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# A comprehensive reparations system for custodial deaths: A human rights approach to justice

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## Abstract

*Death in police custody is one of the major social injustices in Kenyan society today. While many continue to call for the criminal prosecution of police officers involved in such extrajudicial deaths, less is said about the human rights remedies available for the victims surviving the deceased. National, regional and international law provides for remedies for human rights violations in the form of reparations. The jurisprudence of Kenyan courts, the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights confirm that such victims are entitled to various forms of reparations.*

*This paper analyses victimhood and the reparation systems in Kenya. The introduction briefly discusses death in police custody as a form of human rights violation. The paper then investigates the notion of a victim in national, regional and international law, with the aim of highlighting the scope of accruing human rights and the attached remedies. Consequently, the paper evaluates the Kenyan system of reparations available to victims in both national, regional, and international human rights law. This evaluation expounds on the forms of reparations available for victims of deaths in police custody. In concluding, this paper makes recommendations for victims and their families pursuing human rights remedies in addition to criminal sanctions against the police.*

**Keywords:** death in custody; reparations; extrajudicial deaths; police misconduct; victimhood

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## 1. Introduction

Deaths in police custody, commonly referred to as extrajudicial killings, are ‘killings committed outside the judicial process by or with the consent of public officials or agents of the government’,<sup>1</sup> particularly by police officers. The Constitution of Kenya guarantees the right to life meaning that no one shall be intentionally deprived of his life except through the due process of the law.<sup>2</sup> The law also provides all Kenyan citizens with the absolute freedom from cruel, inhuman or degrading treatment or punishment.<sup>3</sup> This is to mean that such a freedom should never be limited.<sup>4</sup> Kenyan constitutional jurisprudence continues to uphold the right to life as a central human right in national, regional and international law.<sup>5</sup> Regional jurisprudence also considers the right to life a core human right, one on which the enjoyment of all other rights depend, and that imposes a negative duty on states to refrain from interfering with its enjoyment.<sup>6</sup> The positive obligation to protect, and the negative obligation to refrain from interference apply to the right to freedom from torture, degrading treatment and punishment as well.<sup>7</sup>

For these reasons, extrajudicial killings violate both the right to life and the right to freedom from torture and degrading treatment or pun-

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<sup>1</sup> N Rodley, *The treatment of prisoners under international law*, 2nd ed., Clarendon Press, Oxford, 1999, 182; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 7 June 2021, A/HRC/47/33, section I B.

<sup>2</sup> Constitution of Kenya (2010), Article 26 (1) (3); African Charter on Human and Peoples’ Rights, 1 June 1981, CAB/LEG/67/3, Article 4; International Covenant on Civil and Political Rights 23 March 1976, 999 UNTS 171, Article 6.

<sup>3</sup> Constitution of Kenya (2010), Article 25(a); African Charter on Human and Peoples’ Rights, Article 5; International Covenant on Civil and Political Rights, Article 7.

<sup>4</sup> Constitution of Kenya (2010), Article 25(a).

<sup>5</sup> See *Zeitun Juma Hassan (petitioning on behalf of the Estate of Abdul Ramadhan Biringe (Deceased)) v Attorney General & 4 others*, Petition 57 of 2011, Judgment of the High Court at Nairobi (2014) eKLR, para 20.

<sup>6</sup> *Forum of Conscience v Sierra Leone* Communication No 223/98, (ACHPR/Commission, 6 November 2000), para. 20.

<sup>7</sup> *Estate of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 others*, Judgement, para 27.

ishment,<sup>8</sup> constituting grave abuses against fundamental human rights.<sup>9</sup> ‘Where there is a right there is a remedy.’<sup>10</sup> The law rightfully provides victims of death in police custody with remedies. However, before elaborating on the scope of such remedies, it is important to elaborate on the nature of victims.

## 2. Victimhood

In Kenya, a victim is ‘any natural person who suffers injury, loss or damage as a consequence of an offence’.<sup>11</sup> This definition could be extrapolated by virtue of Article 2(6) that imports the treaties and conventions ratified by Kenya as part of domestic law. The relevant treaties in this regard are the African Charter on Human and Peoples’ Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR), among other ratified treaties that provide for the right to redress for gross human rights violations.

