ASSESSMENT OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND THEIR APPLICATION ON EXTRA-JUDICIAL KILLINGS BY THE NATIONAL POLICE SERVICE IN KENYA

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DECLARATION

I, the undersigned declare that this thesis is my original work and has not been presented for the award of a degree in this University or any other Institution of higher learning for examination.

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ABSTRACT

Extra-judicial killings have been of concern in Kenya, especially as the perpetrators are state agents, the National Police Service. Kenya is a signatory to key international human rights instruments and is therefore bound to respect and uphold the foundation documents of international human rights law. The study assessed the key international human rights instruments and the application on extra-judicial killings by the National Police Service in Kenya. The study objectives sought to analyze the various international human rights instruments and how they are effective on extra-judicial killings by the National Police Service in Kenya. The study analyzed the historical background of extra-judicial killings in Kenya and the perspective from the global to local level. This presented an understanding of extra-judicial killings since Kenya gained independence and the efforts undertaken by the various governments to address them.

The literature review focused on the international, regional and domestic human rights instruments. The theoretical perspective of the liberal school of thought was adopted due to the key role international institutions play in cooperation among states which reduce the opportunity of conflict and that states are embedded in international and domestic laws that constrain their actions. The research methodology employed was the desk method which is based on secondary data collected through qualitative analysis.

The study linked the obligations of Kenya to international human rights instruments, especially on the right to life of persons. The results indicated that international human rights instruments are effective on the limitation of extra-judicial killings by the National Police Service in Kenya. The government of Kenya has undertaken various steps to address extra-judicial killings such as the domestication of international instruments which form part of the laws of Kenya and setting up various commissions which have been significant in the reforms of the National Police Service.

Despite the commitments, Kenya has faced a backlash from the international community for extra-judicial killings which have been documented in various reports such as Amnesty International (2017). The National Police Service has faced criticism for failure to adhere to the rule of law notwithstanding the major police reforms that the country committed to after the 2007/2008 post-election violence and which were included in the Constitution of Kenya (2010) and subsequent legislation. The study also found that some factors inhibit the limitation of the extra-judicial killings in Kenya include corruption, lack of political will, police impunity among others.

Among the study recommendations of the study include adherence to the Constitution, police professionalism, ratification of treaties, and alternative dispute resolution. This thesis will be a valuable source for policy makers at the international, regional and domestic level in formulating strategies for limiting extra-judicial killings.
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LIST OF ABBREVIATIONS/ ACRONYMS

ACHR-African Court of Human Rights
AI-Amnesty International
APS-Administration Police Service
AU-African Union
CIPEV- The Commission of Inquiry into Post-Election Violence
DCI-Directorate of Criminal Investigation
ECOSOC- Economic and Social Council
HRW-Human rights watch
ICCPR- International Covenant on Civil and Political Rights
IPOA- Independent Policing Oversight Authority
IGP-Inspector General Of Police
KHRC-Kenya Human Rights commission
KNCHR- The Kenya National Commission on Human Rights
KPS-Kenya Police Service
NPS-National Police Service
NPSC — National Police Service Commission
OAU-Organization of African Unity
UNDHR-Universal Declaration on Human Rights
UN-United Nations
WISPI- World Internal Security & Police Index
CHAPTER 1: INTRODUCTION

1.1 Introduction

Since the promulgation of the Constitution of Kenya in August 2010, International human rights instruments have been given a more prominent role and recognized in the Kenyan legal system through the inclusion of provisions that directly incorporate ratified treaties into the domestic legal system as a legitimate source of law. Enactment of The Treaty Making and Ratification Act No 45 of 2012 was significant in the recognition of treaties, as it gave effect to the provisions of Articles 2(5) and 2(6) of the Constitution.

The UN defines extrajudicial killing as the deprivation of life without full judicial and legal process, and with the involvement, complicity, tolerance or acquiescence of the government or its agents (UN, 2002).

Various international human rights instruments provide for the inherent right to life of persons and therefore the right cannot be arbitrarily deprived through any means either by the state or non-state actors. Despite the country’s commitments to the international human rights instruments, Kenya has faced a backlash from the international community for extra-judicial killings which have been documented in various reports such as Amnesty International (2008). The National Police Service has been criticized for failing to adhere to the rule of law notwithstanding the police reforms that Kenya committed to after the 2007/2008 post-election violence and which were included in the Constitution of Kenya (2010) and subsequent legislation such as the IPOA Act (2011), The Police Act (2010) NPSC Act (2011).

Kenya still faces challenges of addressing the extra-judicial killings as reported recently during the 2017 general elections despite the efforts undertaken by the Kenyan
government to address extra-judicial killings which included constituting task forces and various commissions of inquiry such as the CIPEV (2008) and TJRC (2008). The study assesses the application of International human rights instruments on extra-judicial killings by the National Police Service in Kenya.

1.2 Background and Context

The Constitution of Kenya (2010) domesticates all international law and recognizes treaties and conventions ratified by Kenya as part of the laws of Kenya hence everyone, including the state, must adhere and abide thereto. The right to life is a Constitutional right guaranteed to everyone and is enshrined in the Constitution 2010 and entrenched in various International instruments such as the Universal Declaration of Human Rights (UNDHR), International Covenant on Civil and Political Rights (ICCPR) and The African Charter on Human and People’s Rights (Banjul Charter).

Reports indicate that the use of excessive and disproportionate force by the police have been a common theme running through the history of Kenya and whenever the state is faced with allegations of extra-judicial killings and/or disappearances’, it has traditionally denied the allegations and attacks the credibility and legitimacy, rather than investigating the allegations (TJRC, 2013). Earlier documentation of the excessive use of force by the police that significantly led to the deaths of civilians in the context of security operations included the opening of the Nyanza General Hospital (Russia) in Kisumu in 1969, the 1991 Saba Saba riots and the 2007/2008 post-election violence (TJRC, 2013). In addition, the establishment of police elite units such as the ‘flying squad” in the 1990s and the “kwe kwe squad” in 2002 resulted in unlawful killings of civilians, especially those
suspected to members of outlawed gangs popularly referred to as “Mungiki” “Baghdad boys” and “chinkororo” (Hakakhe, 2014).

Extra-judicial killings have been witnessed globally for instance, the USA with the calls for police reforms due to the targeted killings of people of color and the usage of drones in the fight over terror in the Middle-East countries resulting in deaths of innocent civilians (Gordon, 2016). The Philippines has had a high rate of human rights violations, especially state sanctioned extra-judicial killings as reported by Amnesty International (Habib, 2015). In Africa, extra-judicial killings have been on the rise in authoritarian regimes and countries experiencing political challenges such as the Democratic Republic of Congo and South Sudan (Igbo, 2017).

In Kenya, the push for multiparty democracy in the 1990s brought pressure for police reforms in the country to modernize the service in accordance with international standards of policing. Therefore, with the change of government in 2002, the government set up a task force in 2003 to analyze the police force and make recommendations which were, however organizational reforms and restructure of the institution leaving out accountability and professionalism (Mogeka, 2015). Even though election-related violence have been experienced since independence, the scale and extent of the 2007/2008 violence caught many by surprise. The aftermath was a turning point of the police reform agenda in the country. Consequently, the Kenya National Dialogue and Reconciliation forum for dialogue and mediation recommended the prioritization of institutional reforms, which included police reforms as a means of return to the rule of law (KNDR, 2008). Various commissions were established to investigate the allegations of gross violations of human rights, especially extra-judicial killings by the security agencies. They included the Commission of Inquiry into Post-Election Violence (CIPEV
or the Waki Commission, 2008), UN Special Rapporteur Report on Extrajudicial, Summary or Arbitrary Executions, (UN, 2009), the Truth Justice and Reconciliation Commission (TJRC, 2009).

Against a backdrop of increased pressure and calls for police accountability and reforms, a task force was established to make recommendations; the Ransley Report, which provided a blueprint for reforms that formed the cradle of police reforms adopted in the 2010 Constitution and related implementing legislations. While the reforms sought to entrench accountability and the rule of law, reported cases of extra judicial killings have remained rampant in Kenya despite the commitment of the country to various treaties and international protocols. Notwithstanding the promulgation of the 2010 Constitution and the enactment of the various police reforms, the cases of extra judicial killings have been reported, for instance the security crackdown on Somali and Muslim communities in Coast, Nairobi and Northern Kenya on clerics, sympathizers and terror suspects (Abukar, 2014) and others such as the killing of a human rights lawyer working at International Justice Mission (IJM), his client and their driver. This led to demonstrations by the legal profession fraternity and human rights groups against the state for extra-judicial killings and demanded accountability and the upholding of the rule of law (FIDH, 2016). The latest reports of the police brutality resulting in extra-judicial killings were witnessed during aftermath of the 2017 general elections’ and the fresh presidential elections (KHRC, 2017).

A report by Amnesty International (2016) ranked Kenya top in extra judicial killings in Africa and the World Internal Security & Police Index ranked the country’s police service among the worst in its ability to address internal security issues focusing on domains of capacity, process, legitimacy and outcomes (WISPI, 2017).
It is against this background that this study assesses the application of international human rights instruments on extra-judicial killings by the National Police Service in Kenya.

1.3 Problem Statement

Kenya is a member of the United Nations and has ratified various international treaties and protocols that protect human rights. Under international law, human rights standards are presumed to only apply to national states as the dominant actors in the global arena and politics, and are those who conclude the treaties and international regulations. As states are international subjects they are presumed to be duty bearers whose primary responsibility is the protection and fulfillment of international human rights norms. Therefore, Kenya as a state is bound to respect and uphold the foundation documents of international human rights law.

The National Police Service is faced with a lot of challenges in Kenya with the most significant being the engagement in extra-judicial killings and have been on the receiving end of accusations of arrests and disappearance of suspects, some of whom were last in their custody. Human rights groups have decried human rights violations in the country perpetrated by the State actors under the guise of maintaining law and order, with the state and police routinely denying claims of extra-judicial killings making it difficult to ascertain the truth.

Despite the steps taken by the government after the 2007/2008 post-elections violence to reform the police service, the police still find themselves in a backlash for extra-judicial killings. Reports of extra-judicial killings by the police have been rampant despite the International Human Rights instruments that the country is committed to and the efforts by the government to address the killings.
Most of the investigations and documentation have been conducted by International and local human rights groups and with little and/or insignificant documentation by academic researchers. It is in this view that this study seeks to assess the international human rights instruments and their application on extra-judicial killings by the National Police Service in Kenya so as to ascertain why the extra-judicial killings persist despite reforms and commitment to international human rights instruments.

1.4 Objectives of the Study

The main objective of the study is to assess the application of international human rights instruments on extra-judicial killings perpetrated by the National Police Service in Kenya.

