

STRENGTHENING POLICING OVERSIGHT AND INVESTIGATIONS IN KENYA

STUDY OF IPOA INVESTIGATIONS INTO DEATHS RESULTING FROM POLICE ACTION

Thomas Probert, Brian Kimari, Mutuma Ruteere



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Acronyms and abbreviations

ATPU	Anti-terrorism Police Unit
CBO	Community Based Organisation
CHRIPS	Centre for Human Rights and Policy Studies
CSO	Civil Society Organisation
DCI	Directorate of Criminal Investigations
DPP	Director of Public Prosecutions
IAU	Internal Affairs Unit
IG	Inspector General of Police
IMLU	Independent Medico-Legal Unit
IPOA	Independent Policing Oversight Authority
KDF	Kenya Defence Forces
KNCHR	Kenya National Commission on Human Rights
KPS	Kenya Police Service
MSJC	Mathare Social Justice Network
NCAJ	National Commission on the Administration of Justice
NIS	National Intelligence Service
NPS	National Police Service
NPSC	National Police Service Commission
OCS	Officer Commanding Station
ODPP	Office of the Director of Public Prosecutions
SSO	Service Standing Orders
WPA	Witness Protection Agency

Executive Summary

This study assesses the gaps in the investigations processes undertaken by the Independent Policing Oversight Authority (IPOA) and identifies areas of possible intervention. It builds upon a review of existing studies into police killings in Kenya, the legal framework protecting human rights in the context of policing, as well as more technical documents of both the Kenyan police and of IPOA. Beyond these texts, the study is informed by a series of key informant interviews and a number of focus group discussions in Nairobi, Kisumu, Nakuru, Mombasa, Kwale and Garissa counties.

The study establishes that while there is a legal and institutional framework in place to guide investigations into potentially unlawful killings by the police in Kenya, there are a number of practical gaps that allow for the manipulation of the investigative process in such a way as to facilitate impunity. This means that implementation falls short of the strong rights protection in the Kenyan Constitution and the principles of international human rights law. In particular, there are provisions on the use of deadly force by law enforcement officials that fall short of the international human rights law standards.

The study highlights that police compliance with the law with regard to notifications remains a significant challenge for IPOA's investigations. In fact, notifications by the police have declined over the years and this presents a challenge to IPOA's investigations process. However, IPOA continues to take up cases on its own motion or as a result of complaints lodged on behalf of victims.

IPOA has embarked on an ambitious plan to decentralise its operations and increase its operational presence in various counties in the country. This local presence has increased the visibility of the Authority beyond Nairobi and increased the efficiency of its officers in responding to incidents. The study confirmed that, internally, IPOA has established the relevant policies, procedures and protocols for undertaking investigations as per the provisions of the IPOA Act.

The decision of whether to prosecute officers after investigations rests with the Office of the Director of Public Prosecutions (ODPP), but this study makes clear that IPOA could do more to communicate effectively both with those directly affected and with the public more broadly, providing timely updates about the status of individual investigations and reporting more systematically about the scale of the problem.

Introduction

This study assesses the challenges faced by IPOA in terms of investigating deaths as a result of police action in Kenya. IPOA undertakes investigations into a broad range of issues, of which deaths are but one. This study was, however, confined to investigations into potentially unlawful deaths.

The underlying motivation for the focus on investigations is an understanding of the impact of impunity on the enjoyment of human rights: for rights to be more than aspirations, there must be accountability when they are contravened. As the African Commission on Human and Peoples' Rights has established, 'States must take steps both to prevent arbitrary deprivations of life and to conduct prompt, impartial, thorough and transparent investigations into any such deprivations that may have occurred, holding those responsible to account and providing for an effective remedy and reparation for the victim or victims, including, where appropriate, their immediate family and dependents.'¹ Moreover, it has stated that, 'The failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right.'²

Background of IPOA

IPOA was established under the Independent Policing Oversight Authority Act of 2011. Its establishment was a product of a long history of efforts to reform the police service that had, over the years, been associated with political interference, ineptness and the widespread violation of human rights. Indeed, central to the democratisation efforts of the 1990s was the need to reform the police service and transform it into a more accountable institution. Some modest efforts at police reforms had started in 2004, when the then government of President Mwai Kibaki established a police-led task force that drew up a new strategic plan for the police. That task force, however, largely focused on improving salaries and allowances for police officers and enhancing budget allocations with the aim of addressing operational,

¹ African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The right to life (Article 4), 2015, para. 7.

² *Ibid.*, para. 15.

THE NPS SHALL
STRIVE FOR THE
HIGHEST
STANDARDS OF
PROFESSIONALISM
AND DISCIPLINE

infrastructural and administrative concerns. Overall, the review did not make any changes with widespread impact on accountability.³

The post-election violence of 2007–2008, where police were accused of widespread unlawful killings, hastened the calls and push for comprehensive reforms. The National Accord that led to the cessation of violence identified police reforms as one of the key reform agendas in order to avoid a repeat of the violence. In 2009, the report of the Commission of Inquiry into Post-Election Violence (CIPEV) specifically noted that the police had failed to conduct themselves professionally during the 2007–2008 post-election violence and had used excessive force leading to many deaths.

Subsequent to this, the National Task Force on Police Reforms was established in 2009 to implement comprehensive reforms in the National Police Service (NPS). One of the key recommendations of the Task Force was the 'creation of an oversight body that will not only benefit the police themselves, but give the public confidence that their complaints are dealt with and that justice and fairness will prevail'.⁴

The promulgation of the 2010 Constitution with human rights and accountability as key principles and values, gave fresh impetus to the push for police reforms and accountability in Kenya. Under the new Constitution, the police were to conduct themselves in compliance with human rights. The IPOA Act is therefore partly aimed at giving effect to Article 244 of the Constitution, which provides that the NPS shall strive for the highest standards of professionalism and discipline, and promote and practise transparency and accountability as well as prevent corruption.

The first IPOA Board was appointed in 2012, with the task of establishing the institution as envisaged under the Act. It has eight independently appointed members who serve single six-year terms, and who are appointed on account of their experience or expertise in public service, policing or security, and human rights, among others.⁵

During its first six years of operation, IPOA has operationalised the Act by setting up a framework for the reporting and investigation of complaints and reports of serious offences by the police service. The issue of police killings was central to the context of IPOA's inception and was always going to be a core area of its work. As the IPOA Investigations Unit Operation Manual states:

3 Osse, A. (2017) 'Set up to fail? Police reforms in Kenya', *The Elephant*, 1 June, <https://www.theelephant.info/features/2017/06/01/set-up-to-fail-police-reforms-in-kenya/>

4 *Report of the National Task Force on Police Reforms*, Nairobi: Government Printer, 2009 (Ransley Report).

5 In 2018 a second Board was appointed. As an early part of this intervention, project partners had the opportunity to undertake an induction/sensitisation session with the incoming Board in early November 2018.

All incidents of death and serious injury that are a result of police action, caused by a member of the police on duty, or happen while in police custody, will be independently investigated by the Authority, with an aim to preventing impunity and reducing incidents of such deaths and serious injuries.⁶

The purpose of this baseline study is to assess the extent to which this aspiration is realised in practice and to ascertain what practical steps might be taken to make such investigations more effective.

Methodology

The development of this study commenced with a review of the legal framework concerning investigations into deaths as a result of police action in Kenya. The literature reviewed included the Kenyan Constitution, as well as primary legislation such as the IPOA Act, the National Police Service Act and the Coroners Act. It also drew upon subsidiary documents, either adopted by Parliament, such as the Service Standing Orders (SSOs), or devised by experts such as the IPOA Investigations Unit Operation Manual. In all cases these documents were contrasted with standards developed at the international level.

This review of written material was then augmented by an extensive series of semi-structured key informant interviews and focus group discussions. These interviews were guided by research guides through a consultative process that included experts from IPOA, CHRIPS and the University of Pretoria. Key informant interviews were conducted in Nairobi, as well as in Mombasa, Kisumu, Nakuru and Garissa. Between June and July 2018, the CHRIPS research team conducted interviews with individuals from IPOA, State institutions, relevant civil society organisations (CSOs) and policing and human rights experts in the five counties.⁷ A total of 58 key informant interviews were held in the five counties: 20 from IPOA, five from State institutions and 33 from civil society groups. In addition to these interviews, small focus group discussions were used to bring together youth, women, men and civil society actors in Nairobi, Nakuru, Kisumu, Garissa, Mombasa and Kwale.⁸ In total, 65 people participated in these focus groups.

