Rights Initiative 2005 Report, *Police Accountability: Too Important to Neglect, Too Urgent to Delay* at 38.

²⁵⁹ *Ibid* at 38.

The Patten Commission envisioned the functions of the Policing Board to extend beyond the oversight role of the police and instead ensure synergy and co-operation with other stakeholders to ensure public safety.²⁶⁰

3.4.3 The Northern Ireland's Police Ombudsman

Due to the over 30-year long conflict experienced in Northern Ireland, commonly referred to as 'The Troubles'²⁶¹ the relationship between the police and the community was completely eroded, hence the need to establish a civilian police complaints agency that solely and independently deals with complaints against the police.²⁶² The establishment of the Ombudsman was as a result of the recommendations of one of the Commissioners of the Patten Commission known as Dr. Maurice Hayes.²⁶³ His report, commonly known as Hayes Report recommended "an independent Police Ombudsman with his/her own independent team of investigators, and a change in the standard of proof required in police disciplinary cases".²⁶⁴ Hayes proposal was premised on the urgent need to break off from the old accountability system and instil credibility among members of the public. He therefore proposed that the office of the Ombudsman would investigate cases of deaths in "police custody or under pursuit, even in the absence of a complaint,"²⁶⁵ and the same would be carried out by "independent non-police investigators."²⁶⁶

²⁶⁰ *A New Beginning: Policing in Northern Ireland* at 29.

²⁶¹ DAVID H. BAILEY, *Post- Conflict Police Reform: Is Northern Ireland a Model?* at 234.

²⁶² CHRI 2005 Report, *Police Accountability: Too Important to Neglect, Too Urgent to Delay* at 63.

²⁶³ For further information on the Hayes report, see *A New Beginning: Policing in Northern Ireland* at 37.

²⁶⁴ *Ibid* at 37.

²⁶⁵ MARY O'RAWE and LINDA MOORE, *Accountability and Police Complaints in Northern Ireland: Leaving the Past Behind?* at 281

²⁶⁶ *Ibid* at 282.

The office of the Police Ombudsman was created through Police (NI) Act 1998 and was subsequently established in November 2000.²⁶⁷ The office of the Ombudsman has the full mandate to investigate all complaints against the police, and this task is carried out solely by the Ombudsman investigators, who possess similar powers to those of the police.²⁶⁸ After investigations, the Ombudsman may recommend to the office of the Director of Public Prosecutions for prosecution if there is sufficient evidence against the police officer under investigation.²⁶⁹

One of the notable cases handled by the office of the Ombudsman was the RUC/PSNI investigation of the Omagh Bombing where 31 fatalities were reported as a result of police involvement. The Ombudswoman found the Special Branch to blame for withholding vital information with other investigating groups, including the office of the police Ombudsman. She found that “at the senior management level, the response to this enquiry has been defensive and at times uncooperative.”²⁷⁰

3.5 POLICE ACCOUNTABILITY IN SOUTH AFRICA

In the apartheid period of South Africa in the early 1990’s, the police in South Africa, as described by Janine Rauch²⁷¹, “had acquired a reputation for brutality, corruption

²⁶⁷ See Policies and Procedures Relating to the Police Ombudsman for Northern Ireland, PD 04/09, available online at http://www.psni.police.uk/policy_directive_0409.pdf at 4.

²⁶⁸ See Management Statement for the Office of the Police Ombudsman for Northern Ireland, available online at <http://www.policeombudsman.org/Publicationsuploads/MSFM.PDF> at 4.

²⁶⁹ JOEL MILLER with the assistance of Cybele Merrick, *Civilian Oversight Of Policing, Lessons from the Literature*, Global Meeting on Civilian Oversight of Police, Los Angeles, May 5-8, 2002 at 4.

²⁷⁰ See Statement by the Police Ombudsman for Northern Ireland on her Investigations of Matters Relating to the Omagh Bombing on August 15, 1998. Report available online at <http://www.policeombudsman.org/Publicationsuploads/omaghreport.pdf>.