The specific objectives of the study are:-

i. To analyze the historical background of the rise of extra-judicial killings in Kenya.

ii. To examine the international human rights instruments that are applicable on extra-judicial killings in Kenya.

iii. To assess the effectiveness of international human rights instruments on extra-judicial killings by the National Police Service in Kenya

1.5 Research Questions

i. What is the historical background of the rise of extra-judicial killings in Kenya?

ii. What are the international human rights instruments that are applicable on extra-judicial killings in Kenya?

iii. How are international human rights instruments effective on extra-judicial killings by the National Police Service in Kenya?
1.6 Justification and Significance of the Study

The research intends to justify that international human rights instruments are key in the promotion of human rights in Kenya due to the incorporation of provisions in the Constitution of Kenya (2010). As a duty bearer in the global system, Kenya is mandated to promote and fulfill its commitment. While there is a wide range of literature examining the international human rights instruments that includes laws and policies, Kenya however faces challenges with regard to extra-judicial killings as reported by various international, regional and local human rights bodies and which are often perpetrated by the National Police Service.

The research could help policy makers and the judicial officers to understand better the extra-judicial killings committed by the state through enforcement bodies, the police, and to enact further sanctions thereof.

The study will also help the society, government, human rights groups and other administrative bodies understand the importance of protection of right to life and understand the human rights instruments applicable to extra-judicial killings hence minimize the violations.

In addition, the research will assist academics especially those in the field of criminal justice, and researchers in understanding the application of the international human rights instruments on extra-judicial killings in Kenya especially those perpetrated by the National Police Service

1.7 Scope of the Study

The scope of the study was limited to human rights instruments which are international, regional and domestic that impact extra-judicial killings by the National Police Service in Kenya. In particular, the study relied on literature and on the reported cases of extra-
judicial killings committed by the National Police Service since the early 1990s to date. The emphasis of the study was on the extra-judicial killings committed within the boundaries of Kenya. However, comparison with other countries such as the USA, Nigeria and Philippines was analyzed due to the reports of extra-judicial killings in these countries.

1.8 Limitations of the Study

The researcher highly relied and was limited to secondary data due to time constraint and the complex and emotive nature of extra-judicial killings in Kenya. In addition, within the course of the research, new literature especially from human rights groups were released which are important to the study hence the researcher had to constantly update the literature. This was due to the fact that Kenya had held the general elections the previous year, 2017, which was occasioned by reported cases of extra-judicial killings.

1.9 Organization of the Study

The study is divided into five main Chapters. The first Chapter is the introduction to the study that includes the background of the study, statement of the problem, purpose of the study, objectives of the study and the research questions. It also provides the significance, scope and justification of the study and definitions. Chapter two provides the literature review of the international human rights instruments and the application on extra-judicial killings by the National Police Service in Kenya by first analyzing the historical background of extra-judicial killings in Kenya and the perspective from the global to local level and the efforts taken by the various governments to address the killings. It also provides the theoretical framework.
The third chapter provides the methodology description that was utilized by the study. The fourth chapter provides the analysis of the findings of the application of international human rights instruments on extra-judicial killings by The National Police Service in Kenya. The fifth chapter provides the key summary of the findings of the study, the conclusion and recommendations.
CHAPTER 2: LITERATURE REVIEW

2.1 Introduction

Guided by the specific objectives of the study, this chapter provides the literature review of the international human rights instruments and the application on extra-judicial killings in Kenya and the theoretical framework.

2.2 Historical Background of the Rise of Extra-Judicial Killings in Kenya

Reports indicate that as a result of the rise in crime in the 1990’s, the government formed a police unit called the “Flying Squad” in 1995 with express authority to shoot any suspect on sight without due process. This was meant to curb the carjacking and violent robberies that were on the rise. As a result, the police were implicated on multiple extra-judicial killings most of which were unjustified. However, despite the outcry the police command commended the police for curbing crime (Halakhe, 2014).

With the economic problems, political dissent and increasing insecurity in the late 1980s and 1990s, notorious criminal gangs emerged operating in slum areas where there was little presence of the state. Some of the groups had names such as “Mungiki”, “Kosovo boys”, “Taliban”, “Chinkororo”, “Baghdad boys” and “Kalenjin warriors”, who engaged each other over interests such as business and territory (Halakhe, 2014).

The government in efforts to curb the spread of the criminal gangs, especially the mungiki, banned the criminal gangs in the year 2002 and established a special police unit called “kwekwe” to eliminate the group. According to a report by Reuters (2009), “mungiki” means a multitude in the Kikuyu language and which consists youths majorly from the ethnic group of the Kikuyu. Further reports that the police term the mungiki as
the Kenyan version of mafia group that are involved in murder, levying protection fees on
the urban poor, extortion and racketeering, political muscles and committing kidnappings.
Human rights groups such as the National Commission on Human Rights (2008)
condemned the special unit for extreme brutality and violation of human rights sanctioned
by the political leadership, police commissioner and top police commander. HRW (2008)
observed that the brutality on the mungiki crackdown was extreme and a violation in of
the human rights.

The 1990s saw push for multiparty democracy with greater pressure for police reform
into a more modern service in line with international standards of policing. This
realization came to light in 2002 with the change of government resulting in
establishment of a task force on police reforms in 2003 by the government, which was
mandated to analyse the poor policing practices and provide recommendations. The
recommendations were however organizational reforms and restructuring the institution
and not on accountability and professionalism (Mageka, 2015).

Extra-judicial killings have been experienced from the global to the local level. It is
reported that the abuse of power by the police can be found in almost all formations in the
world, however the nature and extent of the abuse vary from country to country and that
the abuse of police powers appear to be higher in totalitarian and authoritarian regimes as
well as in military dictatorships than in democratic societies and governments (Igbo,
2017).

For instance, police brutality and the use of deadly force by law enforcement has been
witnessed in recent years in countries such as the USA. Accusations of alleged
extrajudicial killings of unarmed people of color have led to social media condemnations
and movements for change using twitter handles such as “#blacklivesmatter”, and further
for national push for police reforms (The Guardian, 2017). The use of aerial operated
drones in the fight against terror by the USA government has been condemned globally
due to the loss of lives, especially in the Middle-East countries which are often targeted
(Gordon, 2016).

Reports indicate that the record for Bangladesh's human rights has deteriorated over the
years after the introduction of the Rapid Action Battalion (RAB) in 2004, which is an
elite force added to the existing contingent of the law enforcing agencies which has been
reportedly blamed as the main state killers in the name of so-called 'crossfire' or 'encounter' or 'gunfight' in Bangladesh (Habib, 2015). The killings have been justified as
“cross fire’ deaths with the media reporting demise of individuals who were in the
custody of law enforcement agencies (Kendra, 2011). The fundamental rights are
prescribed in Article 26 to 47A of the Constitution of Bangladesh. Documents indicate
that the war on drugs in the Philippines may constitute crimes against humanity as the
wave of extra-judicial killings have been widespread, deliberate and systemic conducted
by the police (Amnesty International, 2017).

In Nigeria, the police are authorized to use both lethal and non-lethal force against
suspected offenders, particularly armed robbers and kidnappers, in cases where the police
officers on the streets are heavily armed, and may be “unprovoked” (Igbo, 2017). The
right to life is reiterated as a fundamental human right but which the police in Nigeria
occasionally disregard in the execution of their mandate in the pretext of fighting crime.
This is despite Section 36(1) of the Nigerian Constitution guarantees every citizen the
right to a fair hearing while Section 36(5) provides for the presumption of innocent until
proven guilty (Igbo, 2017).

Locally, despite the commitment of Kenya to international human rights instruments,
international and local human rights organizations such as KNHRC (2008) UN (2009),
the CIPEV (2008), IMLU (2008), MSF (2008), HRW (2008) and Haki Africa (2016) have reported police brutality resulting in deaths of civilians.

Post the 2010 Constitution and the enactment of the various police reforms, reports of some of the victims of the crackdown on Somali and Muslim communities in Coast, Nairobi and Northern Kenya on clerics, sympathizers and terror suspects included: Abubakar Shariff alias Mkaburi who was gunned down alongside four other Muslim preachers (Kiser, 2014), killing of Sheikh Aboud Rogo on allegations of ties to Al Shabaab terror group (Bocha, 2013) and Shabaan Makotse (HRW, 2014). Others involve the killing of a human rights lawyer, his client and their driver (FIDH, 2016), the killing of two people in Eastleigh in Nairobi (IPOA, 2017). In addition, there have been allegations that some police officers have been killing suspected gangsters in informal settlements. According to reports, these self-proclaimed crime busters suspected to be police officers are popularly known as “Hessy wa Kayole and Hessy wa Dandora”, “Hessy Wa Huruma” and “Blackest Widow” allegedly warn notorious gangster on social media and then post their slain images on social media (The Star, 2017).

The 2017 general elections and the Fresh presidential elections saw a rise of reported cases of extra judicial killings and extreme force being used by the police forces to contain the opposition supporters during the mass demonstrations and in areas perceived to be opposition strongholds (Amnesty International, 2017). Among the various groups that conducted investigations into the post-elections’ police brutality include the IPOA that forwarded the report and recommendations to the office of the Director of Public Prosecutions. Others were the Amnesty International (2017), IMLU (2017) KHRC (2017) and Kura Yangu Sauti Yangu (2017) and IDLO (2017). Reports included that of a six-month old baby who was allegedly clobbered with a baton on the head in Kisumu leading
to her demise and a nine-year old allegedly shot as she played on the balcony of their rental house in Mathare North on August 12, 2017 and brutality against students of University of Nairobi in a video depicting them beating up the students on campus on September 28, 2017 which sparked public outrage (IPOA, 2017).

HRW(2017) reports that the violation of human rights is more pronounced when the police are extracting information from suspects or while dealing with cases of political dissent and mostly terrorism leading to disappearance of suspects. Efforts to condemn extra judicial killings have been by various non-governmental and Human rights organizations who have held campaigns to end extrajudicial killings in Kenya by bringing on board victims, families, civil society, grass-root human rights defenders, religious leaders and criminal justice agencies (IMLU, 2017). In addition, there have also been calls for the appointment of a Judicial Commission of Inquiry into Allegations of Forced Disappearances and Extrajudicial Killings by legal experts.

The slow response by the government in addressing the cases of extra judicial killings by the National Police Service has been widely condemned both locally and internationally with the country achieving low scores in the ability of the national police service to address internal security issues focusing on domains of capacity, process, legitimacy and outcomes (WISPI, 2017).

2.3 International Human Rights Instruments on Extra-Judicial Killings by the National Police Service in Kenya

Amnesty International (2006), defines extra-judicial killings as those committed outside the judicial process and in violation of national laws and international standards forbidding the arbitrary deprivation of life.
The establishment of the United Nations, UN, and the adoption of the Charter was a key landmark in the promotion of human rights in the world as governments consented to protect the rights of people under their jurisdiction and that if any human right is violated against a person, the person has a claim against the government that caused the violation (The Charter, 1945). Since 1948, international standards for the protection and promotion of human rights have been strengthened through the adoption of successive instruments as later discussed in this study.