The African Commission on Human and Peoples’ Rights (African Commission), in interpreting the right to an effective remedy under Article 7 of the African Charter, defines ‘victims’ to be ‘persons who individually or collectively suffer harm, including physical or psychological harm, through acts or omissions that constitute violations of the African Charter.’<sup>12</sup> The identification of a victim is carried out on a case-by-case

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<sup>8</sup> Kenya National Commission on Human Rights, *Human rights: The elusive mirage? The Fourth State of Human Rights Post Promulgation 2010-2014*, para 2.1.2.2.

<sup>9</sup> Special Rapporteur of the Commission on Human Rights, Human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, United Nations General Assembly, Fifty-fifth session, 11 August 2000, A/55/288, para. 21.

<sup>10</sup> *Masoud Salim Hemed & another v Director of Public Prosecution & 3 others*, Petition 7 & 8 of 2014 (Consolidated), Judgement of the High Court of Kenya (2014) eKLR, para 37.

<sup>11</sup> Victim Protection Act, (No 17 of 2014, Rev 2019), Section 2.

<sup>12</sup> General Comment No 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and Peoples’ Rights, para 16.

basis, depending on the harm experienced by the individual or group.<sup>13</sup> The nature of a victim is independent of the victims' relationship with the perpetrator and notwithstanding whether the perpetrator of the violation is known, prosecuted, or convicted.<sup>14</sup> The African Commission expressly includes the affected family members or dependants of the victim, and persons who suffer harm while intervening to assist victims under the term 'victims'.<sup>15</sup>

Similarly, the UN Basic Principles on the Right to a Remedy and Reparations, under Principle 8, describe victims as:

...persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.<sup>16</sup>

The Principles equally describe a victim as the 'immediate family and dependents of the direct victim'; they further prescribe victimhood as independent of whether the perpetrator of the violation is 'identified, apprehended, prosecuted or convicted'.<sup>17</sup>

A death in custody direct victim, therefore, is any person who has died as a result of the acts or omissions of the police as the perpetrator by way of torture, deprivation of liberty or execution. An indirect victim is an immediate family member, dependents of the victim or any other person who has suffered harm in intervening to assist victims in distress.

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<sup>13</sup> General Comment No 4, ACHPR, para 19.

<sup>14</sup> General Comment No 4, ACHPR, para 17.

<sup>15</sup> General Comment No 4, ACHPR, para 17; *Zongo and others v Burkina Faso* (reparations), African Court on Human and Peoples' Rights (ACtHPR), (2015) para 46.

<sup>16</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Commission on Human Rights, Resolution 2005/35, UN Doc. E/CN.4/2005/L. 10/Add. 11 (19 April 2005).

<sup>17</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principles 8 and 9.

A victim of suicide whilst in custody is equally considered as a victim of death in custody as the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*<sup>18</sup> mandates a rebuttable presumption of state responsibility on persons under state custody. The Human Rights Committee emphasised this in *Guillermo Ignacio Dermit Barbato and others v Uruguay*, in rejecting the State's defence that the deceased had committed suicide in prison.<sup>19</sup> Consequently, persons who die as a result of gross negligence by the personnel handling them, be it state or non-state actors, are to be equally considered as victims of death in custody.

A victim can thus include persons who die after coming into contact with the police. This is not to necessarily physical contact but where an individual dies following some kind of interaction with the police, such as a hostage situation where the police or relevant authorities have some sort of control over the situation, but the besieged person ends up killing themselves or the hostages.

### 3. The Kenyan reparations system

#### 3.1 National remedies

The remedies available under constitutional law in Kenya (Article 23(2)) are: declaration of rights, an injunction, a conservatory order, orders of invalidity of unconstitutional law, orders for compensation and an order of judicial review. In addition, an order of *habeas corpus* is entrenched as 'unlimitable' under Article 25(d) of the Constitution.

Aside from the constitutional provisions aforementioned, the right to life is also protected under Section 203 of the Penal Code Cap 63 through criminalisation of murder.<sup>20</sup> Within the realm of public law,

<sup>18</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, 21 November 2021.

<sup>19</sup> *Guillermo Ignacio Dermit Barbato and others v Uruguay*, Communication No. 84/1981, UN Doc. CCPR/C/OP/2 at 112 (1990), para 9.2.