²⁷¹ JANINE RAUCH is an independent consultant - presented a paper to the South African institute for International Affairs Conference, 2000 titled, *Police Reform and South Africa’s Transition*. Available online at <http://www.csvr.org.za/wits/papers/papsaiia.htm>.

and ineptitude,”²⁷² and “were notoriously unaccountable and unconstrained in their use of force.”²⁷³

With the transition and democratic elections held in 1994, accountability within the police in South Africa experienced drastic changes, “to enhance democratic oversight as well as to institutionalise police-community consultation.”²⁷⁴ At the national level, the South African Constitution²⁷⁵ provided for police oversight by Parliament and Cabinet.²⁷⁶ Further developments included the creation of the National Secretariat for Safety and Security, the establishment of secretariats at the provincial level and creation of community police forums at each police station.²⁷⁷

3.5.1 The Establishment of the Independent Complaints Directorate (ICD)

The ICD is an independent body of the government that was established in April 1997²⁷⁸ under Chapter 10 of the 1995 South African Police Act, as envisaged under Section 222 of the South African Interim Constitution²⁷⁹ which provided for the establishment of;

An independent mechanism under civilian control, with the object of ensuring that complaints in respect of criminal offences and misconduct allegedly committed by members of the Service are investigated in an effective and efficient manner.²⁸⁰

²⁷² *Ibid* at 1.

²⁷³ *Ibid* at 9.

²⁷⁴ DAVID BRUCE and RACHEL NEILD, *The Police That We Want*, A Handbook for Oversight of Police in South Africa, 2005 published by the Centre for the Study of Violence and Reconciliation, at 6.

²⁷⁵ The South African Constitution, Act 108 of 1996.

²⁷⁶ As discussed in the DAVID BRUCE and RACHEL NEILD, *The Police That We Want*, that Section 199(8) of the Constitution which provides that a member of Cabinet is responsible for policing.

²⁷⁷ As discussed in *Ibid* at 6.

²⁷⁸ Details about the formation and functions of the Independent Complaints Directorate see the official website at www.icd.gov.za

²⁷⁹ Interim Constitution of the Republic of South Africa, Act No. 200 of 1993.

²⁸⁰ *Ibid* Section 222.

The establishment of the ICD was therefore part of measures put in place to enhance oversight and accountability of the police in the post-apartheid South Africa, by investigating the conduct of the SAP officers.²⁸¹ Its core mandate is described in a nutshell as to “investigate complaints of brutality, criminality and misconduct against members of the South African Police Service (SAPS), and the Municipal Police Service (MPS).”²⁸²

In order to achieve the intent set out in the aforesaid Section 222 of the Interim Constitution provided that the ICD:

- a) may mero motu, or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by any member, and may, where appropriate, refer such investigation to the Commissioner concerned.
- b) Shall mero motu or upon receipt of a complaint, investigate any death in police custody, or as a result of police action; and
- c) May investigate any matter referred to the directorate by the Ministry or the member of the Executive Council.²⁸³

The establishment of the ICD has been celebrated as a positive step in the accountability of the South African Police.²⁸⁴ However, its success has been hampered by various factors including its enabling Act, which, as Amnesty International pointed out²⁸⁵, arise out of the requirement that the ICD being placed under the Ministry of Safety and Security as opposed to it being independent and to report directly to Parliament.²⁸⁶ Other challenges include lack of financial constraints due to its limited resources, lack of a legal mandate on the part of the police to report all cases of torture to the ICD and lack of co-operation with the South African

²⁸¹ See <http://www.icd.gov.za/about%20us/legislation.asp>

²⁸² See <http://www.icd.gov.za/about%20us/legislation.asp> and as provided under Section 52 (1) (a) of the South African Police Service Act.

²⁸³ South African Police Service Act, Act No. 68 of 1995, Section 53 (2) (a), (b) & (c).

²⁸⁴ See BRONWEN MANBY, *The South African Independent Complaints Directorate*, in ANDREW GOLDSMITH and COLLEEN LEWIS (Ed), *Civilian Oversight of Policing ; Governance , Democracy and Human Rights at 201*.