Unfortunately, it was not possible to interview the full range of actors relevant to IPOA's investigations. Most importantly, the participation of the police could not be secured as the research team did not secure authorisation from the Inspector General. In addition, the research team received no response to requests to arrange interviews with the ODPP and the Witness Protection Agency (WPA).

6 Independent Policing Oversight Authority, *Investigations Unit Operation Manual*, p. 16.

7 Sampling for the key informant interviews was purposive and guided by the initial list generated at the tools' design stage. Sampled key informants were considered 'expert informants' since they work primarily on investigations, policing and human rights issues, and have first-hand knowledge on these matters. Some key informants were sampled on the basis of suggestions from other key informants.

8 Kwale was added part-way through the research, owing to the realisation that many of the cases handled in Mombasa originated from Kwale.

Stakeholder perceptions of deaths as a result of police action in Kenya

How are the deaths perceived in affected communities?

The study found that a lot of the cases of police killings were as a result of police response to crime. A key challenge, as will be discussed, is that Kenyan law and Kenyan society in some cases have difficulty in differentiating lawful from unlawful killings in these circumstances. Respondents from the study argued that the police often violate the law by killing persons who do not pose a threat to them.⁹ A majority of the interviewed respondents expressed disapproval for any killings by the police, maintaining that officers should follow the rule of law at all times. On the other hand, some respondents pointed out the complexity surrounding police killings. A member of a community-based organisation (CBO) in a Nairobi low-income settlement explained that residents often support killings in situations where the victim was implicated in crime within the neighbourhood. He stated:

IPOA should understand when police at times have to kill criminals. Like there was a guy... who killed so many kids and people in the community to the point people were afraid to leave their houses. We even formed a community security group and he still scared us because he used to walk around with a gun. In these situations, police can't just arrest, they have to kill.¹⁰

However, this perception was not universal: another member of a Nairobi community organisation opined that community support for killings is very problematic since it incentivises police killings.¹¹

In some cases, the police have not denied claims that the victim was unarmed but merely maintained that the person was dangerous and involved in violent crime, and thus such a situation required a violent response.¹² In other cases, the police have explained away the

9 Interview with CSO representative, Nakuru, 2018.

10 Interview with CBO representative, Nairobi, 2018.

11 Interview with CSO representative, Nairobi, 2018.

12 Fick, M. (2018) 'Special report: Amid claims of police brutality in Kenya, a watchdog fails to bite', *Reuters*, 23 February, <https://www.reuters.com/article/us-kenya-police-watchdog-specialreport/special-report-amid-claims-of-police-brutality-in-kenya-a-watchdog-fails-to-bite-idUSKCN1G7178>

killings by claiming that the victim had been armed and that there was an exchange of fire before the suspect was shot. The way in which some such cases are reported in the media¹³ serves only to blur standards about when police may use potentially lethal force, a decision that should always be based upon the threat posed, not the identity of the victim.

There have also been cases where the police have denied claims of killings by arguing that it was a suicide. Speaking during a focus group discussion in Nakuru County, one witness recounted that:

When my son was killed, they tried to allege that he had stabbed himself six times. The mortuary informed us that there wasn't a suicide. When we tried to report, police 'advised us' not to pursue the case.¹⁴

In other cases, police have been implicated in the killings of arrested and detained persons with evidence suggesting either that the death was as a result of police use of force before detention or that violence had occurred in places of detention.¹⁵ However, in some of those cases, the police have blamed the deaths on other inmates. For example, a former Ruaraka Officer Commanding Station (OCS) was sentenced to death after an inmate died in the cell on the night of 19 December 2013. Initially, police blamed an alleged fight in the cells for the death but investigations by IPOA showed that he was tortured and his fellow inmates falsely accused.¹⁶

Many police killings have also occurred during public gatherings and demonstrations. In 2017, for instance, many people were shot as a result of police response to protests following the declaration of October and November 2017 election results. Over the course of the two elections, it was reported that at least 92 Kenyans lost their lives,¹⁷ while many others were seriously injured. Human rights groups reported that at least 71 people were raped – 68 women and three men – in election-related violence.¹⁸ There were allegations from human rights groups and opposition politicians that the police had used live ammunition to disperse social

MANY POLICE
KILLINGS HAVE
ALSO OCCURRED
DURING PUBLIC
GATHERINGS AND
DEMONSTRATIONS

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- 13 Kahongeh, J. (2018) 'Did police execute four men or were they criminals?' *Daily Nation*, 14 January, <https://www.nation.co.ke/news/Did-police-execute-four-men-in-cold-blood-/1056-4263034-12gu61mz/index.html>
- 14 Focus group discussion, Nakuru, 2018.
- 15 Mung'ahu, A. (2017) 'Ex-Ruaraka OCS has murder case to answer after evidence analysis', *The Star*, 8 December, https://www.the-star.co.ke/news/2017/12/08/ex-ruaraka-ocs-has-murder-case-to-answer-after-evidence-analysis_c1681671
- 16 'Ex-Ruaraka OCS Nahashon Mutua sentenced to death', *Nation*, 14 February 2019, <https://www.nation.co.ke/news/Ex-Ruaraka-OCS-Nahashon-Mutua-sentenced-to-death-/1056-4981128-cttor2/index.html>
- 17 Kenya National Commission on Human Rights (2017) *Still a Mirage: A Human Rights Account of the Fresh Presidential Poll for the Period September and November 2017*, Nairobi: Kenya National Commission on Human Rights.
- 18 Human Rights Watch (2017) 'They Were Men in Uniform': *Sexual Violence against Women and Girls in Kenya's 2017 Elections*, New York: Human Rights Watch, <https://www.hrw.org/report/2017/12/14/they-were-men-uniform/sexual-violence-against-women-and-girls-kenyas-2017>

THE ISSUE OF
YOUTH BEING
KILLED IS
EXACERBATED
BY POOR POLICE—
COMMUNITY
RELATIONS

protests.¹⁹ Respondents in focus groups held in Kisumu, as well as Mathare and Kibera informal settlements in Nairobi, were of the view that police killings had become a norm in their communities since the communities are seen as aligned to the opposition party.

Human rights groups have alleged that counterterrorism operations by security officers have resulted in numerous killings and accused the Anti-Terrorism Police Unit (ATPU) of involvement in disappearances and the killings.²⁰ Respondents from Mombasa and Garissa counties highlighted that a lot of the killings by police are carried out in the name of ‘the fight against terror’.

In poor urban settlements, many of the alleged police killings are the result of police response to criminal groups operating in those areas. This was observed in low-income areas of Nakuru, Nairobi, Mombasa and Kisumu where previous studies have shown the presence of active criminal groups.²¹ Respondents from a Nakuru human rights organisation stated:

*In Nakuru, most cases of police killings involve youth and suspected gang members especially in the informal settlement areas of Bondeni and Kivumbini.*²²

Many of those killed are youths. This is consistent with previous studies, including by Mathare Social Justice Centre (MSJC), which observed, in its report on extrajudicial killings in Nairobi, that the average age of victims is approximately 20.²³ In its report ‘State of Human Rights at the Coast of Kenya 2019’, which covered the period between January and December, human rights organisation Haki Africa recorded 43 killings suspected to have been committed by the police, with the majority being youth.²⁴ The organisation had reported a similar trend of police targeting the youth in its 2018 report.

Respondents in this study pointed out that this issue of youth being killed by police is prevalent in low-income economic areas and that it is exacerbated by poor police–community relations. A young person interviewed as part of a Nairobi focus group complained that:

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- 19 Kimari, B. (2017) ‘Kenya election violence and the police response’, Centre for Human Rights and Policy Studies, <https://www.chrips.or.ke/commentary/kenya-election-violence-and-the-police-response/>
- 20 Open Society Justice Initiative and Muslims for Human Rights (2013) ‘We’re Tired of Taking You to the Court’: Human Rights Abuses by Kenya’s Anti-Terrorism Police Unit, Nairobi: Open Society Foundations.
- 21 National Cohesion and Integration Commission (2018) *The Impact of Organized Gangs on Social Cohesion in Kenya: Policy Options*.
- 22 Interview with CSO representative, Nakuru, 2018.
- 23 Mathare Social Justice Centre (2017) “Who is next”: A participatory action research against the normalization of extrajudicial executions in Mathare’, https://drive.google.com/file/d/oB2NZry_SioNhWEFyQWNuVVBJV2M/view
- 24 ‘Report: 43 extrajudicial killings reported in Coast last year’, <https://www.the-star.co.ke/counties/coast/2020-01-31-report-43-extrajudicial-killings-reported-in-coast-last-year/>; Mkongo, M. (2018) ‘Cops behind Coast youths’ killings to face the music – Haji’, *The Star*, 9 September, https://www.the-star.co.ke/news/2018/09/09/cops-behind-coast-youths-killings-to-face-the-music-haji_c1815859

In informal settlements, this is the way of life because there will be no action taken against the police. No one cares when a ghetto boy is killed. Experience ya youth na polisi ni kama mafuta na maji. Huku polisi wanamaliza vijana. Wako na fixed mind kuwa kijana ni mwizi. Vijana nao wako na unique problems kwa slums - drugs, poverty, early pregnancy, school dropouts na so many others.²⁵ [The relationship between young men and police is akin to water and oil. Here, the police are killing young men. They believe that young men are thugs. Young men also face unique problems in informal settlements including drug abuse, poverty, early pregnancy, dropping out of school and so many others.]

