Legal Advice Centre t/a Kituo Cha Sheria & 2 others v Cabinet Secretary, Ministry of Interior Security and Co-ordination of the National Government & 7 others; Law Society of Kenya & another (Interested Parties) (Petition E194 of 2022) [2025] KEHC 5718 (KLR) (Constitutional and Human Rights) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5718 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E194 OF 2022

LN MUGAMBI, J

MAY 9, 2025

BETWEEN

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA ..... 1ST PETITIONER

HAKI AFRICA ..... 2ND PETITIONER

CHARLES NJUE ..... 3RD PETITIONER

AND

CABINET SECRETARY, MINISTRY OF INTERIOR SECURITY AND CO-ORDINATION OF THE NATIONAL GOVERNMENT ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF FOREIGN AFFAIRS .... 2ND RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE ..... 3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 4TH RESPONDENT

INDEPENDENT POLICING OVERSIGHT AUTHORITY ..... 5TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 6TH RESPONDENT

CLERK OF THE NATIONAL ASSEMBLY OF KENYA ..... 7TH RESPONDENT

ATTORNEY GENERAL ..... 8TH RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

INTERNATIONAL JUSTICE MISSION ..... INTERESTED PARTY

JUDGMENT

Introduction

1. The petition dated 25th April 2022 is supported by an affidavit of even date sworn by the 1st petitioner's Director, Dr. Annette Mbogoh and also, the affidavits of Hussein Khalid, the 2nd petitioner's Executive Director and Charles Njue, the 3rd petitioner.

2. This petition is founded on what the petitioners' describe as widespread enforced disappearances and extra judicial killings perpetrated by police officers in Kenya. The petitioners bring this petition against the respondents seeking the following reliefs:

    a. A declaration that all incidents of death and serious injury that are a result of police action, caused by a member of the police on duty, or happen while in police custody, should be primarily, independently and exclusively be investigated by the Independent Policing Authority and not any other investigatory body including by the National Police Service.

    b. A declaration that investigations on all incidents of death and serious injury that are as result of police action, caused by a member of the police on duty, or happen while in police custody and carried out by the National Police Service are illegal, null and void.

    c. An order directed at the Attorney General and the Ministry of Foreign Affairs to initiate the process of ratifying the International Convention for the Protection of all Persons from Enforced Disappearance in accordance with Section 7 of the *Treaty Making and Ratification Act* and a status report be filed before this Court within 3 months of the Court judgment.

    d. An order that in view of Kenya's lack of a law that criminalizes and prescribes sentences for the crime of enforced disappearances, this Court does direct that a copy of the Court judgment be transmitted to the offices of the Attorney General and the Clerk of the National Assembly for proposed law reforms for the purposes of enacting legislation that will criminalizes and prescribe sentences for the crime of enforced disappearances and a status report be filed before this Court within 6 months of the Court judgment.

    e. An order directed at the 3rd and 4th Respondent to furnish the Petitioners and the Court with information and data on:

        i. Official number of complaints of extrajudicial killings and enforced disappearances received from 2010 to date.

        ii. The consequences of such complaints, including numbers of prosecutions particularly officers that have been disciplined and criminally prosecuted. Within 2 months of the court's judgment.

    f. An order directed at the 5th and 6th Respondents to furnish this Court with the status of investigation and prosecution in the 3rd Petitioner's case.

    g. A declaration that in view of the widespread and systematic practice of enforced disappearance in Kenya, constitutes a Crime against Humanity under the *Rome Statute of the International Criminal Court* and the *International Crimes Act*, No. 16 of 2008 Laws of Kenya.

    h. An order directing the 8th Respondent to advise the state to erect a monument in Nairobi in memory of all victims of extrajudicial killings and enforced disappearances.

i. An order compelling the Attorney General to forthwith refer the Kenyan situation requesting the Prosecutor of the International Criminal Court to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

j. The issues in this Petition being matters of grave public interest there be no orders as to costs.

k. Any other relief that the court may deem fit to grant.

Petitioners' Case

3. The petitioners assert that there have been numerous cases of enforced disappearances and extrajudicial killings in Kenya at the hands of police officers. Majority of these cases are said to have taken place among the members or sympathizers of the terrorist groups such as Al -Shabab, drug traffickers and poachers.

4. It is averred that the Human Rights Watch in 2016 documented 34 cases of enforced disappearances and 11 case of extra judicial killings. This number rose higher the following year being an election year, 2017. It was recorded that the police and armed gangs killed more than 100 people. A joint report with Amnesty International revealed that at least 67 people had been killed during the first round of voting in August by the police. Additionally, the Independent Medico Legal Unit (IMLU) in the same year documented 152 extra judicial killings also carried out by the police.

5. It is further averred that Kenyan human rights groups in 2018 in like fashion, documented at least 267 cases of extra judicial killings. The Kenya National Commission on Human Rights has also since 2013 documented over 1040 cases of extra judicial killings and enforced disappearances. According to the 2nd petitioner, these cases were the highest in the history of Kenya in 2021.

6. It is stated that at the onset of 2022, 30 bodies were retrieved from River Yala, Siaya County and more cases continue to be reported daily. The 2nd petitioner concerning this matter wrote to the 6th respondent, seeking an intervention and carrying out of investigations. It is claimed that the results of those investigations have never been made availed. In these accounts, the petitioners also recall the brutal murder of Counsel, Willy Kimani, his client, Josphat Mwendwa and their taxi driver, Joseph Muiruri. The 3 were also dumped in a river in 2016 after their murder.

7. Bearing this in mind, the petitioners are distressed that despite the severity of the situation, little seems to have been done concerning this issue. Furthermore, the petitioners argue that this situation is indicative of a greater pattern of abuses and impunity which the State has condoned and failed to investigate.

8. The petitioners accuse the government of failing to ratify the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPPED). This is despite the pleas by civil societies for legal framework to be formulated to deal this disturbing matter. For instance, the 2nd petitioner informs that in collaboration with the 1st interested party, the Supreme Council of Kenya Muslims, the National Muslim Leaders Forum and Amnesty international submitted a petition to the 1st respondent seeking solutions to enforced disappearances.