²⁸⁵ See ANNEKE OSSE, *Understanding Policing* at 217.

²⁸⁶ *Ibid* at 216.

Police.²⁸⁷ Bronwen Manby²⁸⁸ further identifies other problems as lack of the ICD's "substantive powers other than to make recommendations to the various authorities"²⁸⁹ lack of expertise in certain key fields and due to it being under-resourced, it is unable to meet the huge number of cases reported to it.²⁹⁰

Inasmuch as the ICD continues to experience a wide array of challenges, it has been held to have the potential of fully meeting its mandate. Its competence and effectiveness may only be improved with, as Bronwen indicates, with "support of the government in the form of additional resources, political support against police resistance to outside investigation, amendments to the legislation giving the ICD its powers, and continued reform of the ICD itself."²⁹¹ The challenges faced by the ICD have recently led to the presenting of the Independent Police Investigative Directorate (IPID) Bill before the South African Parliament, for the establishment of an independent body, known as the IPID.

3.5.2 The Independent Police Investigative Directorate

The IPID is a body proposed to be established in South Africa under the IPID Bill.²⁹²

The IPID is to be established against the backdrop of the challenges faced by the ICD

²⁸⁷ See Amnesty International 2002, Policing to Protect Human Rights: A Survey of Police practices in Countries of the Southern African Development Community 1997-2002, at 60-61 ,as quoted in ANNEKE OSSE, Understanding Policing, at 217.

²⁸⁸ BRONWEN MANBY, author of *The South African Independent Complaints Directorate*, in ANDREW GOLDSMITH and COLLEEN LEWIS (Ed), *Civilian Oversight of Policing ; Governance , Democracy and Human Rights*

²⁸⁹ *Ibid* at 211 . Further information on the problems faced by the ICD also see BRONWEN MANBY, *The Independent Complaints Directorate : An Opportunity Wasted?* , 12 South African Journal on Human Rights (1996) at 419.

²⁹⁰ *Ibid* at 219 and 221.

²⁹¹ *Ibid* at 222.

²⁹² The Independent Police Investigative Directorate Bill was published in the South Africa Gazette No. 33357 of 5 July 2010.

and is premised on the need to ensure effective accountability of the South African Police Service.²⁹³ It seeks to enhance its independence, impartiality and accountability by delinking the Directorate and having it function fully independently of the SAPs. As at the time of compiling this thesis in October 2010, the IPID Bill was yet to be passed in the South African Parliament.

²⁹³ See *Ibid* Preamble.

CHAPTER 4

POLICE ACCOUNTABILITY IN KENYA REVISITED: RECOMMENDATION FOR THE ESTABLISHMENT OF A KENYAN POLICE OMBUDSMAN

From the previous chapters, it is clear that lack of accountability within a policing service may be a major cause of lawlessness, impunity and a breach of the rule of law in a nation. It has been demonstrated how Kenya's police service have constantly been associated with these vices. This chapter shall seek to give a possible solution to the problem of lack of accountability within the police service. However, it shall be prudent to first analyse the recent developments that have taken place in the country as this thesis was being concluded. This is with the promulgation of the new Constitution of Kenya, which has been seen to be a milestone in the quest for police reform and accountability, and the same shall be discussed in detail herein.

The term 'ombudsman' may be translated to "agent or representative of the people or group of people."²⁹⁴ Maria Canineu²⁹⁵ defines the role of the Ombuds office in the context of police accountability as "an office established by constitution or statute, headed by an independent high-level public official who receives complaints about

²⁹⁴ AYENI, DR. VICTOR O. *The Ombudsman Around The World: Essential Elements, Evolution and Contemporary Issues*: Article within the book *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States . The Caribbean Experience. . Commonwealth Secretariat in Collaboration with the International Ombudsman Institute, as quoted by MARIA CANINEU, The Role of Ombuds Agencies in Police Accountability in the Commonwealth . available online at*

http://www.humanrightsinitiative.org/programs/aj/police/res_mat/ombuds_agencies_in_cw.pdf