A civil society actor working on police accountability in various informal settlements around the country gave his experience:

Generally, every youth in informal settlements is considered a threat. They are prevented from meeting. In Mukuru, we've had eight cases of young men who were killed by police, most of them being secondary school students. They had formed a group working on waste management in the community and were killed during one of their meetings on suspicion of criminal intent.²⁶

Stakeholders explained that one of the reasons for a large number of killings by the police is the poor evaluation measures of police performance. The police are seen to have performed well by arresting and even killing presumed criminals. A CSO representative in Nairobi stated:

There's also an extent to which police are under pressure to kill youth so that they may be deemed to be working. The community incentivises them. Part of their evaluation is, 'How much crime have you stopped?' The killings serve as proof that they've worked.²⁷

ONE OF THE
REASONS IS
THE POOR
EVALUATION
MEASURES OF
POLICE
PERFORMANCE

Popular explanations for police violence and killings

Respondents attributed a number of police killings to their lack of knowledge and training on the use of force and firearms. They expressed that many of the police officers implicated are young and inexperienced, having only benefited from entry-level police training, which is insufficient. A CSO representative working on police accountability in Nakuru pointed out that many police officers 'lack knowledge on policing standards. They don't know about Standing Orders.'²⁸ The curriculum of basic training and the content of training manuals on the use of force are not made publicly available, so it is difficult to establish whether their content is sufficiently grounded in Kenyan law and international human rights standards.

25 Focus group discussion, Nairobi, 2018.

26 Interview with CSO representative, Nairobi, 2018.

27 Interview with CSO representative, Nairobi, 2018.

28 Interview with CSO representative, Nakuru, 2018.

THEY EXPRESSED
CONCERN OVER
THE FACT THAT
POLICE NEVER
GET COUNSELLING

The killings appear also to be driven in part by the poor quality of investigations conducted by the police, which makes it difficult to secure prosecutions. The 'Baseline Survey of Policing Standards and Gaps in Kenya', conducted by IPOA in 2013, found that 64% of the felony cases reviewed did not meet the minimum evidentiary threshold to charge a person with an offence.²⁹ Respondents in the study stated that these frustrations cause police to avoid trial entirely by disappearing or summarily executing criminal suspects.³⁰

Another factor thought to play a part in the frequent use of force by officers is the lack of incentives for them to do a professional job. Police officers are said to have low morale since their living standards in police camps are deplorable – although there have been ongoing efforts to address this.³¹ Moreover, police officers take little pride in their work since it is perceived as a job that is only taken by people who were unable to secure college admission,³² and also because they seldom get recognition when they perform well.³³ This affects the attitudes of police officers and may result in them treating citizens inhumanly.

In addition, respondents argued that some of the killings result from police officers who suffer mental illnesses and psychological distress. They expressed concern over the fact that police never get counselling to help them deal with the trauma of working in dangerous situations. A CBO representative stated that the National Police Service Commission (NPSC) should take up this role and provide psychological services to police officers because lack of it affects their work. He further stated:

*The police have some kind of psychological issue as well. It's not normal for someone to just open fire on people for no apparent reason. It's not psychologically sound to take a life just like that.*³⁴

Some of the killings have also been linked to criminal activities by the police themselves and are seen to serve the end of protecting their criminal ventures. In Nakuru, a CSO representative pointed out that:

*The challenge is that the cops here are very involved in the criminal groups, so the killings could be as a result of turf wars or a way to silence people who know too much.*³⁵

29 Independent Policing Oversight Authority (2013) 'Baseline Survey on Policing Standards and Gaps in Kenya', http://www.ipoa.go.ke/wp-content/uploads/2017/03/IPOA-Baseline-Survey-Report_06.09.2013_revised2-1.pdf

30 Focus group discussion, Nairobi, 2018.

31 Focus group discussion, Nairobi, 2018.

32 Interview with CSO representative, Nairobi, 2018.

33 Interview with CSO representative, Nakuru, 2018.

34 Interview with CBO representative, Nairobi, 2018.

35 Interview with CSO representative, Nakuru, 2018.

Furthermore, residents in a Nairobi informal settlement pointed out that:

*Police also have a money-making mentality in their service. They are themselves in business with rogue youth. Drugs and robbery, inter-gang clashes. The police are involved, and they use the young boys and engage with them. That's why they are killed.*³⁶

A CSO representative also argued:

*They'll engage in corruption daily and extort those who sell chang'aa and marijuana, then at the end of the day harass and kill young men so that they can say they've been working hard to stop crime.*³⁷

Recommendations

Recommendation 1: The National Police Service should develop and implement effective strategies to improve relations between police officers and the communities they police.

Recommendation 2: Police officers should be trained on de-escalation tactics both for dealing with individual suspects and for managing large gatherings or demonstrations.

Recommendation 3: The Independent Police Oversight Authority should engage with community-based organisations to raise awareness of their mandate and operating procedures, underlining that they represent an avenue for public complaints about the service they receive from the police.

³⁶ Focus group discussion, Nairobi, 2018.

³⁷ Interview with CSO representative, Nairobi, 2018.

Framework for the use of force by Kenyan police and its oversight

Legal framework for the use of force by the police

The NPS Act stipulates that police may be authorised by law to use force.³⁸ The Criminal Procedure Code, for instance, mandates the use of force by police or other persons in effecting arrests where the person forcibly resists or attempts to evade the arrest. Such force, however, must be no greater 'than was reasonable in the particular circumstances in which it was employed, or was necessary for the apprehension of the offender'.³⁹

The NPS Act and its Sixth Schedule encapsulates certain general principles to be followed by the police on the use of force and firearms, including: **necessity** – police are required to attempt the use of non-violent means first and only use force when non-violent means are ineffective or insufficient to achieve the intended result; **proportionality** – requiring force used to be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary; **legality** – police are required to use force in adherence to the provisions of the law and the Standing Orders; **dignity** – upon any injuries as a result of police force, the officer is required to immediately provide medical assistance and notify the relatives or close friends of the injured or affected persons; **accountability** – having used force, the police are required to immediately report to their supervisor and to IPOA where death or serious injury result, failure to do which constitutes a disciplinary offence; **transparency** – uniformed police are required to at all times affix a name tag or identifiable Service Number in a clearly visible part of the uniform; and **individual responsibility** – where it provides that following the orders of a superior is no excuse for unlawful use of force.⁴⁰

More specifically with respect to firearms, the Sixth Schedule also underscores the principle of necessity and provides specific purposes for which firearms may be used. These are as follows:

- (a) *saving or protecting the life of the officer or other person;*

³⁸ National Police Service Act, No. 11A of 2011 [Rev. 2016], Section 49(5), Section 61, and Sixth Schedule, §A.

³⁹ Criminal Procedure Code, Cap. 75 [Rev. 2015], Section 21.

⁴⁰ National Police Service Act, No. 11A of 2011 [Rev. 2016], Section 49(5), Section 61, and Sixth Schedule, §A.

- (b) *in self-defence or in defence of other person against imminent threat of life or serious injury;*
- (c) *protection of life and property through justifiable use of force;*
- (d) *preventing a person charged with a felony from escaping lawful custody; and*
- (e) *preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.*⁴¹

The last three of these purposes were added by amendment to the original 2011 Act in 2014.⁴² Each is in its own way in tension with international human rights law, which has over the past 30 years developed clear standards concerning the circumstances under which force may be used in law enforcement.