<sup>20</sup> Penal Code, Cap. 63 (2009), Section 203.

therefore, the most imperative local remedy for custodial deaths is instituting criminal proceedings against persons alleged to be responsible for the custodial deaths. Provided the death at issue occurred in police custody, there is a rebuttable presumption of state responsibility.<sup>21</sup> The High Court appreciated this in *Zeitun Juma Hassan v Attorney General & 4 others*, citing the jurisprudence in *Veronica Wambui Karanja v Attorney General* where the High Court found the state culpable for torture, cruel and inhuman treatment based on circumstantial evidence such as that the deceased was 'in no other company except the law enforcement personnel of the Kenya Police'.<sup>22</sup>

The Constitution of Kenya (2010) under Article 19(1) describes the Bill of Rights as an integral part of Kenya's democratic state and a framework for social, economic and cultural policies. Article 21(1) mandates the state and every state organ to respect and uphold rights and fundamental freedoms in the Bill of Rights. Victims or their representatives have the right to institute court proceedings claiming that the government has violated their rights under the Bill of Rights.<sup>23</sup> It further confers authority on the courts to enforce the Bill of Rights under Article 165 by hearing and determining cases of violation of rights contained in the Bill of Rights.<sup>24</sup> In this regard, the High Court has jurisdiction over such claims and may issue remedies such as a declaration of rights, an injunction, a conservatory order and an order for compensation.<sup>25</sup>

The High Court in *Masoud Salim Hemed & another v Director of Public Prosecution & 3 others* also appreciated the remedy of an order of *habeas corpus* under Article 51(2) as an immediate and urgent relief to the family of the victim in cases where the location of the victim's body remains unknown.<sup>26</sup> Section 389(1) of the Criminal Procedure Code Cap

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<sup>21</sup> *Estate of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 others*, para 48; Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 4, 7 and 8.

<sup>22</sup> *Estate of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 others*, para 48.

<sup>23</sup> Constitution of Kenya (2010), Article 22.

<sup>24</sup> Constitution of Kenya (2010).

<sup>25</sup> Constitution of Kenya (2010), Article 23.

<sup>26</sup> Petition 7 & 8 of 2014 (Consolidated), Judgement of the High Court of Kenya (2014) eKLR, paras 30-33.

75 equally provides the power of the High Court to grant an order of *habeas corpus*. Article 25(d) of the Constitution guarantees that the right to an order of *habeas corpus* is not subject to limitation.

According to *Laban Kipsang v Director of Public Prosecutions* a conservatory order under Article 23(c) of the Constitution would preserve the status quo in case of any attempt by the perpetrators to abuse the legal process or any other substance of law.<sup>27</sup> In this case, the petitioners sought conservatory orders to prevent the police from interfering with inquest proceedings and investigations to establish the circumstances in which the deceased died in police custody.

### 3.2 Regional and international remedies

Well-founded principles and human rights treaties further guarantee victims of gross human violations the right to an effective remedy in the form of reparations. The African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights accord victims of human rights violations the right to an effective remedy.<sup>28</sup> These treaties do so in two ways: first, in requiring states to remedy human rights violations as an international obligation.<sup>29</sup> Second, by providing mechanisms for enforcement mechanisms such as the African Commission on Human and Peoples' Rights and the Human Rights Committee.<sup>30</sup>

This stance was reaffirmed by the African Commission of Human and Peoples' Rights in the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe*.<sup>31</sup> The complainants argued that government agents had violat-

<sup>27</sup> Criminal Case 20 of 2014, Judgment of the High Court at Nyeri (2016) eKLR.

<sup>28</sup> International Covenant on Civil and Political Rights, Article 2(3).

<sup>29</sup> *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*, (Judgment), 1 AfCLR 219; International Covenant on Civil and Political Rights, Article 2.

<sup>30</sup> African Charter on Human and Peoples' Rights, Article 45; Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, GA/R/2200A, Articles 1 and 2.

<sup>31</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACmHPR 2006).

ed human rights in the African Charter and had caused the death of more than 80 people during a constitutional referendum.<sup>32</sup> The Zimbabwean government argued that the complainants should have approached the Attorney General to prosecute suspects or institute private prosecution of the suspects.<sup>33</sup> The African Commission emphasised that it is the state's responsibility to maintain law and order by instituting criminal proceedings against alleged suspects of human rights violations.<sup>34</sup>