9. In addition, it is noted that a similar recommendation was made by the Senate Standing Committee on the Justice, Legal Affairs and Human Rights in its report titled, Report on the inquiry into extra judicial Killings and enforced disappearances in Kenya. The 1st petitioner proceeded to follow up on this recommendation with the 2nd and 8th respondent in a letter dated 1st February 2022.This letter did not however illicit any response from these respondents. It is alleged that similar requests were made

by the 1st interested party and other civil society organizations to the 8th respondent in view of the *ICPPED*.

10. The petitioners are in addition aggrieved that despite the existence of the 5th respondent, investigations of the cases before it are still carried out by the National Police Service. It is averred that this defeats the goal of impartiality in its proceedings due to the conflict of interest. This challenge was also captured in the Senate's Report. It is claimed that its lack of independence has affected the operation of its mandate and compromised people's confidence to lodge complaints before it. Furthermore, the petitioners claim that investigations by the police on incidents of death and serious injury as a result of the police action are illegal.

11. The petitioners further posit that there is a lack of official data by the State on police extrajudicial killings and enforced disappearances. The petitioners in a letter addressed to the 3rd respondent sought a record of the missing persons in Kenya however this too was futile. The petitioner asserts that lack of proper records shows a lack of accountability and transparency on the part of the government.

12. The petitioners also fault the State for failing to enact legislation that criminalizes and punishes enforced disappearances. As a consequence of this lacuna, it is stressed that the perpetrators are not held accountable for their actions. This issue is said to be problematic as while murder and its elements are prescribed in law, in an enforced disappearance the fact of death is uncertain and a conviction of murder cannot be secured without a body. The petitioners aver that regrettably victims and families of enforced disappearances are disadvantaged in access to justice due to this. To bring this to life, the petitioners aver that the 3rd petitioner's case is one such incident.

13. The 3rd petitioner depones that he is the cousin of Jackson Njue who disappeared mysteriously on 31st July 2021. At the time of his disappearance, he had travelled to Mombasa on business in April 2021. His mother alerted the 3rd petitioner that Jackson Njue's phone had been off for over a week. They had spoken last on 22nd July 2021 while he had spoken to him last on 18th July 2021.

14. In a bid to find Jackson Njue, the 3rd petitioner travelled to Nyali on 2nd August 2021 and lodged a report at Nyali Police Station under OB No.11/3/8/2021. He further went on to search for Jackson Njue where he was last known to be and also used social media. He depones that he discovered Jackson Njue's disappearance had been tagged along with that of one, Abshir Ali Garo on facebook. He proceeded to contact Abshir's family.

15. He alleges that the family of Abshir informed him that the two alongside a third unidentified person had been having lunch at Ukunda on 24th July 2021 when persons claiming to be police officers arrested them. They were ferried in away in a Toyota Land Cruiser registration number KCD xxxE which the witnesses at the scene took a video of.

16. Later on, in the day, the police came to Abshir's family home claiming to conduct an investigation. Abshir's mother alleged that he heard a scream from one of the three vehicles that had come and confirmed that it was the three men. She pointed out that they were badly bruised and bleeding. The family was then directed by Ukunda Police Station, to follow up on the matter at Central Police Station at Nairobi. On arrival at Nairobi, the family was told that there was no record of such a case there. It is noted that soon after on 24th August 2021, Jackson Njue's vehicle was burnt down.

17. He avers that the 4th respondent's officers at Nyali Police Station tracked Jackson's phone to Bamburi and the other at Nyali. The Land Cruiser that had ferried them away is said not to exist in the National Transport and Safety Authority (NTSA) system. Attempts to find Jackson in different hospitals, police stations and mortuaries has also been in vain. Follow ups on the matter with the police has also bore no fruits.

18. The petitioners assert that the 3rd petitioner's case of mental anguish and psychological torture in their unending search for Jackson Njue is one shared by many Kenyan families. It is stated that these families have sought in vain for information even through habeas corpus petitions about the whereabouts of their purportedly arrested family members with no success. It is stated that these families are left in abeyance as they wait for their family members to be traced.

19. It is alleged that this situation becomes even more frustrating when it is clear that the person disappeared while in police custody as seen in the case of *Daniel Baru Nyamohanga & another v Director of Public Prosecutions & 3 others* (2018) eKLR.

20. The petitioners are grieved that despite the abundant cases of such tales, the State continues to be unwilling to carry out investigations and prosecution of the perpetrators. Further that the State fails to establish a legal mechanism to address the crime of enforced disappearance which qualifies to be classified as a crime against humanity. The petitioners aver that there is need for these cases to be referred to the International Criminal Court (ICC) for investigation and identification of the perpetrators.

21. In view of the foregoing, the petitioners bring this petition against the 3rd and 4th respondents for failing to carry out investigations concerning incidents of death caused by the police; the 3rd and 4th respondent's failure to issue the information in the cited letters; the respondents failure to enact law to govern the crime of enforced disappearances and ratification of *ICPPED*; and the pursuit for justice for the 3rd petitioner's family and rights of the victims and their families in similar predicaments.

Respondents' Case

22. The 1st, 2nd and 7th Respondents responses and submissions are not in the Court file or Court Online Platform (CTS).

3rd and 4th Respondents' Case

23. In reply, these respondents through the 3rd respondent's Chief Inspector and Senior Investigator, George Mwangi Okal filed their replying affidavit sworn on 28th November 2022.

24. He depones that the petitioners' allegations on enforced disappearances and extra judicial killings based on the various cited cases such as drug traffickers is unfounded as their investigations are solely based on the law as supported by evidence. Equally, he depones that the petitioners have not adduced any evidence to support the numerous allegations of extra judicial killings by police officers as captured in the various reports relied on in the petition.

25. He similarly denies the allegations of the bodies retrieved from River Yala as are not anchored on any factual evidence that ascertains it was the police officers who carried out these killings. It is nonetheless noted that this matter is still under investigation.

26. On the 5th respondent's investigations, he avers that the 3rd and 4th respondents have a constitutional mandate under Article 239, 243, 245 and Sections 24(e), 35(b) 51(j) and 87(2A) of the *National Police Service Act* to investigate all categories of crime including those committed by police officers. He adds that in carrying out this mandate the 3rd respondent is guided by the principles set out under Article 10, 238, 244 of the *Constitution*.