International standards are principally elaborated in the UN Code of Conduct for Law Enforcement Officials,⁴³ and the UN Basic Principles on the Use of Force and Firearms.⁴⁴ These are reinforced by various other human rights documents, including the recent General Comment on the right to life under the African Charter,⁴⁵ and other soft-law documents from the African Commission on Human and Peoples' Rights.⁴⁶ These regulations make clear that the use of force must be for a legitimate law enforcement purpose, must be the minimum necessary force to achieve the objective, be proportionate to the threat posed, and last only as long as is necessary. Prior planning to avoid the use of force is expected, and officers using force must be capable of being held accountable for the manner in which they do so.

Most germane to the subject of deaths as a result of police action, specifically as a result of shooting, is the standard established by Basic Principles on the Use of Force and Firearms:

- 9. *Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person*

THESE
REGULATIONS
MAKE CLEAR
THAT THE USE OF
FORCE MUST BE
FOR A
LEGITIMATE LAW
ENFORCEMENT
PURPOSE

⁴¹ Ibid., Sixth Schedule, §B.1.

⁴² National Police Service (Amendment) Act, No. 11 (2014), §54. This Amendment Act was controversial at the time principally because it gave the president authority directly to appoint the Inspector General of Police, eroding his independence, though several commentators also highlighted the challenge posed by the amendment to the Sixth Schedule.

⁴³ *Code of Conduct for Law Enforcement Officials*, adopted by the UN General Assembly by Resolution A/RES/35/170, 1979.

⁴⁴ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁴⁵ African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The right to life (Article 4), adopted in November 2015.

⁴⁶ Most recently their *Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa*, adopted in March 2017.

AMENDMENTS
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KENYAN LAW
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USE OF FIREARMS
FOR PURPOSES
OF PROTECTING
PROPERTY

presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

The amendments made to the Kenyan law allow police use of firearms for purposes of protecting property; preventing a person charged with a felony (but not necessarily posing a threat) from escaping lawful custody; and preventing a person assisting such an escape.⁴⁷ The use of firearms for these three purposes is inconsistent with the requirements set out in Basic Principle 9 shown above.

Likewise, in the particular case of the use of force during public assemblies, the Public Order Act contains a broad provision relating to the use of firearms: while making clear that less lethal options should be contemplated first, it appears to permit the use of firearms for a broader range of purposes than purely the protection of life from a direct threat of death or serious injury.⁴⁸

The NPS Act further requires that regulations should be drawn up in consultation between the Inspector General of Police (IG) and the Cabinet Secretary for the Ministry of Interior and Coordination of National Security, giving further direction on the lawful use of force and firearms by police, including regulations on training; reporting systems upon use; and firearm and ammunition control, issuance and storage procedures that ensure officers are accountable for equipment issued to them.⁴⁹ In 2014, the National Police Service published the Service Standing Orders (SSOs), which are designed to operationalise the NPS Act. All officers are expected to be trained on the SSOs and it is required that a copy of the Standing Orders be issued to every police officer.⁵⁰

The SSOs require that officers first attempt to use non-violent means and only employ force where it would be the only effective

47 National Police Service Act, No. 11A of 2011 [Rev.2016], Sixth Schedule, §B.1.

48 Public Order Act, Cap. 56 [Rev. 2016], Section 14. Part (1) of this section provides that, 'Whenever in this Act it is provided that force may be used for any purpose, the degree of force which may be so used shall not be greater than is reasonably necessary for that purpose; whenever the circumstances so permit without gravely jeopardising the safety of persons and without grave risk of uncontrollable disorder, firearms shall not be used unless weapons less likely to cause death have previously been used without achieving the purpose aforesaid; and firearms and other weapons likely to cause death or serious bodily injury shall, if used, be used with all due caution and deliberation, and without recklessness or negligence.' Part (2) then adds that 'Nothing in this section shall derogate from the lawful right of any person to use force in the defence of person or property'.

49 National Police Service Act, No. 11A of 2011 [Rev.2016], Sixth Schedule, §§ A.12, B.8.

50 Ibid., Section 10. In September 2018 it was announced that officers would soon be able to access the Standing Orders via a new application for their mobile phones.

means capable of achieving the intended result.⁵¹ The purposes for which force may lawfully be used are to protect the officer or others from what 'is reasonably believed to be a threat of death or serious bodily harm', to protect life and property, to prevent the escape from lawful custody of a person charged with a felony, or to suppress or disperse a riotous mob committing or attempting to commit serious offence against life or property.⁵²

The next clause of the SSOs is labelled 'restrictions on the lawful use of force' but seems generally aimed only at the use of firearms. Nonetheless, there is a separate provision on the use of firearms later in the SSOs, which clearly states that firearms may only be used when less extreme means are inadequate and for the purposes of saving or protecting the life of the officer or other person or in self-defence or in defence of the other person against an imminent threat to life or of serious injury.⁵³

Both the primary legislation and the SSOs make clear that upon any use of force, police officers are required immediately to report the incident to their superior, detailing the circumstances that necessitated such use of force.⁵⁴ Where the use of force has resulted in 'death, serious injury, or other grave consequences', the officer-in-charge or another direct superior officer must immediately report to the IPOA, which shall investigate the case.⁵⁵ Meanwhile, the reporting officer must secure the scene for the purpose of investigation, and, as soon as reasonably practical, inform the next of kin of the event.⁵⁶

The NPS Act makes clear that failure of a police officer to report in accordance with these regulations shall be a disciplinary offence.⁵⁷ The special obligations of superior officers with respect to the reporting of potentially unlawful use of force is provided for in Part C of the Sixth Schedule. In addition to securing the scene, they are to report the case to IPOA immediately, 'using the means of communication that guarantee there will be the least delay, and confirm this in writing no later than within 24 hours after the incident'.⁵⁸ Moreover, they are to supply IPOA with all evidence and other information related to the matter, and failure to comply with any of these provisions shall be an offence (for the superior officer).⁵⁹

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51 The National Police Service Standing Orders, Legislative supplement No. 46, § 47.3.

52 Ibid., § 47.1(1).

53 Ibid., § 47.13.

54 National Police Service Act, No. 11a of 2011 [Rev.2016], Sixth Schedule, § A.4. The Sixth Schedule also makes clear that officers must report to their superiors any use of a firearm, whether or not injury was caused (§ B.4).

55 Ibid., § A.5. Part B includes an almost identical provision concerning the lethal use of firearms (see § B.5).

56 Ibid., §§ A.7, B.7.

57 Ibid., § A.8.

58 Ibid., § C.1(3)(b).

59 Ibid., § C.1(3).

THERE IS
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The NPS Act further requires the IG and the Cabinet Secretary to consult in drawing up regulations giving specific directions on the systems through which police should report upon use of force and firearms.⁶⁰ As discussed below, there is currently a lack of clarity about the exact procedure for making a notification, which is resulting in delays that can have a severely negative impact on the effectiveness of the subsequent investigation.

Use of force by other law enforcement officials

The NPS is not the only institution empowered to use force on behalf of the State. It is a generally agreed position of international law that anyone undertaking policing activities should be considered – at least so far as the use of force – as a law enforcement official. Nonetheless, for the avoidance of doubt we here examine the legal authority under which various State actors might use force for the purpose of law enforcement in Kenya, and the extent to which they are subject to IPOA's jurisdiction.

Section 33 of the Kenya Defence Forces Act provides that the **Kenya Defence Forces** (KDF) can be deployed in joint operations and in support of the NPS in situations of emergency or disaster. It also requires that whenever the KDF are deployed, the IG of the National Police Service shall be responsible for the control and overall superintendence of the operation.⁶¹ Members of the KDF deployed under Section 33 shall have the same powers and exercise the same duties as a member of the NPS (except with respect to investigating crime), and they shall be liable for acts or omissions to the same extent. The deployed KDF members are further required to receive appropriate training prior to such deployment and shall be equipped accordingly.⁶²

Members of the **National Intelligence Service** (NIS) are empowered to use force, but the First Schedule of the National Intelligence Service Act restricts the use firearms to those circumstances where less extreme means are inadequate and for the purposes of saving life, in self-defence or in defence of others against an imminent threat to life or serious injury. It further mandates them to report to superiors when firearms are used regardless of whether injuries resulted. Where the use of a firearm results in death or serious injury, a direct superior shall report the matter to the Director-General or other relevant authority to investigate the matter.⁶³

The Wildlife Conservation and Management Act contains some highly problematic provisions concerning the use of firearms by members of the **Kenya Wildlife Service**. Section 112 mandates the

60 Ibid., §§ A.12, B.8.

61 Kenya Defence Forces Act, No. 25 of 2012 [Rev.2016], § 33.

62 Ibid., § 35.

63 National Intelligence Service Act, No. 28 of 2012 [Rev.2014], First Schedule, §§A.1, A.3, A.4.

use of firearms against any person charged with an offence under the Act when attempting escape, provided only that no other means of preventing escape is available and that ample warning has been given.⁶⁴ Moreover, the Act makes no provision at all for reporting use of firearms even to a superior officer, let alone to some form of oversight authority.