Kenya, as state party to the Charter, is required by the African Charter to provide adequate, effective and comprehensive reparations to victims of violations attributable to the State. Similarly, the UN Basic Principles require Kenya, as UN member state, to incorporate in national law, provisions to avail adequate, effective, prompt and appropriate remedies such as reparations.<sup>35</sup> The African Commission thus noted in *Mbiankeu v Cameroon*, that once a state is liable for an internationally wrongful act, it should make full reparation that is adequate, effective, comprehensive, and proportional to the gravity of the violations and harm suffered.<sup>36</sup> The African Commission's General Comment and the UN Basic Principles, categorise reparations as restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>37</sup>

### 3.2.1 Restitution

Restitution purposes to restore the victim to the position they were prior to the human rights violation.<sup>38</sup> This is an integral part of reparations, which, as elaborated by the African Court on Human and Peoples' Rights, should 'wipe out all the consequences of the illegal act and

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<sup>32</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para 1-13.

<sup>33</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para 61, 62 and 68.

<sup>34</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para 70.

<sup>35</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 3.

<sup>36</sup> *Mbiankeu v Cameroon* (decision on reparations), 389/10, ACmHPR (2015) para 131; See also *Mebara v Cameroon* (decision on reparations), 416/12, ACmHPR, Views, (2015), para 135; Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 15.

<sup>37</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 15

<sup>38</sup> General Comment 4, ACHPR, para 36.

re-establish the situation which would, in all probability, have existed if that act had not been committed'.<sup>39</sup>

The defaulting parties are thus required to restitute the victim, family of the victim or the dependents of the victim by paying for the harm or loss occasioned to the affected parties and reimbursement for expenses incurred as a result of the violation. In custodial death, as a result of the impossibility of restitution of the victim due to their death, (part) restitution can take effect through the families and dependents of the victim. For state actors acting in official or quasi-official capacity, the state through the principle of vicarious liability ought to restitute the victims.<sup>40</sup>

### 3.2.2 Compensation

Compensation constitutes economically assessable damage commensurate to the severity of the human right violation and the circumstances under which it occurred.<sup>41</sup> Principle 20 of the UN Basic Principles mandates compensation to be derived from physical or psychological harm suffered as a result of the infringement.<sup>42</sup> Compensation also covers past, present and future medical expenses and personal and professional development expenses resulting from the violation.<sup>43</sup>

In *Konate v Burkina Faso*, the African Court granted reparations under the African Charter in form of compensation for loss of income, medical expenses and moral damages.<sup>44</sup> With death in custody as a violation of human and constitutional rights, compensation thus takes the form of general damages. This would include loss of dependency by the dependents of the victim, pain and suffering.

<sup>39</sup> *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Baise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (judgement on reparations)*, ACtHPR, 5 June 2015, para 20.

<sup>40</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 19.

<sup>41</sup> General Comment 4, ACHPR, paras 37 and 38.

<sup>42</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN/GA/R 40/34 of 29 November 1985.

<sup>43</sup> General Comment 4, ACHPR, paras 38 and 39.

<sup>44</sup> *Lohe Issa Konate v Burkina Faso (judgement on reparations)*, 004-2013, ACtHPR, (2018).

### 3.2.3 Rehabilitation

This is the restoration of independence on the part of the victims and their participation in society.<sup>45</sup> Rehabilitation incorporates medical and psychological care to the victims as a result of mental harm occasioned by the violation contained in Principle 21 of the UN Basic Principles. The standards of rehabilitation under the African Charter require a holistic approach, taking into account the resilience of the victim and their chances of re-traumatisation.<sup>46</sup> Victims of death in custody may seek rehabilitation for psychological harm including distress caused by the death of their kin.

### 3.2.4 Satisfaction

Satisfaction are symbolic forms of reparations such as official declarations, commemoration and tributes truth seeking and public disclosures.<sup>47</sup> A court's finding of guilt accompanied by judicial sanctions may be considered as satisfaction.<sup>48</sup> Official declaration or judicial verdict that seeks to restore the reputation and dignity of the victim will also serve likewise. An official public apology to the family, administrative action and human rights training to various security arms of the government under Principle 22 of the UN Basic Principles may also constitute satisfaction. The African Commission further includes the right to truth as satisfaction – that is, the state's recognition of its responsibility.<sup>49</sup>

In *Zongo v Burkina Faso*, the African Court granted satisfaction under the African Charter in the form of an order requiring Burkina Faso to publish the Court's judgement.<sup>50</sup> Satisfaction is thus available to custodial death victims by way of a full and public disclosure of material

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<sup>45</sup> General Comment 4, ACHPR, para 40.