27. Correspondingly, he stresses that as guided by Part A (6) of the Sixth Schedule of the *National Police Service Act*, the 3rd respondent's investigations are not precluded in investigations of matters before the 5th respondent. He points out that the 5th respondent does not have the capacity to investigate all crimes thus relies on the 3rd respondent to conduct investigations as seen in a number of cases. For instance,

the alleged murder of brothers, Emmanuel Mutura and Benson Njiru and the alleged assault of one Kennedy Muruga by the 4th respondent's officer at Buruburu.

28. He avers that in this matter that, the National Task Force on Police Reforms while recommending the establishment of a civilian police oversight body, it also recommended the need for establishment of an internal police oversight body with the mandate to conduct investigations on police complaints. He informs that it is on this premise that the Internal Affairs Unit (IAU) was established under Section 87 of the *National Police Service Act*.

29. He depones that vide a letter dated 26th November 2020, the 6th respondent directed the 3rd respondent to undertake investigations into cases of death caused as a result of excessive force used by police and submit its findings. He informs that these findings were submitted to the 6th respondent without any bias on their part or coverups. He notes that this can be appreciated from the cases of the shooting of Elizabeth Ndunge the suspicious death of PC Dorina Luchera, the murder of Daphine Kebei Morara among others including the case of Advocate Willie Kimani alongside Joseph Muiruri and Josphat Mwenda.

30. In addition, the IAU has investigated incidents of missing persons some of which are still pending before Court. For instance, the alleged enforced disappearance of two Indian nationals Mohammed Zaidi, Zulfigar Ahmed Khan and their taxi driver, Nicodemus Mwania. He as such stresses that the petitioners' allegations that police investigations concerning police incidences are false and based on a misinterpretation of the law.

31. It is further stated that the statistical data of complaints received, investigated and resolved against police is provided in the annual reports which are accessible to the public. Moreover, this information is equally furnished to the 5th respondent. Consequently, it is contended that the IAU has in these cases discharged its mandate.

32. He as well denies the 5th respondent's allegations terming them as being false and misleading. Moreover, it is argued that the 5th respondent did not table any evidence to demonstrate that the 3rd respondent through the IAU had frustrated and interfered with its function. He noted in addition that the 3rd and 4th respondents had not investigated the death of one Martin Koome Manyara as claimed.

5th Respondent's Case

33. The 5th Respondent in response filed its replying affidavit through its Director of Investigations, Emmanuel Lagat sworn on 2nd December 2022.

34. He depones that the 5th respondent has over the years received and admitted for investigation cases for death and enforced disappearances by police officers. He notes that this information has been published in its reports that are available to the public.

35. It is stated that the 5th respondent has carried out investigations in these cases and at the time had 88 cases relating to enforced disappearances by police officers. In addition, 256 cases involving death and serious injuries as unlawfully caused by the police. In total, he depones that since 2012 to December 2021, the 5th respondent had completed investigations in 3437 cases and 141 of those cases are currently in Court.

36. He avers that the 5th respondent also conducted investigations into the deaths that occurred during and after the 2017 general elections. In this matter, it was found that commission of these crimes by police officers was part of a widespread attack against the public in specific areas and thus recommended prosecution for these crimes against the senior police commanders in HCCR No. E074 of 2022.

Likewise, it is averred that the 5th respondent conducted investigations in the case of Daniel Baru Nyamohanga and filed its report in Court.

37. He asserts that despite the 5th Respondent's mandate to conduct impartial and independent investigations, it faces numerous challenges as highlighted in the Senate's Report. One of the key challenges is the parallel investigations conducted by the police which end up interfering with their own investigations. He points out that this difficulty was also captured in the reports of the *Commission of Inquiry into the Post-Election Violence (Waki Report)* and the National Taskforce on Police Reforms (Ransley Report) as outlined in its affidavit dated 7th November 2022 in response to the application dated 24th October 2022.

38. Accordingly, he agrees with the petitioners that the parallel investigations where witness interference and evidence tampering is probable whilst mandate belongs to the 5th respondent is unlawful and infringes on the victims' rights under Article 26, 28, 29 ,48 and 50 of the Constitution. In addition, the parallel investigations erode the public's confidence in the 5th respondent's mandate. He states that this issue has also been highlighted by the Courts in various cases.

39. He depones that to deal with this matter the 3rd, 5th and 6th respondents developed the Standard Operating Procedures on Prosecution and Investigation of Serious human Rights Violations (SOPs), wherein the 5th respondent has the exclusive jurisdiction to investigate crimes that amount to serious human rights violations committed by police officers. He states regrettably that despite the operation of SOPs, the 3rd and 4th respondents continue to carry out the parallel investigations in these cases.

40. Refuting the 3rd and 4th respondents' claims on the 5th respondent's capacity to conduct investigations, he avers that *Independent Policing Oversight Authority Act* empowers it to conduct investigations under Section 25. Instead as per Section 4, 7, 25(2) and 31 of the *Act* the police are only required to assist the 5th respondent's investigations by availing the requisite documents and exhibits in their custody and not tampering with the investigations.

41. Referring to the Indian nationals case as an illustration, he asserts that the 3rd respondent has to date refused to avail the necessary information sought by the 5th respondent in its letter dated 21st October 2022 and 7th November 2022. He notes that despite the 5th respondent raising these concerns with the 3rd respondent, the parallel investigations continue to be carried out.

42. He further claims that contrary to the 3rd and 4th respondents' allegation, the IAU was not established as a result of the National Taskforce on Police Reforms in view of investigations of cases of death or serious injury by fellow police officers. He notes that the 5th respondent in this regard is only mandated to monitor, review and audit the investigations of the cases of death and serious injuries alleged to have been caused by police officers.

43. Consequently, he claims that it is necessary that this Court issues the sought orders (a) and (b) in the petition to safeguard the 5th respondent's mandate and its independence. It is however noted that order (f) in the petition cannot be issued against the 5th respondent and so should be dismissed against it.