²⁹⁵ MARIA CANINEU, author of *The Role of Ombuds Agencies in Police Accountability in the Commonwealth*.

injustice and maladministration from aggrieved persons against government agencies, officials or employees, or who acts on his or her own initiative.”²⁹⁶

4.1 A NEW BEGINNING FOR KENYA- RECENT DEVELOPMENTS IN THE KENYAN POLICE REFORM AND ACCOUNTABILITY AGENDA

On 4th August 2010, the Republic of Kenya experienced a re-birth, as she, through a referendum process²⁹⁷, passed a new Constitution which was promulgated on the 27th August 2010.²⁹⁸ A majority of the people of Kenya were optimistic that with the passing into law of the proposed Constitution, a wide range of positive changes would be experienced.²⁹⁹ Notably, the security sector would acquire a new face, in terms of reform and accountability.³⁰⁰

4.1.1 Kenya’s New Constitution- Ensure effective policing of the police?

4.1.1.1 The Bill of Rights

Kenya’s New Constitution now entrenches the Bill of Rights³⁰¹ in the document, there strengthening the provisions by declaring them Constitutional right, while at the

²⁹⁶ *Ibid* at 1.

²⁹⁷ The final results of the referendum were declared vide the Kenya Gazette notice No. 10019 dated August 23, where the proposed new Constitution was ratified by over 67 percent of the total votes cast. For an update on the outcome of the referendum, see <http://www.nation.co.ke/Kenya%20Referendum/Election%20team%20paves%20way%20for%20Kenya%20historic%20day%20/-/926046/995578/-/cq6mdpz/-/>.

²⁹⁸ See details available at the Office of Public Communications, Office of the Government Spokesman, <http://www.communication.go.ke/media.asp?id=1203>.

²⁹⁹ This optimism was discussed by politicians and the general public in different public forums. For example, see poll results revealing that a majority of Kenyans are “fully confident” of the Government’s commitment to fully implement the new Constitution. Information available online at <http://allafrica.com/stories/201008260819.html>.

³⁰⁰ See more details as discussed in text on the impact of the new Constitution on policing.

³⁰¹ See Chapter 4 of the Constitution of Kenya, Bill of Rights.

same time obligating organs of the State, being duty-bearers to respect, protect and enforce the said rights.³⁰² Other rights stipulated that directly affect the functioning of the police include freedom and security of the person³⁰³ and the rights of arrested persons, where arbitrary arrest is now prohibited under the Constitution,³⁰⁴ a provision further emphasised by the article on rights of persons detained, held in custody or imprisoned.³⁰⁵ The entrenchment of these rights into the Constitution will have a positive effect as the acts of the Kenyan Police may be now challenged in a Constitutional Court by any member of the public or organisation demanding for the enforcement of these rights.³⁰⁶ Prior to the promulgation of the Constitution, members of the public as well as human rights defenders could only rely on Statutes³⁰⁷ and judicial precedents³⁰⁸ when seeking enforcement of their rights, and the Courts were not legally bound to find a deprivation in their favour.

4.1.1.2 The Establishment of the Kenya National Human Rights and Equality Commission

The New Constitution further establishes the Kenya National Human Rights and Equality Commission.³⁰⁹ This has been seen as a positive step towards enhancing the

³⁰² See Part 1 of Chapter 4 on General Provisions Relating to the Bill of Rights. For example, under Article 20, the Courts, tribunal or other authority is mandated, in applying and interpreting the Bill of Rights, to promote the spirit and purpose of the Bill of Rights.

³⁰³ See Article 29.

³⁰⁴ See Article 49.

³⁰⁵ As provided under Article 51.

³⁰⁶ As provided under Article 22.

³⁰⁷ Such as the Kenyan Police Act, Criminal Procedure Act and Penal Code.

³⁰⁸ The celebrated Kenyan case of *ANN NJOGU & 5 OTHERS v REPUBLIC*, Misc.. Criminal Application Number 551 of 2007, where the Court held that any detention after the expiration of 24 hours is a violation of the Constitutional rights of the detainees and therefore ordered the immediate release of the 6 suspects. A copy of the Ruling is available online at http://www.knchr.org/dmdocuments/Ruling_Anne_v_Republic.pdf.