The foundation documents of international human rights law are: The Charter of the United Nations (1945) and the International Bill of Rights which includes UNDHR (1948), ICCPR (1966) ICOSOC and their Additional Protocols.

A report by Robert (2004) indicated that International Human Rights branch of the law is concerned with the protection of individuals and groups against violations of their internationally guaranteed rights, and with the promotion of these rights. Everyone is entitled to these rights and freedoms by virtue of being human and corresponding duties of those who exercise authority or forms of power.

Miller (2002) indicates that Kenya is a member of the United Nations (UN) having joined on 16th December, 1963 after gaining independence on 12th December 1963. Since then, Kenya has ratified a number of UN and AU human rights conventions, and has made binding legal commitments laid down in the universal and regional human rights documents. Kenya is State party through signing, accessing, ratification or declaration of: The International Covenant on Economic, Social and Cultural Rights ratified in 1984; The International Covenant on Civil and Political Rights ratified in 1972; The International Convention on the Elimination of All Forms of Racial Discrimination; The Convention on the Rights of the Child ratified on 30th July 1990; Convention against
Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ratified in 1997.

The Right to Life is recognized in Article 3 of the UNDHR and echoed in Article 6 of the ICCPR which recognizes the inherent right of every person to life which must be protected and cannot be arbitrarily deprived. Article 6.17 emphasizes the right to life of persons who are under the age of 18 and puts the obligation on States to ensure the enjoyment of this right to the maximum extent possible (UNDHR, 1948). Further, Article 2 of the UNDHR and Articles 2 and 26 of the ICCPR emphasize the protection of the right to life without distinction or discrimination of any kind, and that all persons are guaranteed equal and effective access to remedies for the violation of the right.

Under international law, human rights standards are presumed to apply only to national states, as states are international subject, who are responsible for the protection and fulfillment of international human rights. For instance situations of extrajudicial, summary or arbitrary executions that a Special Rapporteur is requested to investigate usually comprise a variety of cases which include violations by the State of human rights through extra-judicial killings (UN, 2009). Therefore all acts and omissions of state representatives that constitute a violation of the general recognition of the right to life embodied in the UNDHR (Article 3) and the ICCPR (Articles 2 and 6, 4 and the death penalty in Articles 14 and 15) as well as a number of other treaties, resolutions, conventions and declarations adopted by competent United Nations bodies, fall within the mandate.

The Geneva Conventions (1949) which Kenya ratified on 20th July 1966, and international humanitarian rules, impose obligations on States and their armed forces to abide by the rules and implement accordingly (ICC Rome Statute, 1998). Articles 5, 6, 7
and 8 provide the four core international crimes were established by the Rome Statute which are crimes against humanity, genocide, war crimes and the crime of aggression. The State is under obligation to respect its rules and to protect civilians and other protected persons and property and is therefore responsible for ensuring that rights and obligations are carried out in full conformity and compliance with its international obligations, especially human rights and humanitarian law. The Rome statute further states that the duties to investigate alleged violations of international human rights law, and to prosecute and punish those responsible. The International Criminal Court has the jurisdiction to try cases of the four core international crimes, however it is only in situations where states are "unable" or "unwilling" to do so themselves and only if they are committed in the territory of a state party or if they are committed by a national of a state party. The exception being under authorization of the United Nations Security Council.

Article 3 of the UN Code of Conduct for Law Enforcement Officials (1978) provides for the principles regarding international standards on the use of force in law enforcement which were further developed in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990). Therefore if actions of a police officer who committed the killing exceed the limits laid down in the two instruments, then it amounts to arbitrary killings and in violation of the prohibition of deprivation of life as provided in Article 6 of the ICCPR.

**2.3.1 Regional Human Rights Instruments (2.3.1)**

The now defunct Organization of African Unity was established on 25th May 1963, Kenya joined on 13th December 1963, and put measures to uphold human rights in the African continent by the adherence to key human rights instruments particularly the
UNDHR by its member states, and which was further reiterated in Article II (10 (e) of the OAU Charter which provided for the promotion of international cooperation with regards to the UN Charter and UNDHR (OAU Charter, 1963). Therefore the incorporation of the UN instruments was an unequivocal creation of the emphasis of the importance of human rights in the region and the need for taking steps to interpret and apply in the region (Abyssinnia law, 2012)

Consequently, the adoption of the African (Banjul) Charter on Human and Peoples’ Rights in 1981 and which entered into force on 21 October 1986 was a landmark development on human rights in Africa. The Banjul Charter is the foremost legal instrument that promotes human rights in Africa and has a list of rights which cover a wide spectrum not only of civil and political rights but also social, economic, and cultural rights. The Charter provides for the right to life which is inviolable and cannot be deprived of arbitrarily and to the respect integrity of a person. Article 62 provides the requirement of member states to submit to the African Commission a report on the legislative or other measures taken after every two years in order to give effect to the rights and freedoms recognized and guaranteed by (The Charter, 1981)

The Charter created the African Commission on Human and Peoples’ Rights (ACHPR) inaugurated on 2nd November 1987 in Addis Ababa to promote and ensure protection of human and peoples’ rights in Africa (Art. 30) and the Protocol to the Charter on the Establishment of an African Court of Human Rights (1998). Complaints that are received include those from individuals, groups of individuals, non-governmental organizations (NGOs), and States that concern alleged violations of the African Charter on Human and Peoples’ Rights. It also provides for establishment of independent civilian policing oversight mechanism and which involves civilian participation in a resolution on police
reform, accountability and civilian oversight which is meant to promote and ensure the upholding of human rights.

The AU replaced the OAU in 2002 and placed the promotion and protection of human rights in its agenda unlike the defunct OAU. The Preamble 9 specifically mentions human rights with member states determination to promote and protect human and the people’s rights, democratic institutions consolidation, good governance and the rule of law (AU, 2002).

Kenya has been a State party to the Protocol establishing the African Court on Human and People’s Rights (the Court) since 2004 and which has jurisdiction over cases and disputes submitted to it concerning the interpretation and application of the African Charter. However, the Court’s jurisdiction applies only to the states which have ratified the Court’s Protocol. Complaints by individuals and Non-Governmental Organizations (NGOs) on cases such as extra-judicial killings are investigated by the Court upon referral by the ACHPR.


2.3.2 Domestic Human Rights Instruments (2.3.2)

The Constitution of Kenya (2010) is the supreme law in Kenya. The Constitution provides for the Bill of Rights from Article 19 to Article 59. These rights belong to each individual and are not granted by the State but are protected by the Constitution and are categorized into: Civil and political rights, and economic, social and cultural rights.
Article 19(2) recognizes the protection of rights and freedoms which is meant to preserve the dignity of individuals and communities and to further promote social justice and the realization of the potential of all human beings. Article 20(2), provides for the enjoyment of rights to the greatest extent consistent with the nature of the right. Article 21(1) ensures that state and state organs have an obligation to uphold the fundamental rights and freedoms of all. And that every person has the right to lodge a case in court if a right or freedom in the Bill of Rights is denied, violated or threatened.

Christiansen (2010) recognizes that South Africa has a transformative Constitution that guarantees the protection of human rights which he calls this, a ‘justice oriented ideology’ and that when countries amend laws, they seek a superior justice than the one previously dispensed with by the former regimes.

Article 48 of The Constitution (2010) provides for the fundamental right of every citizen to access justice through the courts. The judiciary is an independent organ and is tasked with the interpretation and dispensation of justice. The courts have to interpret the laws in strict adherence to the provisions of the constitution and the promotion of its values (Article 259).

Article 238(1) and 238(2)(b) of the 2010 Constitution provide that National security shall be promoted and guaranteed with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. These provisions are meant to make the police more effective and more accountable, especially with the establishment of independent oversight institutions, and a strong, unified command.

Reports indicted the police force for extra-judicial killings during the 2007/2008 post-election violence in reports such as the CIPEV (2008). In addressing the police misconduct, Article 244 of the 2010 Constitution provides that the police therefore must
be professional in carrying out their mandate to prevent corruption, promote transparency and accountability and together with other security agencies must protect and respect human rights standards, in addition to Kenya’s obligations under international human rights law and standards. Article 246 of the 2010 Constitution significantly enhanced police accountability by placing the police under a single hierarchy led by an Inspector General of Police (IGP) with authority over the Administrative Police and the Kenya Police Service.

In addition, the NPS Act (2011) provides for the regulation the administration, functions and powers of the IGP and the DIGs, the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations. It gives the police a robust mandate, strengthens internal accountability, and attempts to curtail interference in police operations. It also places limits on the force that the police are able to exercises to an extent that is only necessary. Schedule 6 of the NPS Act provides for the use of force and firearms by the police officers. The NPSC Act (2011) established an independent commission overseeing appointments, promotions and transfers of police officers, to address corruption in recruitment and career management, and also disciplinary matter.

The IPOA Act (2011) stipulates the objectives, functions, and powers of the Authority, a significant step towards promoting police accountability and enhancing access to justice and is mandated to deal with complaints against the police, conduct disciplinary and criminal investigations and recommendations for disciplinary action or criminal sanctions. The KNCHR was established to ease access for public report complaints of Human Rights violation by any state organ.

The Standing Orders sets out the specific rules and procedures that the Police must adhere to which include how they carry out their duties which must always be consistent with the Constitution of Kenya, the National Polices Service Act and all other national laws.
Other national legislations that provide circumstances under which extreme force can be applied and how to deal with those who violate human rights are: The Police Act, the Code of Conduct and The Criminal Procedure Code.

2.4 The Effectiveness of International Human Rights Instruments on Extra-Judicial Killings by the National Police Service in Kenya

Pushka (2012) reports that international human rights norms establish the fact that human rights are universal, indivisible, inalienable and interrelated and that in recent developments international human rights standards have acquired the status of norms of jus cogens, that is important status of norms of peremptory international law. Therefore there cannot be any derogation of these rights.

Kenya is obliged to not only refrain from violation of human rights but to also take positive measures to protect human rights from abuse by non-state actors (Amnesty International, 2013). States are required to hold account those responsible for human rights violations and remedy and reparation to the victims. States must also take measures for the prevention of recurrence of the violations such as by changing the state party’s law or practices (ICCPR, 1966).

Extrajudicial killings are unlawful as provided in the Constitution of Kenya, 2010, and other international obligations which the country has ratified. Orago (2010) points out that the prominence of international human rights law in the domestic legal system of a State usually depends on the hierarchical place which is occupied by the international law in general. Kenya, as a Commonwealth country, has always followed a dualist approach that requires the domesticating legislation to be enacted by Parliament for ratified international law treaties to have application in the domestic legal system (Orago, 2010).
This position however changed with the promulgation of the Constitution of Kenya (2010) which now recognizes international law treaties by virtue of Articles 2(4) and 2(5).