6th Respondent's Case

44. The 6th respondent opposed the petition in the grounds of opposition dated 22nd April 2024 on the basis that:

    i. The petition lacks clarity and precision in setting out the declarations in relation to the 6th Respondent.

ii. The orders sought are therefore untenable as against the 6th Respondent as the Petitioners have not shown how the 6th Respondent has a duty in the matters raised.

iii. The powers of the 6th Respondent as enshrined in Article 157 of the Constitution do not include the power to arrest or detain a person.

iv The 6th Respondent is not aware of the matters alleged in the Petition as they do not fall within his constitutional mandate hence the 3rd Petitioner ought to direct their inquiry to the proper officers;

v The 6th Respondent has not directed the 3rd Respondent under Article 157(4) of the Constitution, to investigate and arrest the 3rd Petitioner for any known offence in law;

vi. There is no inquiry file pending before the 6th Respondent in respect of the 3rd Petitioners or the issues raised in the Petition as the 6th Respondent is not seized of the matter at all.

vii. The 6th Respondent has not received any formal complaint from the petitioner to enable him direct the 3rd Respondent under Article 157(4) of the *Constitution*.

viii. The 6th Respondent has no capacity to furnish the Court with the status of investigation and prosecution of the 3rd Petitioner's case.

ix. The Petitioners Petition is bad in law and devoid of any merits. The same is a classical description of an abuse of the due process of this Court and should be dismissed with costs.

1st Interested Party's Case

45. The 1st interested party filed its replying affidavit sworn by its Chief Executive Officer, Florence Wairimu Muturi on 22nd February 2023.

46. It is asserted that the issue of enforced disappearances and extra judicial killings has been a major issue Kenya and to the legal profession. She informs that there has been several incidents of advocates and their clients being injured, abducted and even murdered while carrying out their legal duties as unfortunately witnessed in the *Willie Kimani, Josphat Mwendwa and Joseph Muiruri's case* in 2016.

47. A similar incident was that of Prof. Wilson Hassan Nadwa. It is averred that he was abducted after reporting to Central Police Station with his client Elgiva Bwire in 2021. This triggered the 1st interested party's involvement in the matter where it went on to file of Constitutional Petition No.467 of 2021. The 1st interested party applied for a writ of habeas corpus which was granted. Soon after issuance of these Court Orders, Prof. Wilson Hassan Nandwa was dumped in Mwingi Town, luckily alive albeit traumatized. His client however is yet to be found to date.

48. Another incident is that of Advocate, Benson Njau Kayai who was abducted during the day on 7th February 2021 in South C, Nairobi. His whereabouts remain unknown.

49. It is asserted that for advocates to protect their clients' interests there is need for the government to provide a safe environment free from harassment, intimidation and threats of harm and violence.

50. She further affirms that various human rights organizations have reported and documented the numerous cases of enforced disappearances and extra judicial killings. To illustrate, she states that the Missing Voice Alliance documented 127 cases of police killings and 25 enforced disappearances in 2022. Equally, she avers that the country has witnessed an increase of similar cases in informal

settlements attributable to the security agencies. Likewise, it is averred that certain areas such as the Yala River have become the dumping grounds for victims of extrajudicial killings.

51. Comparable findings are also documented in the Senate's Report. She depones that the 1st interested party made recommendations to the 1st respondent advising that the 8th respondent should initiate the process of ratification and domestication of the *ICPPED*.

52. She adds that the 1st interested party also wrote to the 1st and 3rd respondent requesting they keep an updated registry of persons arrested by the anti-terrorism police. It is argued that the lack of an official record of these cases undermines public's confidence and acts as a barrier to police accountability.

53. It is contended that it is lamentable that little has been done to resolve this issue which has caused great suffering to the victims' families. It is argued also that there has been a display of lack of good will in investigating these cases by the National Police Service. In like fashion, the government has continued to deny its knowledge of the missing persons and failed to hold to account the responsible officers.

54. She additionally avers that the 5th respondent's mandate under the *IPOA Act* and the IAU's mandate under Section 87 of the *National Police Service Act* creates a jurisdictional overlap with regard to investigation of complaints relating to disciplinary or criminal offences by the 3rd respondents' members. It is argued however that the 5th respondent's mandate prevails over that of this IAU. The 1st interested party echoed the challenges the 5th respondent consistently faces as it carries out its mandate in view of the overlap of roles with IAU.

55. It is posited that enforced disappearances and extrajudicial killings are an affront to the Constitution and administration of justice thus the need for this Court's intervention. Furthermore, it is stated that the Court should safeguard the 5th respondent's independence with reference to carrying out its function.

2nd Interested Party's Case

56. The 2nd interested party through Ruth N. Kihuria filed its replying affidavit sworn on 16th October 2024.

57. She depones that the 2nd interested party is directly involved in the issues raised in the petition owing to its representation of several victims and families of victims on pro bono basis. These matters are currently being heard by a number of Courts across the country. She echoes that the issue of extra judicial killings and enforced disappearances are a major concern in the Country. It was noted that this issue also hit home when their own employee, advocate Willie Kimani alongside Josphat Mwendwa and Joseph Muiruri were abducted and later on brutally murdered.

58. She asserts that the ability to conduct comprehensive investigations in these matters has been frustrated by the lack of teamwork and collaboration between the 3rd respondent, the IAU and the 4th and 5th respondents. In particular she argues that the parallel investigations are counterproductive. This in turn leads to conflicting findings, inefficiency, witness fatigue and ultimately injustice. Furthermore, the parallel investigations lead to unnecessary waste of resources and cause delays which in turn translate to delayed justice to the victims and their families.

59. It is further asserted that despite the development of the SOPs to guide, define and clarity each of these bodies' functions, the police have resorted to outrightly ignoring the 5th respondent's independent investigations. In addition, the police officers are said to cover up their crimes.

60. She indicates that one such case among the others listed was that of Martin Koome, who died while being tortured in police custody. The alleged police officer was charged with murder in Nairobi High

Court Criminal Case No.1 of 2014, *Republic versus Kevin Odhiambo*. It is alleged that when the 5th respondent intervened following the families appeal, it lead to the withdrawal of the charges against Kevin as the same were fabricated and the truth about Martin's death came to light.

61. She posits further that the 6th respondent in a Directive issued on 4th November 2023 directed that all cases involving police officers be referred to the 5th respondent to undertake independent and comprehensive investigations. She reasons that this in essence settled the issue of investigation responsibility concerning such cases.

62. She stresses that it is in public interest that the Court safeguards the 5th respondent's functional and operational independence in the matter at hand. Equally, that the lack of specific legislation on enforced disappearances limits the ability of such crimes being tried independently. This in addition enables a lack of accountability and failure to charge the perpetrators.

63. That said, it is acknowledged that there have been efforts to ratify the *ICPPED*. However, it is stressed that this Court should compel the 8th respondent to provide a report on the ongoing reforms in this area as sought by the petitioners.