³⁰⁹ Under Part 5 of the Kenyan Constitution, see Article 59 (1) for the establishment of the Commission. As at the time of compiling this thesis in October 2010, the said Commission had not yet

protection and promotion of human rights through independent human rights bodies. The Kenya national Commission on Human Rights, which the body mandated with such a task, was only established through an act of Parliament³¹⁰, and part of its greatest challenges was lack of governmental support in its role of being the government watchdog.³¹¹

Among the functions of the Commission as stipulated in the Constitution shall include; “to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs.”³¹²

It is therefore hoped that this new Commission, when established, shall be more equipped to deal with human rights violations arising out of the acts of the security forces, as the same will have Constitutional powers.

4.1.1.3 National Security- The Establishment of the National Police Service

The New Constitution now, under Part 14, establishes the National Security organs, among them is the National Police Service.³¹³ A notable development is the stipulation of the functions of the National Police Service,³¹⁴ which have been clearly

been established, and the Kenya National Commission on Human Rights as well as the Equality Commission were still operating independently.

³¹⁰ Established under Act Number 9 of 2002, see copy of the establishing Act available online at http://www.knchr.org/dmdocuments/knhcr_Act.pdf

³¹¹ See, for example, the Kenya National Commission on Human Rights Public Accountability Statement for 2006-7, Statement of Successes and Challenges at 2, available online at the KNCHR website on <http://www.knchr.org/>

³¹² Article 59 (2) (d)

³¹³ Article 243.

³¹⁴ As provided under Article 244.

articulated to ensure respect and promotion of human rights. Some of their functions include;

- (a) strive for the highest standards of professionalism and discipline among its members;
- (b) prevent corruption and promote and practice transparency and accountability;
- (c) comply with constitutional standards of human rights and fundamental freedoms[...]

4.1.1.4 Omission of the Police Ombudsman in the Constitution

The New Constitution has established various commissions and independent offices³¹⁵ with a wide range of mandate touching on issues of National importance. In my opinion, the omission of the establishment of the police ombudsman or any other independent police oversight institution in the Constitution may lead to a gap in the effort to enhance accountability among the police service. The establishment of the National Police Service Commission³¹⁶, with a mandate to, *inter alia*, “observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service” does not, in my opinion, provide adequate safeguards for the effective oversight of the police, as the same shall not operate independent of the police.

4.2 WORKABLE SOLUTION FOR KENYA FOR THE ESTABLISHMENT OF AN EFFECTIVE ACCOUNTABILITY BODY- THE SOUTH AFRICAN OR THE NORTHERN IRELAND MODEL?

³¹⁵ See Chapter 15

³¹⁶ Article 246

As noted earlier in Chapter 3,³¹⁷ Kenya has in the past many years, adopted or put in place different measures aimed at enhancing reforms and accountability of the police force. Key among them was the creation of the National Taskforce on Police Reform,³¹⁸ which submitted its final recommendations in November 2009, and the same has been adopted.³¹⁹

As at 19 July 2010³²⁰, the Government of Kenya had made some progress on the implementation of the report, key among them is the appointment of the Police Reforms Implementation Committee and drafting of the Independent Police Oversight Authority Bill, which is yet to be tabled in Parliament.³²¹ However, the contents of the said Bill have not yet been made public and therefore this thesis will not be able to offer a possible critique of the said Bill.³²²

This paper has, in the previous chapters, sought to have an insight of the accountability measures put in place in South Africa and Northern Ireland, and to borrow best practices from the two jurisdictions. However, looking at the two models, notably, establishment of the South African Independent Complaints Directorate or the Northern Ireland's Police Ombudsman, the question left to be answered is: 'Is the adoption of either the South African or the Northern Ireland model workable in Kenya?'

³¹⁷ See 3.3 herein, *The Kenyan Experience in Police Accountability*

³¹⁸ The Task Force is commonly known as the Ransley Commission, as has been discussed previously in this thesis.