The **Kenya Forest Service** are also authorised, under the Forest Conservation and Management Act, to use firearms. Like the Wildlife Service, their Act authorises the use of firearms against any person escaping custody having been charged with an offence under the Act. More broadly, it also authorises the use of a firearm against 'any person unlawfully hunting any animal within a forest area or nature reserve'.⁶⁵

The provision for the involvement of the KDF in police operations and for the use of force by members of the NIS are largely in conformity with international law. Indeed, the National Intelligence Service Act is closer to the international standard than the NPS Act. However, provisions under which members of the Kenya Wildlife Service and Kenya Forest Service may use firearms are significantly less protective than international standards suggest they ought to be.

Broader framework of police oversight and accountability

Although this study primarily focuses on IPOA, as the institution with an explicit mandate to investigate deaths resulting from police action in Kenya, in reality the police oversight and accountability architecture includes a number of other actors. Internally, the police have their own legal and institutional mechanism for accountability and oversight, while externally, a number of actors and institutions exercise a measure of oversight over the police.

Section 87 of the National Police Service Act established the **Internal Affairs Unit** (IAU) within the NPS. The IAU has the mandate to receive and investigate complaints against the police; promote uniform standards of discipline and good order in the service; and keep a record of the facts of any complaint or investigation made to it. It is also empowered to investigate misconduct on its own motion, upon complaints by the public or members of the service, upon direction by the IG, and at the request of IPOA. It may also recommend disciplinary action against officers found to have engaged in unlawful conduct and may even be authorised by the IG to institute disciplinary proceedings in exceptional cases.

Under Article 246, the Constitution established a **National Police Service Commission** (NPSC) with the mandate to oversee

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64 Wildlife Conservation and Management Act, No. 47 of 2013, § 112.

65 Forest Conservation and Management Act, No. 34 of 2016, § 63.

recruitment of NPS officers, including through appointing them, confirming their appointments and determining their promotions and transfers; and to observe due process, exercise disciplinary control over, and remove NPS members.

In addition to these specialised mechanisms there are a whole host of other institutions in Kenya that play a valuable role in police oversight. The **National Assembly** exercises oversight over the security sector in various ways. As budget holder it can determine the financial spending of the security agencies, but it also provides oversight through committees.⁶⁶ The Departmental Committee on Administration and National Security and the Departmental Committee on Defence and Foreign Affairs oversee relevant appointments of senior security officers that may require vetting. These committees also scrutinise security reports that national security organs are legally mandated to submit. Parliament can also establish *ad hoc* select committees on any security issue where they can address the conduct of the relevant security actors. In addition, Parliament can provide necessary support to other accountability mechanisms, both financially and through political support towards the implementation of their mandates.

The **judiciary** also plays an important role. Chapter Four of the 2010 Constitution provides for an elaborate Bill of Rights which seeks to protect Kenyans from the arbitrary use of powers by security agencies. In particular, the strong protections against arbitrary arrests (Art. 49), and the provisions for the rights of those detained, in custody or in prison (Art. 51), seek to remedy past violations in the name of national security, as well as the misuse of power by security agencies. The 2010 Constitution has led to a judiciary that has demonstrated assertiveness in holding the security forces to account, for example in cases of individuals held in custody beyond the period allowed by the Constitution and also in convicting police officers found to have committed human rights violations.

The **Kenya National Commission on Human Rights (KNCHR)** is a constitutional commission with a core human rights mandate. Under Section 8 of the KNCHR Act, the commission has the mandate to receive and investigate complaints about alleged abuses of human rights. This includes reports of human rights abuses from all national security organs. It monitors and produces regular reports on security issues, particularly on the police.

The **National Commission on the Administration of Justice (NCAJ)**, established under Section 34 of the Judicial Service Act,⁶⁷ also plays a role in oversight through its function in ensuring the administration of justice. It works to remedy maladministration, including on the part of security actors.⁶⁸

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66 Constitution of Kenya, 2010, Article 238(2).

67 Judicial Service Act No. 1 of 2011 [Rev. 2012], § 34.

68 Interview with constitutional commission official, 2018.

In addition to this range of different official institutions, **civil society organisations** are an important external form of oversight and accountability in security governance. A number of civil society groups seek to pursue accountability on security issues. These groups are particularly effective in blowing the whistle on violations by security agencies. Many respondents pointed out that civil society groups are their first point of call in most cases of violations by security actors.⁶⁹

Many of the civil society groups, however, lack resources to sustain their work, and in time their activities reduce in number and quality. They are also geographically limited in most cases. Respondents also noted that these groups do not have effective follow-up capabilities.⁷⁰ Civil society capacities for sustained and long-term work in data collection, monitoring and research to inform interventions into better security governance remain limited. In addition, civil society space is getting more restricted in Kenya, making accountability and oversight work more dangerous.

Recommendations:

Recommendation 4: Lawmakers should amend Schedule Six of the National Police Service Act so as to restrict the use of firearms by the police to those circumstances where there is a threat of death or serious injury to themselves or to another member of the public.

Recommendation 5: Lawmakers should amend §112 of the Wildlife Service Act and §63 of the Forest Conservation and Management Act so as to ensure that they do not include provisions regarding the use of firearms that are more permissive than the NPS Act, and to ensure that accountability for any use of force by officials under the mandate of those Acts is achievable through IPOA.

Recommendation 6: The NPS should make the core content and modalities of its training accessible to key actors who can make necessary recommendations on how to reduce the use of lethal force and probability of deaths during encounters with suspects.

69 Focus group discussion, Nairobi, 2018.

70 Interview with civil society representative, Nakuru, 2018.

IPOA's mandate to investigate and the scale of the problem

As the African Commission on Human and Peoples' Rights has affirmed, a lack of accountability concerning a potential violation of the right to life is in itself a violation of the right to life. Accountability plays a central role in affirming the norm against arbitrary deprivations of life. It thus also plays a vital preventive role: the two components create a self-reinforcing virtuous circle. For accountability to achieve this end it must be understood in a broad fashion, not narrowly limited to the legal finding that a specific individual was responsible for a particular death, or to the sanctions imposed. It must also include the provision of remedies to the victims or their families and be aimed at some measure of reform to prevent recurrence. But before the full range of accountability measures can be reached, an investigation is usually required to establish the facts.⁷¹

In the case of a potentially unlawful death the relevant standards for an investigation, including the question of when the State has a duty to investigate, are established in the United Nations' recently revised *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*. The duty to undertake such an investigation applies to all potentially unlawful deaths, which primarily fall into three categories: (1) where the death may have been caused by acts or omissions of the State, in violation of its duty to respect the right to life; (2) where the death occurred when a person was detained by, or was in the custody of, the State; and (3) where the death occurred where the State may have failed to meet its obligations to protect life.⁷²

The State's duty to investigate therefore applies where it knows or should have known of any potentially unlawful death, including where reasonable allegations of a potentially unlawful death are made. Because it applies in all cases where the State has caused a death or is suspected to have done so, it applies to all situations where law enforcement officials used force that may have contributed to the death.⁷³ It also applies to all deaths occurring in custodial settings, where, as the Protocol makes clear, '[o]wing to the control exercised by the State over those it holds in custody, there is a general presumption of State responsibility'.⁷⁴

⁷¹ See generally, Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/71/372 (2016), paras. 111–112.

⁷² *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, §§ 2(a)–(c).

⁷³ *Ibid.*, § 16.

⁷⁴ *Ibid.*, § 17.