Petitioners' Submissions

64. Khaminwa and Khaminwa Advocates for the petitioners filed submissions dated 20th March 2023.They sought to discuss the following points: whether the incidents of death and serious injury caused by the police should be independently and exclusively investigated by the 5th respondent; whether this Court should issue orders to the 8th respondent and Parliament to enact legislation that criminalizes the crime of enforced disappearances and also initiation of ratification of the *ICPPED*; whether this matters should be referred to the prosecutor of the ICC; whether the crime of enforced disappearances and extrajudicial killings meets the threshold for crimes against humanity; whether the 3rd and 4th respondents should issue the petitioners the sought information; whether the 5th and 6th respondent should be ordered to furnish the Court with the status of the 3rd petitioner's case and whether the 8th respondent should be directed to enact a monument in memory of all the victims of extrajudicial killings and enforced disappearances.

65. On the first issue, Counsel submitted that the 5th respondent was established as a result of the need to reform police service which has been associated with political interference, ineptness and violation of human rights. As such, the 5th respondent established under the *IPOA Act* was created with the mandate to hold police accountable to the public in the performance of their duties. It is noted that one of its functions under Section 6(a) is to investigate any complaints related to disciplinary or criminal offenses.

66. In this regard therefore, Counsel submitted that Article 244 of the *Constitution* which led to the establishment of the 5th respondent was designed to respond to the police use of brutality that had plagued the Country even then. Accordingly, Counsel stressed that this Court in interpreting the Constitution in this regard ought to pay attention to the historical foundation to give the *Constitution* its true meaning. To buttress this point, reliance was placed in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR) where it was held that:

> "We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our *Constitution*. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the

various provisions of the *Constitution* that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to Articles 4(2), 33, 34, and 35of our *Constitution* has been given above in paragraphs 145-163."

67. In light of this consideration, Counsel submitted that indeed the powers to investigate police brutal actions lies with the 5th respondent.

68. On the flipside, Counsel submitted that Section 87 of the *National Police Service Act* contrary to the 3rd and 4th respondents' averment refers to complaints from members of the public concerning the discipline of police officers not serious injury including death caused by the police. Moreover, the investigations to be conducted by the IAU only entail disciplinary action. It is emphasized that the two issues are distinct and thus it is clear that the 5th respondent is the one vested with the power to investigate the serious crimes committed by the police.

69. Counsel also urged the Court to appreciate that the public cannot have confidence in the findings of investigation conducted by the police officers on crimes caused by fellow police officers. Reliance was placed in *Council of County Governors v Attorney General & another* [2017] KEHC 6395 (KLR) where it was held that:

> "In addition to being guided by rules of statutory interpretation, one key function of the court in interpreting a statute is the creation of certainty in law. Certainty in law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past. The other key point for the court to consider while interpreting the law is to change and adapt the law to new and unforeseen conditions. Law must change because social institutions change. The courts should resolve these uncertainties and assist in adapting the law to new conditions.
>
> While interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case."

70. Counsel additionally submitted that the existence and operation of an external oversight body such as the 5th respondent is recognized and utilized the world over for instance in South Africa and the United Kingdom. Such bodies are recognized as one of the ways of enhancing confidence, transparency and accountability in police service. It is noted that the 5th respondent's independence has also been appreciated in *Republic v Chief Executive Officer, Independent Policing Oversight Authority & 2 others Ex parte Harish Kanji Patel* [2019] KEHC 8438 (KLR) as follows:

> "There are no express powers given to the 1st Respondent to delegate its functions to the Internal Affairs Unit of the National Police Force, and on the contrary, one of its functions under section 6 (d) of the *Independent Policing Oversight Authority Act* is to "monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service in response to complaints against the Police and keep a record of all such complaints

regardless of where they have been first reported and what action has been taken". Therefore, an implied power to delegate its functions to the Internal Affairs Unit cannot also exist, as the said Unit is one of the subjects of the exercise of the 1st Respondents' functions and powers...The nature of the 1st Respondents objectives and its functions are therefore essentially quasi-judicial in nature, as they involve investigation and disciplining of the Police Service. These objectives and functions of necessity and in the interests of fairness and justice rules out any implied power to delegate the 1st Respondent's functions of investigating complaints made to it about police misconduct to the Internal Affairs Unit of the same Police Service."

71. Like dependence was placed in *La Cantuta v Peru, Inter-American Court of Huma rights*, Judgment of 29th November 2006, Series C, No.162, para 224.

72. On the second issue, Counsel submitted that the *ICPPED* has become jus cogens as an accepted norm in the international community of which derogation is not permissible. To illustrate, Counsel relied in the Chile case of Pollaco Gallardo and others where its Supreme Court held that enforced disappearance constitutes a violation of jus cogens. Similar findings have also been found in Costa Rica, Argentina, Peru, and Colombia among others.

73. To buttress this point further reliance was placed in the case of *Barrios Altos (Chumbipuma Aguirre et al.) v Peru,* Series C No.75(Judgment of 14th March 2001) where it was held that:

> "This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of then prohibited because they violate non-derogable rights recognized by international human rights law."

74. Like dependence was placed in *Arges Sequiera Mangas v Nicaragua*, Case 11.218 Report No.52/97, Inter-Am C.H.R., OEA/Ser.L/V/II.95 Doc 7 revat 692(1997).

75. Accordingly, Counsel stressed that there is great need to domesticate the ICPPED so as to specifically create the offense of enforced disappearance and prescribe penalties. Counsel argued that these orders do not interfere with the doctrine of separation of powers. Counsel in this regard relied in *Legal Advice Centre t/a Kituo Cha Sheria & 33 others v Cabinet Secretary, Ministry of Education & 7 others* [2021] KEHC 390(KLR) where the Court found that there was need for a law to be enacted setting out the necessary procedures and protocols on disclosure of confidential and sensitive information, including information touching on national security.