³¹⁹ See the KNCHR National Conference on Security Sector Reform, brief by the Minister of State for Provincial Administration and Internal Security, Prof. George Saitoti, dated 19th July 2010, available at the Daily Nation Newspaper of July 19, 2010, at 30.

³²⁰ See *Ibid* at 30-31.

³²¹ See *Ibid* at 30-31.

³²² Efforts to obtain a copy of the said Ransley Recommendations from different sources proved futile. However, a summary of the said recommendations have been made public and that is what has been relied on in this paper.

As was discussed hereinbefore, the South African ICD is experiencing challenges, some of which are attributable to its constituting Act. In the ICD latest annual report of 2008/2009³²³ stated that there was need to change its constituting Act to empower the directorate so that it could have ‘obligatory’, as opposed to ‘discretionary’ powers with respect to its recommendations to the SAPS. Borrowing from the challenges experienced from South Africa, one of the notable lessons learnt is to constitute the oversight body to be fully independent and not be placed under a Ministry³²⁴ but instead report directly to Parliament. This challenge is however being addressed with the recent Independent Police Directorate Bill that has since been presented to the South African Parliament.³²⁵

Looking at the Northern Ireland police Ombudsman model which has been celebrated to be unique in the world the model seems ideal as cases handled by the Ombudsman are investigated by independent persons and the police are not concerned in the investigations.³²⁶ However, if this model were to be used in Kenya today, would the Ombuds office be able to sustain the workload, considering the population of Kenya which is estimated at slightly over 38 million³²⁷ contrasted with that of Northern

³²³ See copy of report available online at <http://www.pmg.org.za/print/18446>

³²⁴ The Independent Complaints Directorate has been placed under the Ministry of Safety and Security, as has been discussed in Chapter 3.

³²⁵ See further information at the South African Government Information website, available online at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=12284&tid=15464>

³²⁶ See JOEL MILLER, with the assistance of CYBELE MERRICK, Civilian Oversight Of Policing , Lessons From The Literature, Vera Institute of Justice, available online at <http://www.vera.org/download?file=93/Civilian%20Boversight.pdf> at 4.

³²⁷ See the Official Census statistics which was released in 2010, which puts Kenyan population at 38.610.097 people. See more information available online at <http://www.knbs.or.ke/Census%20Results/Presentation%20by%20Minister%20for%20Planning%20revised.pdf>

Ireland which is estimated at approximately 1.78 million³²⁸. The Kenyan Ombudsman shall therefore, in my opinion, not be able to handle the thousands of cases reported to it, while investigating the same without the help of the police.

This thesis therefore seeks to come up with an effective yet independent model, that is sustainable and achievable. The Kenyan Ombudsman shall operate independent of the police. This is premised on the backdrop that a large majority of Kenyans have no faith in the Kenyan police and therefore would not trust the results of investigations performed or that involve the police.³²⁹ The Police Ombudsman may therefore be able to strike a balance between independence on the one hand, and effectiveness and sustainability on the other by liaising with other independent bodies and civil society organisations which will be taken through a thorough vetting process to determine their competence and independence. These organisations, I suggest, should include the Kenya National Human Rights and Equality Commission, the office of the Ombudsman, as well as other non-governmental organisations that will be recommended by the civil society due to their track record of performance but that will undergo a rigorous vetting process. These organisations will therefore form a committee that will be mandated to offer expertise, knowledge and investigative skills while working together with the office of the police Ombudsman. Clear regulations shall be set up to ensure that these organisations are not compromised and offer their services effectively and with impartiality.

³²⁸ Northern Ireland Statistics and Research Agency (NISRA) census results as at the year 2009 was 1,788,896 people . NISRA is the principal source of official statistics and social research on Northern Ireland's population and socio-economic conditions. Information available online at <http://www.nisra.gov.uk/>

³²⁹ It has been held that Kenyans associate the police with impunity, secrecy and violence"- see The Police, The People, The Politics: Police Accountability in Kenya, A joint report by the Commonwealth Human Rights Initiative and the Kenya Human Rights Commission, 2006.