IPOA's mandate to investigate

Section 6 of the IPOA Act sets out its functions but does not explicitly include the investigation of all deaths potentially caused as a result of police action (or inaction). Instead, this is included as one of the Authority's powers in Section 7(1)(a)(x). This section gives the Authority power to investigate the Service on its own motion or on receipt of complaints from members of the public, and for that purpose, to gather any information it considers necessary by such lawful means as it may deem appropriate, including by:

- (x) *investigating any death or serious injury occurring or suspected of having occurred as a result of police action.*

As highlighted above, it is important to think of 'police action' in the broadest sense. Nothing in the Act directly suggests that members of KDF or other arms carriers would not be subject to investigation by IPOA for their acts or omissions when undertaking law enforcement activities. The IPOA Act establishes that for its purposes:

'the Police' means the National Police Service and includes—

- (a) *any person or body—*
 - (i) *employed by it; or*
 - (ii) *acting on its behalf, under its control or at its behest; and*
 - (iii) *any other person for the time being exercising Police powers under any written law.*⁷⁵

The IPOA Act further reinforces the obligation of members of the Kenya Police Service (KPS) to notify the Authority of a death and also to secure evidence:

- 25. *Deaths and serious injury in custody*
 - (1) *The Authority shall investigate any death or serious injury including death or serious injury while in Police custody, which are the result of Police action or were caused by members of the Service while on duty.*
 - (2) *The Police shall upon a death or serious injury as contemplated in subsection (1) take all necessary steps to secure evidence which may be relevant for the investigation, including pictorial and written evidence, and shall in writing notify the Authority, and supply it with the evidence and all other facts relevant to the matter, including, if available, the names and contact details of all persons who may be able to assist the Authority should it decide to conduct an investigation.*
 - (3) *A Police officer who contravenes subsection (2) commits an offence.*⁷⁶

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SENSE

⁷⁵ Independent Policing Oversight Authority Act, No. 35 of 2011 [Rev.2012], § 2(1).

⁷⁶ *Ibid.*, § 25.

Initiation of investigations

There are three ways through which cases are brought to the Authority: through official notification by the police (as mandated by law); as a result of a complaint by a member of the public (whether related to the victim or not); or as a result of IPOA acting on its own motion when a case comes to its attention through other means.

The number of notifications IPOA reports having received from the NPS has declined sharply since the early years of its inception, as is evident from Figure 1.

As IPOA has noted in several reports, in recent years these numbers do not reflect the number of reports of deaths as a result of police action received through other channels.⁷⁷ The number of deaths occurring as a result of police action seems unlikely to have declined during this period (in fact, rather the opposite) and so this non-compliance by the NPS is a significant limitation of the investigative capacity of IPOA. Subsequent performance reports by IPOA for the periods January–June 2018, July–December 2018 and January–June 2019 have not included data on the number of notifications by police.

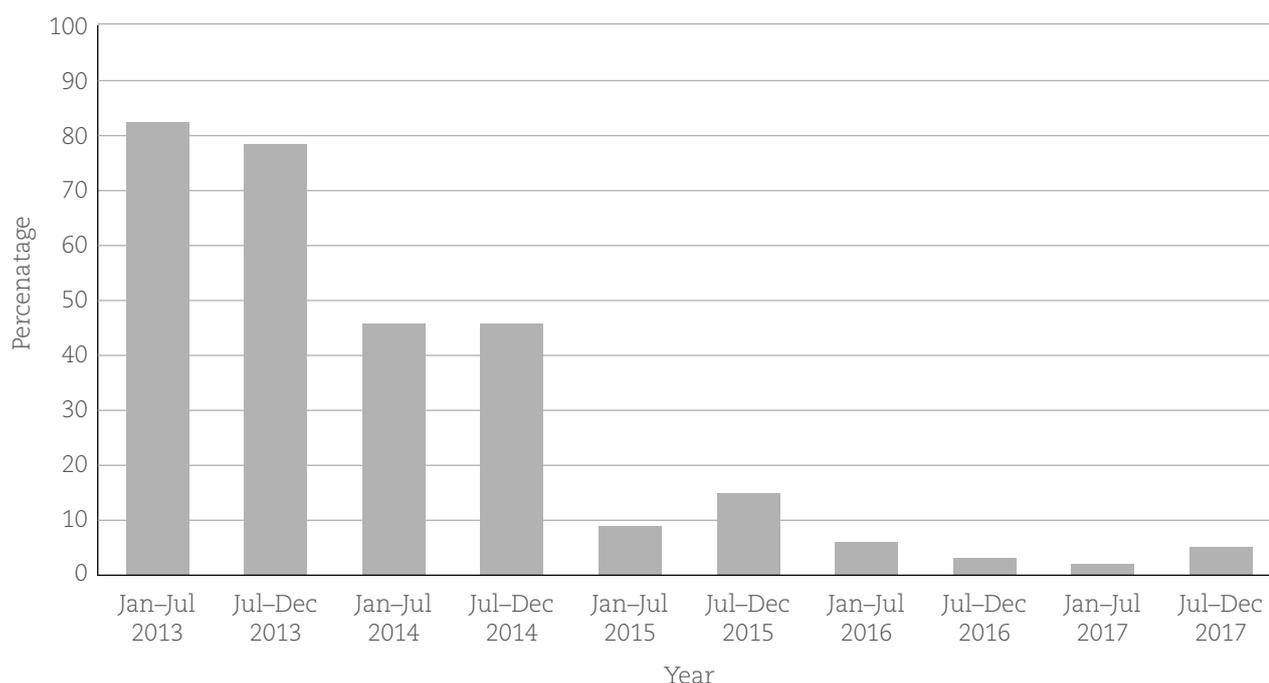
There are significant investigative advantages to receiving a notification of the death directly from the NPS, rather than discovering it later from other sources. This would enable IPOA adequate time to examine and prevent contamination of the scene and available evidence, as well as maintain records of the date, time and handling of all evidence, establishing a chain of custody.

In terms of receiving cases, it is important to note that notifications are rarely received from the police even when, according to the law, ‘the police must notify the Authority in writing within twenty-four hours’ of a death or serious injury caused by police action.⁷⁸ This notification should include an explanation of the circumstances surrounding the death and should incorporate

77 See, for example, IPOA Performance Report (Jul–Dec 2016), p. 21.

78 IPOA, *Investigations Unit Operation Manual*, p. 34.

Figure 1: Number of notifications made to IPOA, by NPS, of death or serious injury resulting from police conduct, by IPOA reporting period



relevant photos of both the victim and the scene of the incident. IPOA staff who were interviewed noted that the most convenient way of communicating these incidences would be the inclusion of IPOA in the 'signals' sent from police stations to headquarters as notifications.⁷⁹

The duty of the police to notify IPOA concerning cases of police killings faces a serious challenge since the time lines for making the notification are not clarified in either the IPOA or the NPS Act. Moreover, the rank of the person charged with responsibility to make the notification and the procedure for doing so are not clear. IPOA investigators stated that the Authority is in the process of drafting regulations that would clarify the time lines and procedure for notification. Police failure to notify has contributed to many incomplete investigations of cases due to lack of crucial evidence.⁸⁰

In addition to this police notification procedure, any person affected by the use of force and firearms, or their legal representatives, can directly lodge a complaint with IPOA. According to Section 24(1) of the IPOA Act, a person wishing to lodge a complaint against the police may do so orally or in writing or in such an appropriate format as may be prescribed in the regulations.

One investigator interviewed shared their impression of the challenge posed by the fact that those who bring complaints to the Authority may not always be the ones with the information required by an investigator:

Looking at the different ways cases are initiated, it could be on our own motion, referrals or a member of the public walks in... of course we have issues that arise depending on how we receive the complaint. Sometimes a CBO comes and you realise that the case does not have all the details that you would need, because they might not be aware of what we require. So we would rather hear from a complainant who has been victimised because we get all the details that we require then.⁸¹

Once they become apprised of a matter falling within their mandate, IPOA may choose to allow another institution to investigate while they observe. With some issues falling within IPOA's mandate, this may mean monitoring an Internal Affairs Unit investigation, but with respect to a death, it is more likely to mean overseeing an investigation by the Directorate of Criminal Investigations (DCI). In either case, IPOA would retain the right to take over the investigation if they felt it was being delayed or was for some other reason at risk of becoming compromised. Nevertheless, regardless of whether or not DCI or IPOA directly undertake an investigation, a certain degree of collaboration between IPOA and the police will be a practical necessity in nearly every case.

THE RANK OF
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79 Interviews with IPOA investigators, 2018.

80 IPOA, *Board end term report, May 2012–May 2018*, p. 93, <http://www.ipoa.go.ke/wp-content/uploads/2018/05/IPOA-BOARD-END-TERM-REPORT-2012-2018-for-website.pdf>

81 Interview with an IPOA investigator, 2018.

Recommendations

Recommendation 8: IPOA should engage with the NPS with a view to developing clear regulations concerning notification requirements, including clarification of time lines, procedures and responsibilities, and then collaborate to increase police awareness of their content.

Recommendation 9: IPOA should consider strategic prosecution of officers for non-compliance with notification requirements in certain cases, for example where delays have made it unlikely for the case to proceed.

Recommendation 10: IPOA should improve communication and collaborations with key stakeholders and partners to ensure they appreciate the value of submitting complaints to the Authority in the event of deaths arising from police conduct.