76. Counsel in the next issue was certain that these crimes meet the threshold of crimes against humanity as can be gleaned from the averments in the petitioners' affidavits and their annextures. This includes the reports and newspaper cutting produced as evidence. Counsel noted that the Courts have in several instances taken judicial notice of facts to prove certain facts as seen in *Ngunjiri Wambugu v Inspector General of Police & 2 others* (2019) eKLR where it was held that:

> "The petitioner has to his affidavit annexed various media reports, copies of Newspapers print outs and photographs of destroyed properties; the information of which was all in the public domain and widely reported in the local dailies, and news on all broadcasters. The Respondent has not filed any Replying affidavit to controvert the petitioner's averment; nor any grounds of opposition. This court would therefore take judicial notice of the same as

sufficient to prove, that there were indeed violations of the rights averred in the petitioner's affidavit. Judicial Notice is defined in *Black's Law Dictionary Tenth Edition* on page 975 as follows:-

"Judicial notice: A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact the trial court took judicial notice of the fact water freezes at 32 degree."

It is further defined by Oxford Dictionary of Law (ed. Jonathan Law and Elizabeth A. Martin) 7th Ed. (Oxford University Press) at page 306 as:-

> "The means by which the court may take as had proven certain facts without hearing evidence. Notorious facts may be judiciary noticed without inquiry."

It would be noted under section 60 of the *Evidence Act* (Cap 80) Laws of Kenya it provides thus:-

> "The courts shall take judicial notice of the following facts:-
>
> All matters of general or local notoriety (things that everyone knows)."

77. Like dependence was placed in Inter-American Court of Human Rights Case of *Velasquez -Rodgriguez v Honduras* Judgment of June 26, 1987.

78. Counsel submitted that based on the documentary evidence supplied by the petitioners, they had proven the fact that there is a systematic and selective practice of disappearances carried out in Kenya with the assistance and tolerance of the government.

79. Counsel submitted further that these crimes indeed meet the threshold set out under the Rome Statute as informs that the elements of crimes against humanity include: crimes of murder, enforced disappearance of persons, other inhumane acts and torture.

80. Counsel in view of this argued that there was need for these cases to be referred to the prosecutor of the ICC as a State Party under Article 14 of the *Rome Statute*. Counsel submitted that the reason for this is because Kenya lacks sufficient domestic legal mechanisms and a law to address the crime of enforced disappearance so as to bring justice to the victims and their families.

81. In addition, the referral is based on the State's incapability to prevent, investigate and punish those responsible. Counsel gave the example of *Apollo Mboya V attorney General & 3 others; Kenya National Commission on Huma Rights (Interested Party) & another* (2019)eKLR where in the matter seeking a judicial commission of inquiry on enforced disappearances was dismissed as this is a mandate bestowed only on the President. These difficulties are argued to thus highlight the shortcomings in dealing with these issues in addition to the parallel investigations carried out by the police and the 5th respondent.

82. Counsel moving on, submitted that the 2nd respondent failed to respond to the 1st petitioner's letter seeking information on the statistics of missing persons. Another letter directed at the 3rd respondent by the 1st interested party was also not responded to. Counsel submitted that these actions contravene the right to access information. Reliance was placed in *President of Republic of South Africa v M & G Media* (CCT 03/11) [2011] ZACC 32 where it was held that:

> " The constitutional guarantee of the right of access to information held by the state gives effect to "accountability, responsiveness and openness" as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights

> in the Bill of Rights. The right to receive or impart information or ideas,13 for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote14 also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."

83. Correspondingly in the next issue, Counsel submitted that the 5th and 6th respondents ought to furnish this Court with the status of the investigation and prosecution of the 3rd petitioner's case.

84. On erection of the monument, Counsel submitted that the Court under Article 23 of the Constitution has power to grant an appropriate remedy. Counsel stated that Article 75 of the Rome Statute further empowers the Court to make appropriate reparations for victims of human rights abuses. Counsel relying in the opine in Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to promote Transitional Justice, submitted that damages should not only be compensated in monetary terms but also through measures that show the relatives and society that such events will not recur.

85. Reliance was placed in *Charles Lukenyen Nabori & 9 others v the Attorney General & 3 others* (Nairobi HCCP No.466 of 2006) where it was held that:

> " The *Constitution* should not represent a mere body or skeleton without a soul or spirit of its own. The *Constitution* being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."

3rd, 4th and 5th Respondents' Submissions

86. Senior State Counsel, Christopher Marwa filed submissions for these parties dated 5th November 2024 and highlighted the issues for determination as: whether indeed there is a violation of the petitioners' constitutional rights by the 3rd and 4th respondents; whether the petitioners are entitled to the orders sought in prayer (c); whether the petitioners are entitled to the orders sought in prayer (d); whether the petitioners are entitled to the prayers sought in prayer (e) and whether the petitioners are entitled to the prayers sought in prayer (f) and (i).

87. On the first issue, Counsel submitted that contrary to the petitioners' allegations, the 3rd and 4th respondents' actions were within their constitutional mandate to investigate commission of a crime once a complaint is made. Reliance was placed in *Republic v Directorate of criminal Investigations, & 4 Others Ex Parte Edwin Harold Dayan Dande & 4 Others* (2016) eKLR where it was held that:

> " It is trite that the Court ought not to usurp the Constitutional mandate of the investigative authorities to investigate any matter that, in their view raises suspicion of the occurrence or imminent occurrence of a crime. Just like in cases of prosecution, the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the said authorities since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid"

88. Like dependence was placed in *Anthony Kihara Gethi v Ben Gethi & 4 Others* (2021) eKLR.

89. Therefore, Counsel submitting that these parties had not violated the constitutional rights as alleged stated that private individuals should then not direct them how to carry out their mandate. Moreover,

Counsel submitted that the petitioners had not adduced any evidence to demonstrate that the 3rd respondent had operated outside its constitutional mandate as envisaged under Article 244 of the *Constitution*.

90. Counsel argued that one of the functions of the 4th respondent under Section 28 of the *National Police Service Act* is to carry out investigations referred to it by the 5th respondent. Counsel reasoned that the petitioners' allegations could not hold water as the mandate to carry out these investigations is exclusively delegated by the Act to the 4th respondent.

91. Counsel equally submitted that the petitioners had not adduced any evidence concerning investigations on the incidents of death and serious injury caused by the police that were conducted contrary to the law. Counsel stressed also that the petitioners cannot seek to limit the period within which investigations are to be carried out as the same needs to be thorough.

92. Consequently, Counsel maintained that, the 3rd and 4th respondent had not failed to carry out their mandate. Tying to this Counsel submitted that the petition had failed the test set out in the Anarita Karimi Case as affirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission* [2013] KECA 445 (KLR).