4.3 A NEW BEGINNING FOR KENYA- ESTABLISHMENT OF A HYBRID INDEPENDENT OFFICE OF POLICE OMBUDSMAN

4.3.1 The Minimum Requirements for a successful Police Ombudsman for Kenya

This paper further recommends that the newly established office of the Ombudsman shall adopt the following minimum requirements in order to meet the internationally recognised standards for an effective and independent oversight role, as have been identified by the Commonwealth Human Rights Initiative³³⁰.

Independence: This is the most important of the requirements, as the police are often seen to be the agents of the government of the day, and therefore an effective ombuds office should be as autonomous as possible from the executive or any other external influence. It shall not be anchored to any Ministry or government body but will instead report directly to the government.

To further achieve this independence, this paper recommends that the said office be established under an Act of Parliament, mandated to investigate complaints either *suo moto* or upon receipt of a complaint brought before it, and engage the services of investigators and other expertise that are non-police. This may be achieved by collaborating with other stakeholders such as the Kenya National Commission on Human Rights, the Office of the Ombudsman, and other non-governmental organisations that have been identified through an independent vetting process.

³³⁰ See *Police Accountability: Too Important to Neglect, Too Urgent to Delay*, Commonwealth Human Rights Initiative, 2005 Report at 64-67.

Fiscal autonomy and adequate resources: In order to obtain actual independence, the office of the Kenyan ombudsman shall be adequately resourced to attain have financial independence. Fiscal autonomy may be attained by creating the police ombuds office independent of a parent ministry, such that its funds are granted separately. Political will is crucial also, as lack of the same will make legislators apportion very limited funding to the office. The output of the ombuds office further greatly depends on other resources in the form of expertise, special investigatory equipment. The office shall have a secretariat drawn from experts in different fields, including forensic investigators, lawyers and human rights defenders.

Sufficient powers: The police ombuds office should be empowered with sufficient command and authority, to enable it to perform its tasks effectively. This requires “concomitant powers to conduct hearings, subpoena documents and compel the presence of witnesses including the police.”³³¹ These powers should be clearly set out by law and should not be open to influence from the executive.

The police ombuds office should have powers of making recommendations on both individual cases and on systemic issues to the police authorities concerned, and if no action is taken, Parliament be informed of the same. Its powers should not be constrained to only making of recommendations but also to act upon the said recommendations in instances where the head of the police service refuses or neglects to act.

³³¹ See *Police Accountability: Too Important to Neglect, Too Urgent to Delay*, Common Wealth Human Rights Initiative, 2005 Report at 64

Further, the police ombuds office shall have prosecutorial powers liaise closely with the office of the Public Prosecutor to ensure that cases of criminal misconduct by the police are prosecuted effectively.

4.3.2 What role shall the Kenyan Police Ombudsman, as a Civilian Oversight Authority expected to achieve?

It is therefore recommended that the office of the Ombudsman shall be established with the core mandate of conducting oversight over the police service. The Commonwealth Human Rights Initiative³³² have in a nutshell summed up the key role of a civilian oversight authority to, “make policing more transparent, involve outsiders, build public confidence, allay fears of bias, assure impartiality of investigation, make the receipt of complaints easier, reduce abuse of power and misconduct, change the internal culture and ensure ever better performance.”³³³

The following functions shall hence be adopted by the said office of the Kenyan Police Ombudsman, as has been generally discussed by the Commonwealth Human Rights Initiative³³⁴:

- To receive, process and investigate any general complaints against the police.

³³² See *Police Accountability: Too Important to Neglect, Too Urgent to Delay*, Common Wealth Human Rights Initiative, 2005 Report.

³³³ *Ibid* at 62.

³³⁴ See generally, *Police Accountability: Too Important to Neglect, Too Urgent to Delay*, Common Wealth Human Rights Initiative, 2005 Report.