Recommendation 11: IPOA should strengthen its 'own motion' investigations in order to compensate for the decline in notifications from the police and complaints received from the public.

Reporting on the scale of the problem

The public debate around police use of force in Kenya is dominated by competing versions of statistical information. Data from the Independent Medico-Legal Unit (IMLU) shows that 78 people were killed in countrywide police operations between January and September 2019.⁸² IMLU compiled the data from print and electronic media reports and from its network of monitors. The *Daily Nation* Deadly Force Database, on the other hand, recorded at least 189 people killed by the police between January and December 2019.⁸³ The database is based on public, media and human rights reports, and on official records held by agencies of the government of Kenya. The figures in the database indicated that 25 counties had at least one case of police killing reported in the media, and Nairobi County with 103 victims (54%). In 2019, according to the Deadly Force Database, the police killed an average of 16 people every month, with the three deadliest months being October (34), September (22) and January (19), respectively. June had the lowest number of killings (6).⁸⁴

However, the numbers have, on several occasions, been disputed by the police, and different organisations and groups have also generated different figures, adding to the confusion and disputation. For instance, following the 8 August 2017 general election, the Kenya National Commission on Human Rights found that police had killed 57 people during the elections⁸⁵ whereas both Amnesty International and Human Rights Watch reported 67 deaths resulting from police action.⁸⁶ IPOA declined to be pressed into releasing the number of deaths in the immediate aftermath of the violence,⁸⁷ but several months later announced that it had completed investigations into two named individuals

82 'Nairobi leads in police extra-judicial killings, says IMLU', <https://www.the-star.co.ke/counties/nairobi/2019-10-29-nairobi-leads-in-police-extra-judicial-killings-says-imlu/>

83 'Deadly force: Unlawful killings by police still prevalent in Kenya', <https://www.nation.co.ke/dailynation/newsplex/deadly-force-unlawful-killings-by-police-still-prevalent-in-kenya-210422?view=htmlamp>

84 Ibid.

85 Kenya National Commission on Human Rights (2017) 'Still a mirage: A human rights account of the fresh presidential poll for the period September and November 2017', press statement, 20 December.

86 Amnesty International and Human Rights Watch (2017) "Kill those criminals": Security Forces violations in Kenya's August 2017 elections,' report, October.

87 Fick, M. (2017) 'Kenya police watchdog says investigating at least 28 election-related deaths', *Reuters*, 17 August, <https://www.reuters.com/article/us-kenya-election-police-idUSKCN1AX22K>

(including a baby) and eleven others – a total significantly smaller than either that presented by Amnesty/Human Rights Watch or by the Kenya National Commission.⁸⁸

Respondents from this study noted that collecting data on police killings is a difficult task, and most organisations do not have the capacity to verify and document all deaths from police action. Many non-State actors rely on complaints from community members, CBOs and the media in compiling their reports.

Experts interviewed in the study pointed out that the figures presented are only the reported ones and that a lot of cases do not come to light. A representative from a Nairobi-based CSO that collects data on police killings pointed out that:

The numbers are only based on a slice of the problem. There are cases that are not reported. The problem is much worse than is reported. We have gone to mortuaries to look at the situation with forensic experts.⁸⁹

Witnesses and families of victims consulted in this study also pointed to police intimidation is a factor leading to lack of full information on police killings. Reflecting on their experiences in reporting, participants at a focus group in Garissa agreed with claims made by a parent of a victim of enforced disappearance that ‘the police told us directly that they can’t write that complaint against police officers.’⁹⁰ The high-profile case of lawyer Willie Kimani and his client Josephat Mwendwa provides a chilling example of the risks faced by those who try to pursue accountability of individual officers using official channels.

In addition to challenges facing victims or witnesses in coming forward directly, some other actors have also been faulted as failing in exercising due diligence when collecting and reporting data. A respondent from a civil society group that works on police accountability in Mombasa pointed out that some of the sources are not credible since they do not take steps to verify complaints and media reports through post-mortems, witness reports and from the families of the alleged victims.⁹¹ Nonetheless, a representative from a Nairobi-based human rights organisation highlighted that it is not within the mandate of human rights organisations to present official data but, rather, only to speak about credible cases for the purpose of documenting human rights violations and calling for accountability.⁹²

POLICE
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INFORMATION

88 Ndonga, S. (2017) ‘IPOA forwards report on police brutality during polls to Tobiko’, *Capital News*, 13 November, <https://www.capitalfm.co.ke/news/2017/11/ipoa-forwards-report-police-brutality-polls-tobiko/>

89 Interview with CSO representative, Nairobi, 2018.

90 Focus group discussion, Garissa, 2018.

91 Interview with CSO representative, Mombasa, 2018.

92 Interview with CSO representative, Nairobi, 2018.

The lack of official data on deaths as a result of police killings as well as enforced disappearances was highlighted across all study sites as a major barrier to police accountability. It also makes it hard to know the extent of the police killings since even the available data has always been in question.

IPOA is well-positioned to make advised contributions to this debate but it should be careful how such statistics are framed. Every six months, IPOA reports on the number of investigations it is conducting as well as progress. These performance reports are relied upon by a wide variety of stakeholders interested in a range of different topics under the IPOA mandate, and are not designed to solely document unlawful deaths. Nonetheless, given the importance of the issue, it is suggested that the documentation of the fundamental issue of deaths arising from police action should be reviewed.

THE WAY IN WHICH IPOA CURRENTLY REPORTS ON COMPLAINTS HAS NOT BEEN CONSISTENT

This is not about counting ‘extrajudicial executions’. Not every instance of someone dying as a result of police action is unjustified. Indeed, even in circumstances when it transpires the killing was not justified, or lawful, the emotive term ‘extrajudicial execution’ could still be unhelpful. The killing may have been a mistake, it may have been a bad judgement call, it may have stemmed from fear or inadequate training and preparation; it need not have been a deliberate decision to perpetrate murder. Though an unlawful death, a violation of the right to life and, by a strict definition, an extrajudicial execution, the term carries a connotation of deliberate action and sometimes even government policy that requires substantiation.

This determination can only be made after the conclusion of an investigation. IPOA does report on a number of different statistics concerning these events: the number of deaths which occur, the number of complaints received, the number of notifications made, the number of investigations opened, the number of investigations closed, the number of recommendations passed to ODPP and the number of police officers subsequently prosecuted.

The way in which IPOA currently reports on complaints has not been consistent. For example, during one reporting period, IPOA documented a general category ‘police shootings and deaths’. This made it unclear whether the reported figure involved all shootings, of which some resulted in deaths, or all shootings that resulted in death. Promisingly, in their latest performance report, IPOA has reported on three categories of complaint: ‘injuries as a result of police shooting’, ‘deaths from police shooting’ and ‘deaths in police custody’.⁹³

93 The same report also included a separate figure for enforced disappearances, which is good practice.

When assessing these reported numbers from IPOA, there are a number of imperfect but potentially informative comparative sources. In this regard, IMLU reports annual figures of deaths they attribute to police action. Likewise, over the last three years, one of the national newspapers, *Daily Nation*, has been maintaining a running total of officer-involved deaths. Neither of these two reference points is necessarily to be taken as a baseline for the actual incidence of potentially unlawful death. However, in circumstances where there is a lack of police notification and a lack of public trust to initiate formal complaints via IPOA, they represent helpful comparison figures for the number of occasions in a given year when there was at least suspicion that the police may have been involved in a death (which is, after all, ample grounds for IPOA to begin an investigation).