In Finland, the international treaty has to be incorporated into national law for it to be applicable in the domestic courts, normally through a statute enacted by Parliament. Additionally if there is conflict between a treaty and domestic law that affects some provisions of the constitution, a special procedure for constitutional deviations will be effected (Pushka, 2012).

As earlier discussed, with the promulgation of the 2010 Constitution, international law has been given a more prominent role in the domestic legal system through the inclusion in the Constitution of a provision directly incorporating ratified treaty law into the Kenyan legal system as a legitimate source of law. Kenya, through the National Assembly enacted the Treaty Making and Ratification Act which gave effect to the provisions of Article 2(6) of the Constitution and the procedure for the making and ratification of treaties. Article 2(5) expressly provides that the general rules of international law shall also form part of the laws of Kenya. Further 2(6) provides that any treaty or convention ratified by Kenya shall also form part of the law of Kenya under the Constitution (2010).

According to Article 2 of the Vienna Conventions (1969) a treaty is an international agreement which is concluded between States in a written form and which is governed by International law whether it is embodied in a single instrument or in more related instruments and whatever its particular designation.

Orago (2010) notes that the change in the reception of international law in the legal system of Kenya from transformation to incorporation was confirmed by Justice Martha
Koome in Re the Matter of Zipporah Wambui Mathara concerning Article 11 of the ICCPR (1966). The Lady Justice ruled that Article 2(6) imported the provisions of international treaties and conventions that Kenya has ratified into Kenyan law as part of the sources of Kenyan law and was similarly affirmed in the High Court case of Beatrice Wanjiku & Another v The Attorney-General & Another.

International system of human rights replaces the domestic system where the domestic human rights system is not effective or lacks the requisite trust (Pushkar, 2012). An example of the application of the international human rights instruments was the case of the ICC intervention in Kenya upon the recommendation by the various commissions that had investigated the 2007/2008 post-election violence. The commissions such as the Waki Commission had recommended the ICC intervention in the event that the government failed to establish credible local jurisdiction (CIPEV, 2008). As a result, the executive and Parliament endorsed the recommendations of the reports and consequently the ICC prosecutor sought Pre-Trial Chamber II permission to conduct investigations which resulted in the issuance of summons on six persons who were suspected to bear the greatest responsibility for crimes committed during the 2007/2008 post-election violence. Among the six suspects was the Commissioner for Police who was alleged to have failed to respect human rights through extra-judicial killings perpetrated by the police force.

Therefore all international law and human rights instruments together with treaties and conventions are applicable in Kenya to the extent of the ratification by Kenya, and must be adhered to, and sanctions for violations undertaken by the States.
2.5 Theoretical Framework

The classical proponents of liberal theory are Woodrow Wilson, Immanuel Kant, John Stuart Mill, Richard Cobden, Norman Angell, Joseph Schumpeter, John Maynard Keynes. According to Moravcsik (2003) the first core assumption of liberal theory is that the fundamental actors in politics are members of domestic society, that is individuals and private constituted groups that seek to promote their independent interests. Since conflict is inevitable, the liberal institutions and policies regulate the social conflict. The next assumption is that the state-society relation is central and that all governments represent segments of the domestic society whose interests are reflected in state policy. For instance the Constitution of Kenya (2010) lays down the fact that supremacy is derived from the people of Kenya. The third core assumption applicable to international relations is the state behavior reflects the nature and configuration of state preferences. Therefore State purpose and not state power is the most essential element in world politics.

Liberalism school of thought believes that international institutions play a key role in cooperation among states which reduce the opportunity of conflict. It is recognizable by certain characteristics such as individual freedom, political participation and equality, that all liberal democratic societies share (Badie, Schloser & Morlino, 2011).

The central insight shared by all Liberals is that states are embedded in international and domestic laws that constrain their actions. For instance, in the promotion of the Human Rights especially in extra-judicial killings, Kenya as a member of the UN is duty bound to adhere to the Human rights treaties and protocols that it has ratified. International law and institutions therefore promote international accommodation failure of which results in backlash, sanctions and intervention by the international such as the institution of criminal charges at the International Criminal Court during the 2007/2008 post-election
violence that saw various individuals including the then Police Commissioner being accused of various grievous human rights violations. Such formal institutions contribute to peace when they are endowed with sophisticated structures (Badie, Schloser & Morlino, 2011).

International law exists to moderate or constrain state behavior. Kenya is a member of the United Nations (UN), The African Union (AU) and other regional organizations such as the East African Community (EAC). In addition, Kenya has ratified various international treaties that address human rights among them the UNDHR, ACHR, ICCPR, ECOSOC and the Geneva conventions. The promotion of human rights is therefore linked to the promotion of good governance and democracy. The human rights are therefore vital to monitor compliance of states as the states have a duty to protect rights.
CHAPTER 3: RESEARCH METHODOLOGY

3.1 Research Design

To achieve the objectives of the study, the researcher applied analytical framework to assess the various international human rights instruments and their application on extra-judicial killings by the National Police Service in Kenya. Ogola (2005) describes research design as the plan, structure and strategy that is used to obtain answers to research questions and control variance. It is the blueprint of the researcher as it lays the plan a researcher adopts for answering research questions. The study adopted qualitative research that utilizes mainly desk research which will be entirely secondary data.

Qualitative data was used as it mainly answers “how” “why” and “what” questions (Webb, 1992). The study cannot be measured hence qualitative data was employed so as to provide greater insights and new perspectives. The study sought to assess the application of international human rights on extra-judicial killings by the National Police Service in Kenya.

3.2 Data Collection

To achieve the objectives of the study, the research utilized qualitative study design which was based on the explorative and explanatory desk study. The data collection was also assisted by the theoretical proposition of the place of international law in the global arena. Creswell (2009) explains that research method consists of how the researcher collects, analyzes, and interprets the data in the study.
The main data collection method was secondary data sources due to the fact that secondary data is information that has been collected previously by someone else other than the researcher (Neuman, 2014). Secondary data was chosen for collection of data due to the efficiency and the speed of using already existing resource and as it carries more legitimacy especially as the data is already published. The Secondary data utilized by the researcher were from reports, newspapers or quantitative such as official statistics. The researcher scrutinized the sources as some data were unsuitable or inadequate in the study that was being conducted. The data must therefore be reliable, suitable and adequate (Kothari, 2004).

The researcher collected data from International legal instruments, various international and domestic statutory provisions that address extra-judicial killings and the right to life. This methodology therefore limited the researcher to already published literature.

**3.3 Data Analysis**

The data collected which is qualitative in nature, was analyzed based on the secondary data. Based on the earlier research and the various Reports of various Taskforces and Commissions and decisions of superior courts, books, journal articles and electronic databases on human rights and extra-judicial killings, the study sought to draw conclusions on the application of international human rights instruments on extra-judicial killings by the National Police Service.

The study employed content analysis. Nachmias and Nachmias (1996) defines content analysis as a technique for making inferences by systematically and objectively identifying specific characteristic of messages and using the same approach to relate trends. According to Mugenda and Mugenda (2003) the main purpose of content analysis is to study existing information so as to determine factors which explain a specific
phenomenon, which in this study is the assessing of the application of international human rights instruments on extra-judicial killings by the National Police Service. In addition, the theoretical perspective provided a foundation by bringing together a connected set of insights. As the study focused on international human rights instruments, the liberal school of thought was adopted due to the belief that international institutions play a key role in cooperation among states which reduce the opportunity of conflict and that states are embedded in international and domestic laws that constrain their actions. The researcher also adhered to ethical considerations which include objectivity and intellectual honesty, quoting of information from the secondary sources and recognition of authors.
CHAPTER 4: FINDINGS: THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS ON EXTRA-JUDICIAL KILLINGS BY THE NATIONAL POLICE SERVICE IN KENYA

4.0 Introduction

The preceding section will analyze the findings of the application of international human rights instruments on extra-judicial killings by the National Police Service in Kenya. The first section looks at the application of international human rights instruments on extra-judicial killings by the National Police Service in Kenya by analyzing the effectiveness of the human rights instruments and the efforts of the government of Kenya in addressing the killings. The second part looks at the factors that dispose the National Police Service to engage in extra-judicial killings in Kenya.

4.1 Application of International Human Rights Instruments on extra-judicial killings by the National Police Service in Kenya

The main finding of the study is that international human rights instruments are effective on extra-judicial killings by the National Police Service in Kenya. These instruments are significant in the promotion of human rights in Kenya especially the right to life.

4.1.1 Effectiveness of international human rights instruments on extra-judicial killings in Kenya (4.1.1)

The formation of the United Nations (UN) after the end of the Second World War and the adoption of the Charter in 1945 marked a significant point in the promotion of the human rights as the member states pledged to work for the universality, respect and observance of human rights. Therefore the fact that the Charter was adopted by the member states
together meant that the violations thereto would collectively be of concern to all governments and not just the government where the violations occur.

International, regional and domestic human rights instruments provide for the inherent right to life of persons and that the right cannot be arbitrarily deprived. Extra-judicial killings are therefore a contravention of the provisions.

The UN Charter and the UNDHR together with the various instruments provide clear provisions for the protection and the upholding of the fundamental human rights and freedoms such as right to life, right to dignity, freedom from torture and other cruel acts, freedom of association and expression. Article 6 of the ICCPR reiterates the Right to life, liberty and security hence the omission of state party to prevent extra-judicial killings is violation of its obligations under the treaty (ICCPR, 1966). The acceptance of the UNDHR has inspired many international conventions, national laws and constitutions all over the world.

The 2010 Constitution domesticates all international treaties and conventions that have been ratified by Kenya in addition to International law forming part of the laws of Kenya hence the country must abide by these laws as they are applicable in Kenya. In addition, the bills of rights contained in Chapter Four of the 2010 Constitution replicate the human rights and fundamental freedoms contained in the UNDHR.

The Constitution, 2010, enshrines the provision that envisions the direct application of international law as contained in the treaties that have been ratified and this significantly shifted the place of international law in the Kenyan domestic legal system. The Constitution that was repealed did not provide for the direct application of treaties and conventions in the Kenyan legal system thereby conforming to the dualist approach of international law which is similar to other common law countries. Therefore the approach espoused the doctrine of transformation whereby international law could only
be applicable if it had domesticated by parliamentary legislation. The ratified treaties would then be on the same level as other domestic legislation. This was replicated in the Judicature Act which did not recognize treaties as a source of law in the domestic legal system of Kenya. The state as the dominant actor in the international system is tasked with ensuring that the human rights of its people are protected from any violations. States must sanction the law enforcers who have been accused of extra-judicial killings. For instance in Kenya, the IPOA is mandated to carry out investigations on alleged misconduct such as extra-judicial killings and to forward the report and recommendations to the Director of Public Prosecutions for further actions on the police officer.