<sup>46</sup> General Comment 4, ACHPR, para 42.

<sup>47</sup> Public International Law and Policy Group (PILPG), *Core element of reparations*, 2013.

<sup>48</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 22(f); REDRESS, European Mechanisms,

<sup>49</sup> General Comment 4, ACHPR, para 44.

<sup>50</sup> *Zongo and Others v Burkina Faso* (reparations) ACtHPR, (2015) para 100; *Rev Christopher Mtikila v United Republic of Tanzania* (judgement), ACtHPR, (2014) paras 45 and 46(5).

facts of the offence, verification of facts by way of adequate investigation, a public apology by the state in a case of state-enforced custodial deaths.

### 3.2.5 Guarantees of non-repetition

Guarantees of non-repetition consist of broad policy and structural changes which touch of institutional reforms aimed at preventing a recurrence of the violations. Such measures are aimed at combatting the impunity behind the violations.<sup>51</sup> These may range from protection of witnesses and whistle-blowers and adequate media coverage under Principle 23 of the UN Basic Principles.<sup>52</sup> They also include continued training of law enforcement officials on the obligations of the state under the national and international human rights law.<sup>53</sup> The victims of custodial death, as well as the members of the public benefit from this reparation through the promotion of human rights in public services which ensures prevention of torture of detainees that could result in death.

## 4. Factors considered in determining reparation

International law places the burden of proof on the victim seeking reparations to establish a causal link between the wrongful act and the moral prejudice warranting reparations.<sup>54</sup> However, there is a presumption that the link exists as an automatic result of a human right violation.<sup>55</sup>

Guided by the International Criminal Court in *Prosecutor v Katanga*, in establishing a case for reparations, the claiming victim need only adduce evidence to the standard of preponderance of evidence.<sup>56</sup> The

<sup>51</sup> General Comment 4, ACHPR, paras 45 and 46.

<sup>52</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation, Principle 22(f).

<sup>53</sup> General Comment 4, ACHPR, para 46(I).

<sup>54</sup> *Rev Christopher Mtikila v United Republic of Tanzania* (judgement), ACtHPR, (2014) para 40.

<sup>55</sup> *Zongo and Others v Burkina Faso* (reparations) ACtHPR, (2015) para 55.

<sup>56</sup> *Prosecutor v Katanga* (order for reparations), ICC-01/04-01/07, International Criminal Court, (2017) par. 39.

standard of proof, therefore, is on a balance of probabilities.<sup>57</sup> That is, 'more probable than not' or 'more likely than not' that the victim is entitled to the reparations sought.<sup>58</sup> The African Court in *Konate v Burkina Faso* determined that this standard applies to all aspects of reparations under the African Charter, including the identity of the victims and the harm suffered.<sup>59</sup>

## 5. Conclusion

The Penal Code criminalises murder, thus warranting criminal remedies against police officers in cases of deaths in police custody. However, the Independent Policing Oversight Authority – responsible for prosecuting criminal cases against the police<sup>60</sup> – has only secured a handful out of the hundreds of deaths in police custody cases reported. Various reasons are adduced for this shortcoming: difficulty in investigations due to police interference and lack of cooperation, lack of sufficient evidence to convict, among others.<sup>61</sup> Human rights remedies present under the Constitution and under regional and international human rights instruments such as the African Charter and the ICCPR offer victims of deaths in police custody more effective remedies. The reparations guaranteed under these human rights remedies go beyond criminal sanctions in addressing the trauma and other forms of harm the victims suffer in using effective and restorative measures. In light of the financial implications that may arise from pursuing such reparations, this paper recommends that victims use representative avenues such as the Kenya National Commission on Human Rights to enforce their rights to an effective remedy.

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<sup>57</sup> *Prosecutor v Lubanga* (Decision establishing the principles and procedures to be applied to reparations), ICC-01/04-01/06, International Criminal Court, (2012), para 253.

<sup>58</sup> *Prosecutor v Katanga* (Order for Reparations), ICC, para 50.

<sup>59</sup> *Konate v Burkina Faso* (judgment on reparations), 004/2013, ACtHPR, (2016) para 15(d).

<sup>60</sup> Independent Policing Oversight Act (No 35 of 2011), Sections 5 and 6.

<sup>61</sup> Report of Independent Policing Oversight Authority on Performance for January-June 2021, 22 March 2022, 28.