93. Turning to the second issue, Counsel submitted that the *ICPPED* has to undergo a mandatory ratification process before the same can be part of the laws of Kenya. This process is set out under Sections 7, 8, 9 and 10 of the *Treaty-Making and Ratification Act*. This involves approval of the Convention by the Cabinet Secretary before the same is transmitted to Parliament for consideration and approval. Counsel considering this urged the Court to uphold the doctrine of separation of powers and exercise restraint in granting this relief. Reliance was placed in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (1399); 2006 (6) SA 416 (CC) where it was held that:

> "This Court has emphasized on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation."

94. On the instant Judgment being transmitted to the National Assembly with a view of enacting a legislation criminalizing enforced disappearances, Counsel submitted that this would be in breach of the doctrine of separation of powers and its legislative mandate under Article 94(5) of the *Constitution*. Reliance was placed in Mumo Matemu (*supra*) where it was held that:

> "Separation of powers must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy."

95. In the next issue, Counsel submitted that while the petitioners seek information relating to the enforced disappearances and extrajudicial killings by the 3rd and 4th respondent under the empowerment of Article 35 of the *Constitution*, it was argued that this right is not one of the non-derogable rights under Article 25 and so can be limited. In this case, it was argued that the petitioners are seeking information that may likely undermine national security and impede the due process of law; endanger the safety and life of the victims' families and the officers involved in the heinous acts.

Ultimately the disclosure was likely to significantly undermine the 3rd and 4th respondents' ability to continue with their pending investigations all in the discharge of their mandate. In any case, Counsel submitted that the petitioners had not proved that they had requested the information as is provided in law.

96. Reliance was placed in *Gatimbu v University of Embu & another* ([2023] KEELRC 126 (KLR) where it was held that:

> " I agree with the respondents that granting free access to the applicant to such restricted and confidential information could be in breach of the University Policies and may prejudice the students' rights. One wonders what was the purpose of copies of the documents if they were to be shown to the applicant and then be availed at the hearing for verification. This court finds that the limited access of the information accorded to the applicant with the undertaking by the employer to avail the document during the disciplinary hearing was fair enough within the meaning of section 4 (3) of the *FAA Act* which requires the administrator to give information, materials and evidence that will be used at the hearing.
>
> Accordingly, this court is not satisfied that the applicant has proved on a balance of probability that the respondents have violated her right of access to information and fair administrative action. The granting of limited access to the information requested for by the applicant has been explained and justified on the basis of the relevant statutes and University Policies formulated pursuant to the said statutes."

97. Like dependence was placed in *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] KESC 45 (KLR).

98. Counsel in the next issue rebutting the petitioners' allegations submitted that enforced disappearances do not constitute crimes against humanity under Article 7 of the Rome Statute. For that reason, Counsel stressed that the same does not warrant invocation of the jurisdiction of the ICC pursuant to Article 7 of the *Rome Statute*.

99. Likewise, Counsel submitted that the ICC operates under the principle of complementarity meaning that the jurisdiction of the ICC is complementary to that of national courts and is invoked when the national courts are unable to proceed to try an act that falls under the crimes within the jurisdiction of the ICC. Consequently, Counsel submitted that no evidence had been adduced to show that our Courts are unable to try the act of enforced disappearances.

5th Respondent's submissions

100. The 5th respondent's Counsel Festus Kinoti filed submissions dated 23rd March 2023 and identified the issues for determination as: whether the conduct of investigations by the 3rd Respondents of cases of death or serious injury while in Police custody, which are the result of Police action or were caused by members of the Service while on duty contemplated in section 25 of the *IPOA Act* is unlawful and violates Article 26 of the *Constitution* on the right to life, Article 28 on Human dignity, Article 29 on freedom and security of the person, Article 48 Access to justice and Article 50 on fair hearing; whether the court should compel the 8th respondent to refer the Kenyan case on extra judicial killings and enforced disappearance to the ICC and whether the 5th respondent should be compelled to advise the 3rd Petitioner of the status of his investigations.

101. On the first issue, Counsel submitted that the 5th respondent has the exclusive statutory mandate to investigate any death or serious injury including death or serious injury while in police custody, which are the result of police action or were caused by members of the service while on duty. Counsel stressed

that it is trite law that the realization and enforcement of the foregoing rights is the requirement that the state conducts independent, transparent and impartial investigations where violations of the foregoing rights is alleged.

102. Reliance was placed in the Human Rights Committee in its General Comment no. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the *ICCPR* where it is noted under paragraph *15* that:

> " Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant."

103. Like dependence was placed in, *C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service* [2013] eKLR.

104. Counsel submitted that considering the historical context of the establishment of the 5th respondent, it is evident that it is the independent and impartial body's mandate to conduct investigations into cases of death or serious injuries allegedly caused by police officers not the 3rd respondent.

105. Reliance was placed *in the Matter of Kenya National Human Rights Commission*, Supreme Court Advisory Opinion Ref. No.1 of 2012 where it was held that:

> "But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances." Similarly, in In *Peter Gatirau Munya v Dickson Mwenda Kithinji & 2 others*, the Supreme Court held at paragraph 167 In *Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation."

106. Equal dependence was placed in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, *Annie Wanjiku Kibeh v Clement Kungu Waibara another* [2018] eKLR, *Attorney General & 2 others v Independent Policing Oversight Authority & another* [2015] eKLR.

107. Further, Counsel submitted that the conduct of parallel criminal investigations by the 3rd respondent into cases of death or serious injury by police officers unlawfully interferes with the conduct of independent and impartial investigations by the 5th respondent, and therefore denies the victims the right to independent and impartial investigations as envisaged under Article 26, 28, 29, 48 and 50 of the *Constitution*.

108. According to Counsel, Section 6 (a) as read with Section 25 of the *IPOA Act* is drafted in mandatory terms and obligates the 5th respondent to investigate cases of death and serious injury while in police

custody caused by police action or member of the service while on duty. Considering this, the 5th respondent is granted this exclusive mandate.

109. Counsel submitted that this differs from Section 87 of the *National Police Service Act* which solely refers to investigations arising out of police misconduct, principally a disciplinary action. As such, it was stressed that the conduct of parallel criminal investigations by the 3rd respondent into cases of death or serious injury as set out in Section 25 of the *IPOA Act* unlawfully interferes with the conduct of independent and impartial investigations by the 5th respondent.