The enforcement of the bill of rights is pegged on the courts hence one has a right to institute criminal proceedings for violation of the human rights. However, in most cases people develop fear to report police officers due to castigation. It becomes a challenge to report a case at the police stations as most of the police officers are unwilling to investigate one of their own. This results in many cases of unreported extra-judicial killings with the perpetrators evading accountability for the misconduct. The law courts have in most cases acquitted police officers despite the evidence of misconduct such as engagement in extra-judicial killings. This has led to lack of confidence and mistrust in the judiciary among victims of police brutality.

One of the most significant human rights instruments that regulate the conduct of the police globally is the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions which was adopted by the Economic Social in the 1989/65 resolution and endorsed by the UN General Assembly the same year. Principle 4 specifically obligates governments to effectively protect individuals and groups who are in danger of extra-legal, arbitrary or summary executions through judicial
or other means. This forms the basis of investigations by Special Reporters, such as Philip Alston, especially on acts and omissions of state representatives that constitute violation of the right to life as embodied under Article 3 of the UNDH (1948).

The state was held responsible for the gross violations of human rights during the 2007/2008 post-election violence as reported by the TJRC report, the UN by Philip Alston report and the CIPEV reports leading to Ransley task force making police reforms recommendations that were later entrenched in the Constitution. The ICC also charged key government officials for gross violations of human rights during the 2007/2008 post-election violence among them being the police commissioner due to the extra-judicial killings that had been committed by the police force.

Normally, the police are permitted in some circumstances to use force in the course of their duties. Law enforcement officials may only use force when strictly necessary to the extent required in the performance of duty as provided in Article 3 of The UN Code of Conduct for Law Enforcement Officials (1978). These are the two important international standards and principles that regulate the use of force in law enforcement. These principles were further developed in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990). The standards also apply to the policing of demonstrations that authorities consider illegal or violent. These measures places clear limits on police powers, including on the use of force.

According to the CIPEV (2008) report, most of the reported deaths were as a result of gun-shot wounds and excessive force by the police. Even though the police have the statutory right to use force including deadly force in certain circumstances, this can result in human rights violations if it is not strictly controlled. The brutally committed by the police force on innocent civilians over the years has been condemned by international
organizations such as Amnesty International (2013). Innocent lives have been lost due to the extra-judicial killings even though various international and local instruments provide for the respect of human rights, in this case the right to life.

Another significant instrument relating to extra-judicial killings is the Declaration on the Protection of All Persons from Enforced Disappearance which was adopted by the General Assembly in 1992 without a vote. This was after the consideration by the UN Commission on Human Rights and its Sub-Commission upon initiatives by non-governmental organizations that believed that there was need for an international instrument to address this form of human violation. Enforced disappearances have often resulted in deaths of victims as was reported in the disappearance of the lawyer together with two of his colleagues who were later found dead. The police officers responsible for the killings are currently facing criminal charges at the Milimani High courts in Kenya.

As the State bears the responsibility of ensuring that rights and obligations are carried out in full conformity and compliance with its international obligations, particularly human rights and humanitarian law, it has the duty to investigate alleged violations of international human rights law, and to prosecute and punish those responsible as provided in the Geneva Conventions (1949). Extra-judicial killings constitute ‘willful killings’ hence are “grave breaches” of the Geneva conventions. This formed the basis for the ICC instituting criminal charges against the former Police Commissioner alongside five others, for gross violations as he was the head of Kenya police force during the 2007/2008 post-election violence whereby the police force were accused of committing various misconducts notably extra-judicial killings on civilians. The charges were however dropped resulting in nobody being held accountable for the actions perpetrated by the police force during the post-elections.
4.1.2 Effectiveness of Regional Human Rights Instruments on extra-judicial killings in Kenya (4.1.2)

Regional instruments that include the AU charter, the Banjul Charter and the African Commission on Human and Peoples’ Rights strive to promote human and peoples’ rights and ensure their protection in Africa. However, with the instruments being in force, various state heads have been condemned for promoting gross violations of human rights within their territories by using state agencies such as the police force.

Extra-judicial killings by law enforcement have been reported in authoritarian countries in Africa with the heads of state not being held accountable even during AU Heads of States of Summit. For instance, the ICC issued warrant of arrest against the Al Bashir for various criminal charges but little has been undertaken by the AU to condemn the human rights violations and handing him over to the ICC to face the charges. This is an indication of the impunity that the Africa faces especially in holding accountable those responsible for human rights violations such as extra-judicial killings.

Other Instruments significant to the promotion of human rights in the continent and which regulate extra-judicial killings include The African Charter on the Rights and Welfare of the Child sets out the rights and defines the universal principles and norms for status of children just like the United Nations with the fundamental principle being the best interest of the child (CRC, 1990). Reports indicated that children were among the victims of extra-judicial killings by the police force which is a contravention of the rights of children (UN, 2009). Other violations against children include The killing of a child at the parents’ home in Meru by the police officers who were seeking his uncle sparked condemnation from the public, a six-month old baby was allegedly clobbered with a baton on the head in Kisumu leading to her demise and a nine-year old allegedly shot as she played on the
balcony of their rental house in Mathare North on August 12, 2017. Students have also been victims of police brutality as was captured by cameras whereby students of University of Nairobi were beaten up on campus on September 28, 2017 leading to death of one of them and which sparked public outrage (IPOA, 2017).

The AU Convention on Preventing and Combating Corruption was adopted in 2003 to fight political corruption in the African continent and Kenya is a state party. Despite this, the corruption in the country is still on the high side with reports indicating the national police service is among the most corrupt institutions hence often times the police officers accused of committing extra-judicial killings have evaded the course of justice.

The AU Convention Governing Specific Aspects of Refugee Problems in Africa also referred to as the 1969 Refugee Convention governs the protection of refugees in Kenya. There have been reported cases of innocent civilians especially from the Muslim community some of whom are refugees being arbitrarily killed on suspicions of being members of the outlawed gang group known as “Al shabaab”. The reports of the killings have been numerous especially at the Coast, Northern part of Kenya and within Nairobi. The Northern part of Kenya hosts refugees in camps some of whom have been victims of extra-judicial killings on allegations that they are involved in terror acts.

The Protocol to the African Charter on the Rights of Women in Africa ratified on 6th October 2010 also referred to as The Maputo Protocol provides for the rights of women which includes political, social and economic rights. It provides for the Right to Dignity (Art 3), the right to life, integrity and security (Art 40) and access to Justice and Equal Protection before the Law (Art. 8) The women have not been spared from extra-judicial killings with reports that women and children have been victims of extra-judicial killings especially during post-election period as was captured by UN (2009) and Amnesty International (2017).
4.1.3 Effectiveness of Domestic Human Rights Instruments on extra-judicial killings
by the National Police Service in Kenya (4.1.3)

In Kenya, unlike the repealed constitution, the Constitution that was promulgated in 2010 brought a lot of hopes for Kenyans with the provisions of clear fundamental human rights.

The sovereignty of the people and the supremacy of the Constitution are provided in Articles 1 and 2 respectively. Therefore, the police remain accountable to the people of Kenya in the exercise of their power.

The Constitution clearly spells out that international law forms part of the laws of Kenya and that treaties and conventions ratified also form part of the laws of Kenya under Articles 2(6). The 2010 Constitution therefore domesticated international law which must be adhered to by all Kenyans, as long as the international law is consistent with the Constitution. The judiciary is under obligation to therefore take judicial notice of international human rights instruments and as sources of law in the domestic jurisdiction.

The Bill of Rights is contained in Articles 19 to Article 59 and they belong to everyone and are not granted by the State as a favor, but are protected by the Constitution. These rights are categorized into Civil and political rights, and economic, social and cultural rights. The recognition of these rights is aimed at protection of the rights and freedoms to preserve the dignity of individuals and communities and to further promote social justice and the realization of the potential of all human beings as provided in Article 19(2). The enjoyment of these rights must be to the greatest extent consistent with the nature of the right and the state and state organs have an obligation to uphold the fundamental rights and freedoms of all. This is provided in Articles 20(2) and Article 21(1) respectively. International law obliges Kenya to not only refrain from violation of human rights, but to also take positive measures to protect human rights from abuse by non-state actors. Those
responsible for human rights violations should be held accountable and remedy and reparation to the victims and measures for the prevention of recurrence of the violations undertaken such as by changing the state party’s law or practices.

With the various allegations of abuse of human rights by the police force in Kenya especially extra-judicial executions, the government, supported by the international community, created various commissions to investigate and make recommendations. This was a fulfillment of the obligations of Kenya under international law such as the ICCPR (1966).

These commissions included:

- **The Commission of Inquiry into Post-Election Violence (CIPEV)**

The Commission of Inquiry into Post-Election Violence (CIPEV) was an outcome of the KNDR accord mandated to investigate the facts and surrounding circumstances related to the 2007/2008 post-election violence, investigate the acts or omission of state security agencies during the post-election violence and make recommendations, and to recommend legal, political or administrative measures to bring justice to the perpetrators of human rights abuses (KNDR, 2008).

The Commission report indicted the security forces for killings that occurred in December 2007 and January 2008. The Report indicated the government agencies failed to prevent or prepare adequately for violence that ought to have been anticipated. Secondly, the high ranking officials of the government were involved directly in inciting, funding and organizing violence and lastly, the police were responsible directly for shooting demonstrators especially in Nyanza Province. Among the recommendations by the commission were the creation of Special Tribunal for trials at the national level and failure of which would involve the International Criminal Court, the establishment of an independent civilian police oversight body to investigate and institute prosecutions
against police officers responsible for human rights abuses and comprehensive police reforms (CIPEV, 2008).

During the release of the report, the chair handed a sealed list of key persons who were accused of orchestrating the 2007/2008 post-election violence. The report was forwarded to the International Criminal Court (ICC) as the Special Tribunal was not established in line with the Waki Report. Upon investigations in line with the IC statute, six individuals were charged among them the Police Commissioner. This was due to the fact that Kenya had ratified the ICC Rome Statute in the year 2005 hence obligated to adhere to the rules and comply with the ICC summons.

- **Independent Review Committee (IREC)**

Another commission created as a result of the KNDR (2008) was the Independent Review Committee (IREC, 2008). However, The Commission “The Kriegler Commission” was mandated to investigate aspects of the 2008 general elections and to make findings and recommendations to improve the electoral process. Among the recommendations were the consolidation of all laws on operational management of elections under one statute and institutional independence.