- To investigate other serious complaints such as extra-judicial killings, death in police custody, torture and assault, caused by either the commission or omission of a police officer.
- To identify, investigate and document systemic human rights violations that arise as a result of police action or inaction.
- To make planned and impromptu visits to places of police detention.
- To identify areas of police reform and make recommendations to Parliament.
- To make such other recommendations to Parliament on legislative deficiencies, matters on policy and other related issues touching on the police service.
- To prepare, make public and present to Parliament annual reports on the cases handled, achievements and challenges as well as proposed recommendations.

CONCLUSION

It is indeed a new dawn in Kenya with the promulgation of the new Constitution on 27th August 2010.³³⁵ With this Constitutional dispensation, issues on police reform and accountability have now been placed on the top of the government agenda. However, implementation of the proposed reforms within the police service may not be fully achieved and actualised without proper structures being put in place.

This paper has highlighted the vital role that the police play in a society, and has demonstrated how a political regime may grant immense powers to the police service, and use the police as tools to meet their political ambitions. Human rights violations such as extra-judicial killings, torture, enforced disappearances become the end result of the police wide powers and discretion. However, it is worth noting that accountability alone may not effectively address the challenges facing the Kenyan police. Other models of policing need to be adopted, such as continuous training of the police, to inculcate a culture of human rights. Further, community policing needs to be adopted, as this will improve the relations between the police and members of the public, as was evident in both the Northern Ireland and South African cases.

Lack of police control and accountability has become one of the major causes of unlawfulness and criminality among the police. Even with change of political regime as was experienced in Northern Ireland and South Africa, public confidence and trust in the police service is found to have been deeply eroded, such that any attempts by the government to introduce police reform and accountability mechanisms is treated with suspicion. The establishment of civilian oversight authorities such as the South

³³⁵ See footnote 287 on details of the promulgation and results of the referendum process.

Africa's Independent Complaints Directorate and the Northern Ireland's office of the Police Ombudsman were premised against this backdrop. The sole purpose of these bodies is to conduct effective independent investigations on complaints against the police while at the same time instilling the confidence and trust of members of the public.

As this thesis has demonstrated, the Republic of Kenya has faced systemic human rights violations by the police, some of which may be described to be egregious in nature. Indeed, just like South Africa and Northern Ireland, Kenyans as a nation have lost confidence and trust in the police. On the contrary, they associate the police with crime, violence and corruption. Further, the political regimes have been associated with these violations, and make no much effort in the implementation of police reform and accountability agendas. Attempts have been made by the present coalition government to sanitise the police, by establishing bodies and commissions with the mandate of bringing recommendations on police reform. Key among them is the proposed establishment of the Independent Police Oversight Authority by the 'Ransley Task Force' that was submitted on 3rd November 2009.³³⁶ As at the time of finalising this paper³³⁷, the said recommendation has not yet been implemented and even legislative steps towards the passing into law of its constituting Act has not yet been presented in Parliament. This may be attributed to lack of political will on the part of the government to prioritise the issue of police accountability.

³³⁶ See media coverage of the receipt of the final report by the President of Kenya, His Excellency Mwai Kibaki, covered at the Daily Nation Newspaper of November 2, 2009. Available online at <http://www.nation.co.ke/News/-/1056/681632/-/uol5vp/-/index.html>

³³⁷ This paper was finalised in November 2010.

Be that as it may, I am optimistic that with the passing of the new Constitution, mechanisms have been put in place to ensure the general reform in public service, and specifically the Kenyan Police Service. The Bill of Rights has now been entrenched in the Constitution, and if a police officer violates the same, he shall be held, by the supreme law of the land, to be in contravention of the Constitution. However, the process of holding these police officers liable is still wanting. This paper therefore proposes that with the establishment of an office of the Police Ombudsman, matters that the new Constitution seeks to entrench such as accountability, rule of law and respect for human rights and general reforms in the public service shall be adequately and effectively dealt with. The office of the Police Ombudsman shall be independent of the three arms of government, and most importantly, independent of the executive and government of the day. It shall bring new hope to the people of Kenya, as fear, distrust and impunity among the police service shall be a thing of the past.

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