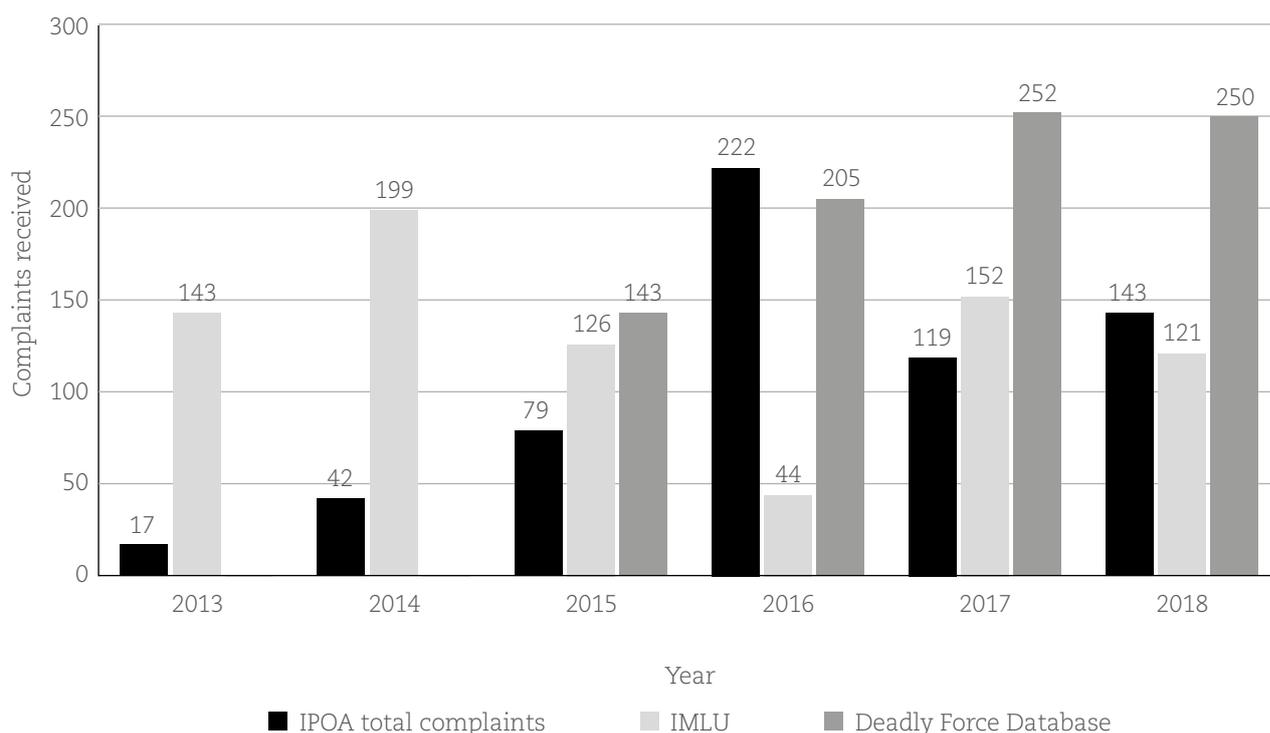
A comparison between the IPOA, IMLU and *Daily Nation* totals can be seen in Figure 2.

Figure 2 highlights that, with the notable exception of 2016, there were markedly more suspicious cases documented by both IMLU and the *Daily Nation* than were noted as complaints by IPOA. Data from the field suggest that the reduced number of complaints made to IPOA owes in part to low enthusiasm by CSOs to report incidences following the failure of successful prosecutions in 2016. A representative of one such organisation in Mombasa explained that ‘for many months, we’ve decided not to send our cases forward to IPOA. We don’t see results.’⁹⁴

It is contended that, with improvements to IPOA’s investigative process, especially at the ‘front end’ of receiving and processing cases, these three figures should move closer together. If anything (as was the case in 2016), the IPOA figure should be higher than the other two because the IMLU and *Daily Nation* figures should amount to referrals worthy of at least preliminary investigation.

94 Interview with CSO representative, Mombasa, 2018.

Figure 2: Reported IPOA complaints received contrasted with reported incidents to the *Daily Nation*’s Deadly Force Database and cases investigated by IMLU



A range of different figures can be contrasted in this respect, and it would be helpful if IPOA were to report publicly on the following:

- (1) *The number of complaints received about deaths (either arising from police action or in police custody).⁹⁵*
- (2) *The number of deaths about which notification was received from the NPS (likely to be smaller, because various complaints may be received about the same death).*
- (3) *The number of deaths IPOA believes have taken place (likely to be different from (1) because of potential duplication or one complaint for several deaths, etc.; similarly, possible to be different from (2) because of duplication – although with proper streamlining that duplication can be avoided).*
- (4) *The number of deaths being investigated by another institution, and IPOA elected to simply observe.*
- (5) *The number of deaths which IPOA elected to investigate ((4) and (5) should sum to or exceed (3)).*

From these five figures, one can discern the number of deaths of which IPOA became aware, and the number of new investigations that have been started during the reporting period.

Because of the length of time that an effective investigation into a potentially unlawful death can take, in order to report meaningfully on performance, reports could then involve the following:

- (6) *The 'opening balance': The number of open investigations into deaths carried over from the previous reporting period (observed and IPOA's own).*
- (7) *The number of investigations that have been closed during the reporting period:*
 - a. *The number of investigations closed at preliminary stage (the death did not occur, the police were not involved, or for some other reason);*
 - b. *The number found – after an investigation – not to be unlawful;*
 - c. *The number found to worthy of referral to the ODPP.*
- (8) *The number of investigations into deaths which remain open (at the end of the reporting period) – the 'closing balance'.*

Recommendations

Recommendation 12: IPOA should report on the complaints received and the status of all the cases, including on decisions to hold preliminary or full investigation, or decisions not to investigate, in such a way as to provide a full understanding of the scope of their work.

Recommendation 13: IPOA should treat as a complaint any media or other report concerning a death resulting from police action upon which they follow-up to establish whether there is a case to investigate.

Conclusion

Deaths as a result of police action are clearly a significant challenge in Kenya and have been for some time. The accusation of 'extrajudicial executions' is often levelled and resonates at all levels of public discourse. This study has outlined the extent to which the frequency of lethal use of force by the Kenyan police is likely the consequence of insufficiently protective legal frameworks, operating procedures and trainings that are based on the same, inadequate equipment, and poor relations between the police and the public whom they are supposed to police, particularly in certain communities.

The creation of IPOA was a timely response that should check impunity and assist the State in fulfilling its duty to investigate potentially unlawful deaths as well as a range of other abuses. The legal framework established by the IPOA Act empowers the Authority to investigate any death it thinks may have been caused by a police officer and could be read more broadly to include any other law enforcement official. This legal architecture is in functional conformity with international law standards on police accountability. Further, IPOA's manuals and standard operating procedures that have been put in place for scene management and forensic sampling are robust.

The central challenge faced by IPOA is in its relationship with the police service itself – perhaps most pertinently evidenced by the steep decline in police notifications. All IPOA staff interviewed mentioned challenges of working with the police. Though there is a clear legal framework for cooperation, investigators made it clear that working with the police to ensure their 'oversight' was the biggest obstacle of their job. In this regard, receiving notifications, collecting evidence, victim support, witness protection and even personal security were shaped by perceptions of the police's suspicion about IPOA, and the seeming power they have over the Authority. The next few years will present an opportunity to rebuild this relationship, including constructing fruitful collaboration with the Internal Affairs Unit, with a view to making police oversight more effective, and ultimately benefiting the police.

Because of the decline of police notifications, IPOA are forced to rely upon complaints and *ex officio* investigations – these bring their own investigative challenges. IPOA's reticence to make clear the difficulties faced in trying to conclude such investigations, and thus drawing attention to the police's failure to cooperate, means that they often end up taking the blame. The Authority should be more open about cases they try to investigate but that are ultimately

frustrated by lack of evidence, as well as about how earlier notification could in many cases avoid this.

A frequent complaint in the stakeholder interviews was inadequate communication regarding cases. This is a delicate balancing act in any investigation, but deserves closer scrutiny by IPOA. This particularly relates to families and victims, about whom the Minnesota Protocol makes specific recommendations in terms of liaison. IPOA ought also to consider improving communication with certain key stakeholders who would be well placed to make timely complaints to the Authority.

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ABOUT THIS STUDY

This study forms part of a larger project by the African Policing Civilian Oversight Forum the Centre for Human Rights at the University of Pretoria, the Centre for Human Rights and Policy Studies, the Danish Institute for Human Rights and the Independent Policing Oversight Authority of Kenya (IPOA), funded by the European Union. The project has been developed and implemented in line with the recent review of the Minnesota Protocol to be able to effectively provide oversight and investigate alleged police abuses, in particular with respect to extra-judicial killings and enforced disappearances, torture and ill-treatment, and arbitrary detention.

This study explores the context in which investigations are undertaken by the Independent Police Oversight Authority (IPOA), and identifies areas for reform by a variety of stakeholders. It builds upon a review of existing studies into police killings in Kenya, the legal framework protecting human rights in the context of policing, as well as more technical documents of both the Kenyan police and of IPOA. Beyond these texts, the study is informed by a series of key informant interviews and a number of focus group discussions in Nairobi, Kisumu, Nakuru, Mombasa, Kwale and Garissa counties.

The study establishes that while there is a legal and institutional framework in place to guide investigations into potentially unlawful killings by the police in Kenya, there are a number of practical gaps that allow for the manipulation of the investigative process in such a way as to facilitate impunity. The study highlights that police compliance with the law with regard to notifications remains a significant challenge for IPOA's investigations.

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