- **Report of the UN Special rapporteur on extrajudicial, arbitrary or summary executions to Kenya**

Philip Alston, a UN Special rapporteur, presented preliminary findings on the fact-finding mission to Kenya which was aimed at investigating the allegations of gross unlawful killings. Alston focused on killings by the police, violence in the Mt. Elgon area and the 2007/2008 post-election violence (UN, 2009).
He noted the overwhelming testimony of the existence of systemic, widespread and carefully planned extrajudicial executions that were undertaken regularly by the Kenya police. The testimonies comprised of cases where the police killed at will for reasons of private or personal nature. He met some of the families of victims of extrajudicial killings, for instance the father and brother of Dr. James Ng’ang’a Kariuki who was killed by the police on 24 January 2009 in Nairobi. A disagreement has ensued resulting to him being shot three times. The police officer responsible for the shooting instead, in order to cover up the killings, filed a report that a bank robber and Mungiki member had been killed.

Alston noted that despite the international standard operating practice requirement for comprehensive reporting of every killing, the police in Kenya would manipulate the reports. Alston received hostility from the police force during the investigation period. For instance, to justify the killings, Alston attempted to obtain from the Police Commissioner data on police killings but he was informed that there was no central database for recording the information (UN, 2009).

Alston documented existence of police death squads that operate in Nairobi and Central Provinces mandated to exterminate suspected Mungiki members. Alston reiterated the KNCHR report on the killings connected by the police force in 2007 in which despite the overwhelming evidence the allegations of human rights violations were never addressed and instead the government attacked the qualifications, mandate and expertise of the critics. This despite the publishing of the testimony of a police whistleblower who acted as a driver for one of the death squads. The testimony implicated senior police officials and Alston recommended the independent investigations and prosecution of the perpetrators. He further reported that there was accountability for the unlawful killings by the police. The police who kill are the same ones who investigate the police killings as at
the time, there was no independent police internal affairs unit to reliably assess the legality of the use of force. This portrayed scenario where the police are the law themselves and therefore kill with impunity leading to dismissal except in instances where the actions are caught on film or recorded by outsiders. In addition, the failure of the justice system often leaves the police with no alternative but to administer “justice” directly by executing those “known” to be guilty and who if arrested would never be prosecuted or acquitted upon charge (UN,2009). He criticized the judiciary for being a stumbling block in achieving justice to the accused criminals and to the police accused of unlawful killings especially with the CIPEV report that the judicial service commission having done little to improve the judiciary. The documentation by organizations such as IMLU and HRW provided clear evidence of human rights violations at the Mt. Elgon by the police force. The government however denied the reports and upon pressure by the public, a report by the parliamentary committees on Administration and National Security, and Defence and Foreign Relations that indicted the security forces for human rights abuses. Alston however reports that the recommendations for further investigations into the abuses were never acted upon. The preliminary report by Alston made recommendations among them, the public acknowledgment by the President of Kenya of the problem of widespread extrajudicial executions and the need for reforms in the police sector, establishment of an external police oversight, the centralization of records of police killings, the establishment of a Special Tribunal, as recommended by CIPEV report, and investigations by the ICC, vetting of police officers, as recommended by CIPEV report, establishment of an independent Commission to investigate human rights abuses from 2005-2008 and the establishment of a witness protection program to counter impunity.
The Truth, Justice and Reconciliation Commission (TJRC)

The Truth, Justice and Reconciliation Commission (TJRC) that was established in the wake of the 2007/2008 post-election violence by the TJR Act (2008) in its 2013 report on extra-judicial killings and enforced disappearances, found that it was common for the state, particularly the police to summarily execute individuals suspected to be criminals or members of gangs, that the excessive use of force by the police resulted in deaths in security operations during the opening of Nyanza General Hospital in Kisumu in 1969, the Saba Saba\(^1\) riots in 1991 and the 2007/2008 post-election violence, the police execution of members of the outlawed Mungiki militia group, the summary execution by the state security agencies and/or enforced disappearance of members of the Sabaot Land Defense Force and that the traditional response by the state on allegations of extra-judicial killings has been attack on the credibility and legitimacy of the allegations without carrying out investigations into the allegations.

The report indicted the state security agencies, particularly the Kenya Police and Kenya Army, as the main perpetrators of bodily integrity violations of human rights in Kenya including enforced disappearances and torture and the security agencies reported to have committed gross violations’ of human rights in Northern Kenya during security operations leading to widespread torture and massacre of innocent citizens.

Among the documented recommendations were the issuance of public and unconditional apology by the then president and respective heads of Kenya Police and Kenya Defense Force, for extra-judicial killings, the fast-tracking of reforms in the Police Service, the ratification of the International Convention of All Persons from Enforced Disappearance,

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\(^1\) A Swahili word which means “seven seven”. Which is significant in Kenya’s political scene as protesters in Kenya demanded for multiparty democracy in 1990. The day is remembered annually on July 7. The riots that began on the first week of July 1990 were sparked in efforts to oppress political opposition and the increased criticism against the government for corruption and refusal to restore multiparty democracy in Kenya. The peak of the riots were held on July 7, 1990 when two influential politicians called a public rally at Kamukunji grounds, in Nairobi to condemn and call for constitutional and political reforms.
reparation for families of victims of extra-judicial killings in accordance with the Commission’s framework, the abolition of the death penalty and the commuting all death sentences to life imprisonment and appropriate sentences. Most of these recommendations such the abolition of death penalty, ratification of International laws and police reforms were entrenched into the Constitution 2010 and subsequent national legislation.

4.1.3.1 Efforts by the Government of Kenya to address extra-judicial killings by the National Police Service in Kenya (4.1.3.1)

In line with the recommendations from the various Commissions, the government set up a National Task Force on Police Reforms headed by former judge Philip Ransley (Rtd) in May 2009 and mandated the task force to make recommendations for police reform in the country. These led to establishment of the Police Reform Implementation Committee which was meant to fast-track and coordinate the implementation of the recommendations. This was supposed to be from the Task Force and in line with the 2010 Constitution. The key issues included demand for police accountability, bringing into one command the police force and creation of institutions for checks and balances into the police force and the recognition of the private security industry as a key player and partner with clear defined roles for the private security guards.

In efforts to operationalize the Constitution and make police reforms a reality, the Government spearheaded the publication of the National Police Service Act, the National Police Service Commission Act and the Independent Policing Oversight Authority Act. The goal of the police reforms was to transform the police to an efficient, professional and accountable police service that is trusted by the public. The implementation of these legislative frameworks carried with it the promise of meaningful police reforms, followed
by the establishment of the three core institutions - IPOA, NPSC and the IGP – which were important milestones towards a reformed police service.

The reforms were meant to enhance police accountability and place the police under a single hierarchy led by an Inspector General of Police (IGP) with authority over Kenya’s two police services; the Administrative Police (AP) and the Kenya Police Service (KPS) so as to curtail political interference with police personnel management practices and was responsible for recruitment, promotions, transfers and disciplinary sanctions of police (Article 246). The 2010 Constitution therefore brought under one command the KPS and the AP which were distinct in the repealed constitution under Section 3(2), whereby the Kenya Police Force was answerable to the Commissioner of Police whereas the Administration Police Force was accountable to the head of state through the Commandant of Administration Police with the functions of the two forces often overlapping leading to confusion and duplication of duties. The Kenya Police Force was established under Police Act, Chapter 84 of the laws of Kenya, while Administration Police Force was established under Administration Police Act.

The NPS (2011) regulates the administration, functions and powers of the IGP and the DIGs, the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations. It gives the police a robust mandate, strengthens internal accountability, and attempts to curtail interference in police operations and also places limits the force that the police are able to exercises to an extent that is only necessary. The NPSC (2011) establishes an independent commission overseeing appointments, promotions and transfers of police officers, to address corruption in recruitment and career management, and also disciplinary matter.

Section 61 of the NPS Act and its Schedule 6 provides for rules on the use of force by the police if indeed necessary to protect law and order. The police are allowed to use force
but are encouraged to use non-violent means first. The force used must be proportionate to the seriousness of the offence, the resistance of the person and the objective sought by the police. The Act provides that when the police officer cause injury they must provide medical assistance and notify close friends or relatives of the injured person and the use of force must be immediately reported to the supervisor of the officer. Further, in case the use of force results in death or serious injury, it must be reported to the IPOA and the police officer must secure the scene for investigations and notify relatives of the victim. Failure of which results in commission of an offence.

Section 87 of the NPS Act establishes Internal Affairs Unit (IAU) that deals internally with grievances against individual police officers and is charged with the responsibility of developing and implementing common standards of discipline in the NPS. The unit has a statutory duty to work with Independent Policing Oversight Authority in executing its functions. The Act also established County Policing Authorities (CPAs) through which local county community can be involved in the policy direction and strategy of police service within their own counties in what is popularly referred to as community policing and the “nyumba kumi initiatives”.

The NPS Act also provides for different organizations that can investigate police misconduct which are The Internal Affairs Unit (IAU) and the IPOA. The IAU is an internal unit of the police service that receives complaints and recommends action to the NPSC, IPOA or the DPP. The IAU is set up by the IG and additionally can investigate suspected misconduct at its own initiative, upon direction of the IG and if requested to do so by the IPOA. The IPOA Act (2011) promotes police accountability and enhancing access to justice and is mandated to deal with complaints against the police, conduct disciplinary and criminal investigations and recommendations for disciplinary action or criminal sanctions. It provides civilian oversight over the work of the National Police
Service in Kenya meant to prevent impunity and enhance professionalism in the National Police Service in the interest of the public. Unlike the IAU, The IPOA receives complaints of serious nature involving criminal conduct by a police officer such as deaths and serious injuries caused by police officers.

The Kenya National Commission on Human Rights (KNCHR) was established by the Kenya National Commission on Human Rights Act (2011) and under the United Nations Paris Principles. It was created as an independent institution and as the national human rights institution under Article 59 of the Constitution of Kenya 2010. The KNCHR is mandated to investigate and provide redress for human rights violations and to further monitor the compliance of human rights standards and norms (KNCHR, 2011). The Commission as the watchdog of the government, monitors government institutions especially on the compliance of human rights and advices the government on enhancement and promotion of human rights in Kenya.

The NPS Act additionally provides for ways in which the public can make a complaint of police misconduct. Complaint to the IAU can be made by a police officer or a member of the public against a police officer. The complaint can be made at any police station. A member of the public or police officer can make a complaint to the NPS Commission about police misconduct. If the complaint is made by a member of the public the NPS Commission may refer it to the IPOA, DPP, KNCHR or the EACC. In addition, complaint can be made to the IPOA regarding police misconduct and this can be either in writing or verbally. The IPOA Act prescribes the steps to be followed in investigation of the complaints.

Therefore by establishing these offices, the responsibility for security was moved from the Presidency to several institutions affording the police more autonomy from the executive and other sources of potential political interference which was meant to
establish a clear roadmap towards full realization of police reforms. However, literature indicates that police reforms in Kenya have been met with a lot of resistance, with forces of impunity and anti-change heavily fighting for retention of status quo (Amnesty International, 2013). For instance, Section 108 of the repealed constitution empowered the President to appoint the Commissioner of Police without any consultative process. However until June 2014, section 12 of the National Police Service Act which mandated the NPSC to recruit and present to the President for appointment the IGP was changed with the amendment of National Police Service Act and took away the role of NPSC in appointing the IGP. Section 12 of The National Police Service (amendment) Act 2014 provides that President’s appointment of the IGP is only subject to approval of the Parliament without involving the NPSC.

Despite the reforms, critics claim that the new dispensation has fallen short of the establishment of a single police service as was recommended by the CIPEV (2008) report. For instance, the two arms of the NPS continue to train their officers in separate colleges under different curriculum and their functions have not been harmonized. This has been complicated by the fact that the National Police Service (Amendment) Act does not sufficiently address overlapping functions between the two arms police service. Another challenge faced by the NPSC has been the conflict of mandate. This was evident sometime in 2013 when the NPSC and the IGP were involved in a dispute over which institution had the mandate to redeploy police officers. The IGP had been appointing, promoting and transferring officers without deliberation and approval from the NPSC of which the IGP is a member. This resulted in was challenge at the High Court in the case of Republic v. Deputy Inspector General of National Police & 32 Others in which the applicant sought an order of certiorari quashing the said appointment and transfers by arguing that the powers vested in the NPSC. The Court held that although the IGP was
mandated to enlist and select members of the NPS, the authority to recruit and assign persons to individual positions in the NPS belongs to the NPSC. The same issues were brought up in *International Centre for Policy and Conflict v. Attorney General & 2 other* where the High Court stated that the power to identify who to promote and transfer was a prerogative of NPSC, although for security reasons the IGP had the authority to temporarily appoint officers to particular offices. Thus transfers or promotions made without consultation or approval of the NPSC are illegal.

Other provisions in the Constitution that regulate extra-judicial killings include the National values and principles in Article 232 which must be adhered to by all state officers when interpreting, applying or enacting the laws, public policy and which include ethics, impartiality and accountability. The principles of national security are also set up including the pursuance in accordance with the law with utmost respect of the rule of law, democracy, human rights and the fundamental freedoms. Article 48 provides for the right of every citizen to access justice through the courts. The judiciary, an independent organ is tasked with the interpretation and dispensation of justice to give life to the constitutional provisions and promotes its values (Article 259). The courts have often been blamed for failure to deliver justice as at times a accused person is arrested but are later released due to corruption and the inefficiencies of the court (Amnesty International, 2016/17).

Other national legislations that provide circumstances under which extreme force can be applied and how to deal with those who violate human rights for instance extra-judicial killings are: The Public Officer Ethics Act (2003) that provides that all National Police Service must observe and adhere to. Section 10 provides that a public officer must carry out duties in accordance with the rule of law and should not violate the rights and
freedoms which are provided in the Constitution such as the right to life by the police service. The Criminal Procedure Code (CAP 75) outlines the procedure of criminal trials in the law courts and provides the process and procedures of accessing court when one is arrested. The Evidence Act (CAP 80) outlines the rules of evidence in Kenya. The Penal Code (CAP 63) outlines the various offences in Kenya. The police also have Service Standing Order which set out specific rules and procedures which must be followed by the police as their conduct their work and it is consistent with the Constitution and all national legislation. The Code of Conduct provides guidelines on the general behavior of the Police in Kenya.

In addition, the rise of INGOs committed to the deepening of compliance of human rights law by states has been significant throughout the world. International organizations such as Amnesty International, campaigns for the recognition of international human rights by acting as information networks that has capacity to communicate evidence of violations of human rights. Amnesty International releases annual reports which are taken seriously by monitoring human rights bodies, for instance the 2016/2017 report that implicated the police service for extra-judicial killings during the general elections period, between August and September.

These organizations also monitor the records of governments on complying with treaties that they have ratified as emulated by organizations such as HRW which expose non-compliance by states to the world.

4.2 Factors that dispose the National Police Service to engage in extra-judicial killings in Kenya

The study has established that various factors dispose the national police service to engage in extra-judicial killings and are a hindrance in the limitation of extra-judicial
killings by the national police service in Kenya. These factors have been a challenge in addressing the killings in the Kenya even as the country carries out steps and puts efforts.

4.2.1 Impunity
According to Amnesty International (2013), the failure to prosecute police officers responsible for human rights violations remains a serious challenge for accountability in Kenya. For instance, due to lack of political will, the charges against the then Police Commissioner for human rights violations committed by the Police service during the 2007/2008 post-election violence were dropped by the International Criminal Court in January 2012.

Kenya like many other African countries has been struggling with entrenched impunity in some of its governance institutions. Human rights violations committed by the police have been sustained by the lack of accountability as few face disciplinary measures or criminal prosecution for human rights violations. The African Union despite being in force has failed to uphold and promote human rights due to the lack of compliance with the ICC warrant of arrest, to arrest Sudan’s president who is wanted to face various criminal charges on gross human rights violations. HRW (2018) reports that despite calls for accountability, the President has not acknowledged the killings nor called for the investigations but has instead commended the police service for executive their mandate during the election period.

4.2.2 Lack of Political Will
Reports have indicated that the undue delays by the executive and legislature in enacting legislation as required by the Constitution (2010) posed a barrier to the various efforts to put in place new structures to address the legacy and mistrust that had been created by the longstanding impunity (Amnesty International, 2013). This led to the inordinate
delays to name and gazette NPSC commissioners stalled the process for almost a year which raised serious concerns about respect for the rule of law within the executive branch of government (Kodongo, 2012).

There have been repeated attempts to amend the security laws by the government such as the amendment of National Police Service Act on the role of NPSC in appointing the IGP which provides under Section 12 of The National Police Service (amendment) Act 2014 that appointment of the IGP by the president is only subject to approval of the Parliament without involving the NPSC.

International and local organizations that have documented the unlawful killings such as IMLU(2017), KNCHR (2017) and HRW (2017) have called upon the government to ensure accountability as they criticize the government for often failing to investigate unlawful killing or holding anyone account.

4.2.3 Inadequate Investigations

Failure to gather evidence is one of the factors that has been motivating the police force to resort to extra-judicial killings as most of the cases taken to court end up in acquittals due to lack of evidentiary threshold (Mugada, 2015). In addition, the recommendations by the IPOA to the DPP of misconduct of police officers in acts of extra-judicial killings have often failed to be acted upon. Reports indicate that the IPOA investigates crimes committed by the police yet they rely on the same police to assist them. The IPOA has over the years been struggling to hold police to account with only securing two convictions; two police officers found guilty of shooting dead a 14-year old girl at her home and a policeman found guilty of murdering a suspected thief in 2013 (Reuters, 2018). One of the main donors of police reform in Kenya is the USA that heavily funds
IPOA since 2012 in addition to supporting the military. Therefore, the IPOA must carry out its mandate with the support accorded to it.

4.2.4 Structural Challenges
The Amnesty International (2016) ranked Kenya top in extra judicial killings in Africa with 122 documented cases out of the 177 sampled cases in Africa. Despite the existence of the various legislation and the oversight bodies such as the IPOA, little has been achieved to streamline the police force especially the extrajudicial killings that have been rampant and which escalate during elections as witnessed during the 2007 and 2017 general elections’. The police response to the KNCHR(2008) report on extra-judicial executions is an example of police unwillingness to conduct serious investigations, as the police instead of making recommendations to improve the NPS instead criticized the report and dismissed the report for failure to provide evidence of police complicity in the extra-judicial killings.

The National Police Service Act 2011 also stipulates that when an officer uses excessive force, the officer is required to make a report to his superior but if the use of that force results in death or serious injury, the officer is required to make a report to the Independent Police Oversight Authority for investigations (IPOA Act, 2012). This is normally not complied with as most cases of extra-judicial killings by the police have remained unreported. For instance, reports indicate that there have been many unlawful killings of civilians in the North Eastern part of Kenya and Mombasa but a large number have not been reported to the Independent Police Oversight Authority (The Final Report of the Kenya Truth and Reconciliation Commission, 2013).

The challenges have hindered the reform of the police sector especially in extra-judicial killings. A few years ago the government launched community policing to address the
mistrust between the Police service and the citizens, (Amnesty International, 2013). The noble initiative fizzled out and in some areas it was misunderstood and taken as a government policy for communities to form vigilante groups and private militias. This has led to lynching of suspects and innocent people suspected of engaging in criminal activities while some of them have turned into extortionist forcing local citizens to part with money in form of “protection/security fee”. Some of these vigilante criminal gangs later mutate and are used by politicians to settle political scores and others operate with the knowledge of the police officers who fail to take actions against them (UNHRC, 2009).

4.2.5 Corruption
The poor ranking of the police service in corruption has been of great concern throughout the years. Various reports such as the United Nations Convention against Torture UN CAT (2008) reported that corruption in Kenya police force was hindering the efforts to deal with the massive human rights violations. The Transparency International (2010) ranked the police force the third most corrupt institution in East Africa. Amnesty International report (2013) ranked the police force as the most corrupt institution in Kenya and therefore the dignity has to be restored especially with the perception that the police is controlled by the ruling class which contributes to failure to address corruption. This has led to the persistence of extra-judicial killings by the National Police service. According to the East Africa Bribery Index (EABI) 2012, the National Police service led as the most corrupt public sector with the likelihood of bribery being at 60%. In 2015, the Anti-corruption Commission ranked the interior ministry where the police service lies, as the most corrupt. The lasts ranking by WISPI (2017) listed the country’s police service among the worst in its ability to address internal security issues focusing on domains of capacity, process, legitimacy and outcomes.
4.2.6 Capacity Building and Infrastructure

A study by Mugada (2015) indicated that the National Police Service is often underfunded. This has hampered efforts to modernize and undertake tasks to match the sophisticated nature of crime and criminals. For example, the CID does not have a forensic laboratory to tackle sophisticated crime. Vehicle patrols and responses are bogged down by lack of serviceable patrol cars. This has led to weaker responses and coordination during incidences of crime and disasters requiring police response.

Kodongo (2012) also reports that police officers do not have life insurance yet most of the time they find themselves in life threatening and dangerous situations when tackling crime or discharging their duties to citizens. The lack of life insurance has left many families of officers who die while on duty paupers with less compensation. The police service also lacks personnel in Information Communication Technology (ICT) to tackle crime using up to date technology in form, for example in cybercrime. This is an area that needs to be given serious consideration by the NPSC and the Ministry of Interior and National Coordination.
CHAPTER 5: DISCUSSION, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter presents the discussion, conclusions and recommendations of the study based on the analysis in the preceding chapter. The study has analyzed the applicability of international human rights instruments on extra-judicial killings by the National Police Service in Kenya and argued that the instruments are effective in the limitation of the extra-judicial killings. The study has however further found that there exist various factors that dispose the police service to engage in extra-judicial killings despite the effectiveness of the International human rights instruments.

5.2 Discussion and Analysis of Findings

5.2.1 International Human Rights Instruments that regulate extra-judicial killings by the National Police Service in Kenya (5.2.1)

Extra-judicial killings are killings that are committed outside the judicial process, in violation of national laws and international standards that forbid the arbitrary deprivation of life (Amnesty International, 2006).

The adoption of the UN Charter was key in the promotion of human rights in the world as governments consented to the protection of human rights within their jurisdiction and that if violation occurs the victim has a right of claim against the government that has caused the violation (The Charter, 1945).

Kenya has ratified various international human rights instruments and has made binding legal commitments such as the UNDHR (1958), ICCPR (1966) and UNCAT (1997). The Charter of the United Nations and the UNDHR together with the various human rights instruments provide for the protection of the fundamental human rights and freedoms
such as right to life, right to dignity, freedom from torture and other cruel acts, freedom of association and expression.

The Rome statute, which Kenya is a state party, established the International Criminal Court to try cases of the four core international crimes which include crimes against humanity, war crimes, genocide and crimes against aggression (Rome Statute, 1998). A Special Rapporteur is requested to investigate cases including those involving State violation of human rights through acts such as extra-judicial killings such as the 2007/2008 post-election in Kenya (UN. 2009).

The police are usually permitted in some circumstances to use force in the course of duty. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides the principles of necessity and proportionality that are required and impose the minimum use of force. Therefore the police must abide by the principles resorting to the usage of force.

Extra-judicial killings have been reported in other countries internationally. For instance, the use of excess force by the USA law enforcement especially on people of color. Philippines through the President Duterte has been accused of massive human rights violations through extra-judicial killings in the war on drugs (Amnesty International, 2017).

At the regional level, Kenya is a member of the African Union and has ratified various human rights treaties and protocols thereto such as the African Charter on Human and Peoples’ Rights “Banjul Charter”1986, AU Convention Governing Specific Aspects of Refugee Problems in Africa and the Protocol to the African Charter on the Rights of Women in Africa “Maputo Protocol” which was ratified in 2010. The African Charter on the Rights and Welfare of the Child provides the rights and the universal principles and norms for the status of children (CRC, 1990). Other countries in Africa such as Nigeria,
South Sudan, Cameroon and Burundi have also been accused of extra-judicial killings by State agencies (WISPI, 2017). It is however noted that the nature and extent of police brutality varies from country to country and appears to be higher in totalitarian regimes, military dictatorship and totalitarian authorities than in democratic governments (Igbo, 2017).

Nationally, individual rights are enshrined in the Constitution of Kenya (2010). The Bill of Rights provides for the right to life, freedom and security of a person, rights of arrested persons, fair hearing and the rights of persons detained, held in custody or imprisoned. It further provides that national security must be construed within the confines of the rule of law, human rights and professionalism. The National Police Service Act provides that the police officers must always attempt to use non-violent means first. Therefore for force to be used, it should be proportional to the desired objective or the seriousness of the offence and must be to the extent necessary with strict adherence to the provisions of the law and the Standing Orders (NPS Act, 2011).

Over the years, reported cases of extrajudicial killings have remained rampant in Kenya despite the commitment of the country to the various treaties and international protocols which prohibit the arbitrary deprivation of life with reports ranking Kenya top in extrajudicial killings in Africa (Amnesty International, 2016). Despite commitments to the human rights instruments, international and local human rights organizations have documented cases of individuals who have gone missing in the hands of the police forces. A UN special rapporteur reported the existence of a special force ‘kwekwe’ squad allegedly set-up to eliminate high-profile suspected criminals and outlawed gangs’ members such as the “mungiki”, upon the orders of senior police officials (UN, 2009). Various reports have accused The National Police Service of unlawful killings of
Muslims in the guise of fighting terror, human rights’ activists and protestors during political rallies and during elections’, negligent killings of minors and criminal.

5.2.2 Application of International Human Rights Instruments on extra-judicial killings by the National Police Service in Kenya

International legal frameworks provide that the State, as a dominant actor in the global arena, has the primary responsibility of protecting its citizens from violation of human rights. The direct incorporation of international law into domestic legislation is in line with international human rights instruments such as ICCPR (1966) that recommend member states to directly apply binding international human rights instruments in domestic legislations so as to enhance the ability to promote and protect human rights and fundamental freedoms. According to documentation, the United States restricts the incorporation and the use of international law including international human rights instruments in its domestic legislation while Colombia practices direct incorporation of international human rights instruments to enhance its protection of human rights and fundamental freedoms (Orago, 2010).

Thus States are not limited to international human rights instruments if they so wish to adopt more progressive legislation for the realization of human rights. The international law must however be consistent with the Constitution.

Article 2(1) of The 2010 Constitution provides for the supremacy of the Constitution which is binding on all state organs and further that any law, custom or Act inconsistent with the Constitution is void to the extent of its inconsistency (Articles 2(3) and 2(4) ). This provision domesticates all international treaties and conventions ratified by Kenya in addition to International law forming part of the laws of Kenya. Therefore, as long as
international law is consistent, it has a prominent place in the domestic legal system of Kenya as it forms part of the laws of Kenya. In addition, the bills of rights contained in Chapter Four of the 2010 Constitution replicate the international/ universal human rights and fundamental freedoms contained in the UNDHR (1948).

The repealed Kenyan Constitution did not however provide for the direct application of treaties and conventions in the Kenyan legal system thereby conforming to the dualist approach of international law which is similar to other common law countries. International law could only be applicable if it had been domesticated by Parliament upon which the ratified treaties would be on the same level as other domestic legislation. The Judicature Act did not recognize treaties as a source of law in the domestic legal system of Kenya.

Extra judicial killing is not a new phenomenon in Kenya as the unlawful killings have been witnessed and reported since independence. Various reports documented the unlawful killings of civilians by the police in the 1990s especially political assassinations/killings and killings of people perceived to be members of criminal gangs. Over the years the police service has been indicted in various reports for failure to conduct themselves in professional manner with regard to public policy order. They continue to score low in their professional conduct with regard to the use of lethal force thereby violating human rights.

The 2010 Constitution guarantees the right to life to all citizens and entrenched in various International instruments and legal framework. Despite these provisions and commitments, factors such as corruption and lack of accountability of authorities responsible for the extra judicial killings remain key issues in past and current governments resulting to slow progress of resolving the extra judicial killings as reported
during the 2017 general elections’ where the police force were once again on the receiving end of accusations for use of excessive force to apprehend political demonstrators leaving scores injured, including women and minors, and others dead as a result of gun wounds.

The study established that various factors dispose the National Police Service to engage in extra-judicial killings and are a hindrance in the eradication of extra-judicial killings by the national police service in Kenya. This is despite the application of international human rights instruments that must be adhered to and which are effective in Kenya especially with the domestication of these laws as part of the laws of Kenya.

5.3 Conclusion

As a Commonwealth country, Kenya followed the dualist approach which required the domestication of legislation which required enactment by Parliament for ratified international law treaties to have application in the domestic legal system. This approach changed with the promulgation of the Constitution of Kenya (2010) which recognizes international law treaties by virtue of Articles 2(4) and 2(5). Various key international human rights bind the country to conform and abide by the international human rights standards. The study has assessed the various instruments which include the UN charter, UNDHR, ICCPR, AU and ECOSOC. Reports by key international human rights bodies such as the Amnesty International, the WISPI and local NGOs and human rights bodies such as the KNCHR and the KHRC have provided insights of the extra-judicial killings by the National Police Service in Kenya. This study therefore concludes that international human rights instruments are effective and applicable in addressing extra-judicial killings by the National Police Service in Kenya. The study has however found that Kenya faces challenges in eradication and limitation of the extra-judicial killings despite abiding and
commitment to the promotion of human rights in accordance to the International Human rights instruments. These challenges include corruption, lack of political will, structural challenges and lack of political will among other factors.

5.4 Recommendations

Moving forward, the international human rights instruments have been significant in the promotion of human rights and fundamental freedoms in Kenya. Despite this, the cases of extra-judicial killings have remained rampant despite the police reforms and legislations due to factors that pose a challenge to the limitation of the unlawful killings.

Based on the findings of the study, the researcher recommends the following actions:-

- **Proper and adequate investigations into extra-judicial killings**
  Extra-judicial killings should be investigated properly for accountability of the perpetrators and to give justice to the victims. Therefore the state and its agencies must strictly adhere to the Constitution that requires the police to be professional, accountable and respect and uphold the rule of law. There is need for political will and less interference by the executive in the security sector. All laws must be respected and the executive must curtail the habit of arbitrarily amending legislations.

- **Ratification of pending treaties and protocols**
  In adherence to the laws of Kenya, the country needs to ratify treaties and protocols as failure has attributed to rise of violations by institutions and security forces (KNCHR, 2018). Among the treaties and conventions that need to be ratified are The African Charter on Democracy, Elections and Governance, The Protocol on the Statute of the African Court of Justice and Human Rights and the AU Convention on the Elimination of Mercenaries in Africa. These instruments need to be ratified to guarantee fundamental rights and freedoms. In addition the country is yet to make a declaration on the African
Charter on the People and Human Rights on the establishment of the African Court on Human and People’s rights.

- **Integrity within the National Police Service**

  Efforts to ensure that integrity within the National Police Service is restored have to be undertaken by the government. Corruption within the police service must be addressed by the relevant authorities’ key being the Ethics and Anti-Corruption Commission and those found culpable must be prosecuted. This will ensure that the corruption within the national police service is limited to ensure efficiency in carrying out its mandate. The vetting processes should also be undertaken by the NPS Commission in strict compliance of the law and those found not fit to serve the police service must be terminated. This should include the pursue of criminal prosecutions where there are credible allegations of violations of human rights by the police.

- **Overhaul of relevant oversight authorities/agencies**

  The oversight authorities such as the IPOA should be overhauled and audit carried out to promote public reputation and confidence. This is because despite funding by foreign countries, the IPOA has failed to carry out its mandate as enshrined in the Constitution and the IPOA Act with little being achieved since its establishment.

- **Allocation of more funds**

  The government should allocate more funds to the security sector as this will promote institutional building and infrastructure. Most police stations and forensic laboratories are under-equipped posing a challenge in carrying out investigations into complains such as unlawful killings. The salaries of police officers should also be increased as most of the police officers engage in corruption due to the insufficient salaries that they receive. The government should enhance the capacity of security officers to ensure that new recruits
and law enforcement are adequately trained and certified to carry out functions for which they will be deployed and establishment of clear line of command for reporting and to ensure commanders know who fall under their command.

- **Alternative Dispute Resolution**

As most of the unlawful killings are conducted during demonstrations, training on the usage of force should be prioritized especially on limitations of the use of force. Alternative dispute resolution methods such as negotiation and mediation can be adopted especially in communities where the police are deployed to breach peace such in inter-communities clashes.
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