110. Counsel asserted that neither the *IPOA Act* nor *National Police Service Act* envisages a situation where the police are mandated to carry out investigations in cases of death or serious injuries arising out of police action. Besides, the parallel investigations that arise as a result are argued to be a waste public resource.

111. Reliance was placed in *Africa Spirits Limited v Director of Public Prosecutions & another (Interested Party's) Wow Beverages Limited & 6 others* [2019] eKLR where it was held that:

> "In performance of his duties, the Directorate of Criminal Investigations must exercise jurisdictional deference to other authorities that have been established by statute to fulfill their mandates (see Section 64 of the *National Police Service Act*. In this case, it is evident that there was an element of jurisdictional overreach by the Directorate of Criminal Investigations on matters which are statutorily under the jurisdiction of the Asset Recovery Authority and the Kenya Revenue Authority."

112. Equal dependence was placed in Constitutional Petition no. E495 of 2021 Geoffrey Kaaria Kinoti and others v The Chief Magistrates Court Milimani law courts, *Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees* [2015] eKLR, *Regent Management Limited v Wilberforce Ojiambo Oundo* [2018] eKLR and *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR.

113. Counsel in the second issue submitted that there is no duty imposed on the 8th respondent under Article 156 of the *Constitution* and Section 5 of the *Office of the Attorney General Act* or the *International Crimes Act*, 2008 to refer a situation to the ICC. In view of this Counsel submitted that this Court cannot therefore compel the 8th respondent to do so. Equally it was noted that such a referral under Article 14 of the *Rome Statute* is discretionary upon the State.

114. To buttress this argument reliance was placed in *Apollo Mboya v Attorney General & 3 others; Kenya National Commission On Human Rights (Interested Party) & another* [2019] eKLR where it was held that:

> "It therefore follows, that an order of mandamus will compel performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body has failed to perform the duty to the detriment of a party, who has a legal right to expect the duty to perform otherwise where public duty is not imposed on a person or body of persons by a statute, no orders of mandamus can issue. I find that there is no legal duty reposed upon a respondent, and as such an order of mandamus cannot issue, so is the case where the Respondent enjoys discretion in the manner of performance of a duty as no order can issue directing Respondent to perform the duty in a particular manner."

115. Likewise, Counsel submitted that Article 17 of the *Rome statute* in view of the principle of complementarity guides that the state has the primary obligation to investigate and prosecute cases of

widespread or systematic gross violations of human rights. In this regard, Counsel submitted that the 5th respondent has the capacity to investigate these serious human rights violations as committed by police officers. Counsel echoed that the 5th respondent's track record to do so was clear in its affidavit.

116. On this premise Counsel submitted that the petitioners had not established any basis for the Court to compel the 8th respondent to refer the Kenyan case on extra judicial killings and enforced disappearances to the ICC.

117. On the last issue, Counsel submitted that the 3rd petitioner did not depone whether he ever lodged a complaint concerning his brother's disappearance with the 5th respondent. Taking this into consideration, it was argued that the order to issue the sought information, cannot therefore issue against the 5th respondent.

6th Respondent's Submissions

118. The 6th respondent through Senior Prosecution Counsel, Edna Ntabo filed submissions dated 29th April 2024. Counsel identified the issues for discussion as: whether the 6th respondents has any duty in the matters raised and whether the petitioners have met the required threshold for grant of the orders sought.

119. Counsel on the first issue submitted that, the petition does not disclose any cause of action against the 6th respondent as the issues raised fall outside its constitutional mandate under Article 157 of the *Constitution*.

120. Counsel informed that there was presently no inquiry file pending before the 6th respondent concerning the issues raised in the petition and neither had there been a formal complaint from the petitioner to enable the 6th respondent to direct the 3rd respondent in line with Article 157(4) of the *Constitution*.

121. Nonetheless, Counsel submitted that the key issue herein is how the cited constitutional rights had been violated by the respondents. Reliance was placed in *William and Others v Spautz* [1993] 2 LRC 659 where the High Court of Australia held that:

> " It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercise, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from prosecution. It is equally important that freedom of access to the courts should be preserved and that litigation of the principal proceeding, whether it be criminal or civil, should not become a vehicle for abuse of process issues on an application for stay, unless once again the interests of justice demand it."

122. Additionally, Counsel stressed that it is trite law that a party that alleges a breach of fundamental rights and freedoms must state and identify the rights with precision and how the same have been or will be infringed as appreciated in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR. Tying to this, Counsel submitted that the petitioners had not pleaded their case with precision as required and affirmed by the Court of Appeal in Mumo Matemu(*supra*).

123. On the last issue, Counsel submitted that the 6th respondent has no capacity to comply with the orders sought against it as the same does not fall within his constitutional mandate.

124. Counsel also challenged the petitioners' reliance on newspaper articles, reports and statistics as their evidence. The same was argued not to be admissible as observed in *Apollo Mboya v Attorney General & 3 others; Kenya National Commission on Human Rights (Interested Party) & another* [2019] eKLR.

1st Interested Party's Submissions

125. Iseme Kamau and Mauma Advocates filed submissions for the 1st interested party dated 23rd February 2023. The issues underscored for determination were: whether all incidents relating to disciplinary or criminal offences committed by any member of the National Police Service should be primarily, independently and exclusively be investigated by the Independent Policing Oversight Authority and not any other investigatory body by the National Police Service and whether the 3rd,4th and 5th respondent should be ordered to furnish this Court with information on the official number of complaints of extrajudicial killings and enforced disappearance; the consequence of such complaints and the status if investigations.

126. Counsel relying in Article 244 of the *Constitution* in the first issue, submitted that the Constitution places an obligation on the national police service to not only subject itself to the rule of law but also transform itself into an institution whose mandate and functions are anchored on democratic ideals.

127. Consequently, it was argued that the 5th respondent's establishment was in recognition that for law enforcement to perform their duties effectively and satisfactorily, they require a high level of oversight. This is because without checks and balance, history has demonstrated that police often misuse their powers, including covering up for their colleagues engaged in criminal conduct by failing to record complaints, botching investigations, intimidating witnesses and/or failing to undertake proper investigations. As a result, there is a need for civilian authority to hold them accountable.

128. To buttress this point Counsel relied in the *United Nations Office on Drugs and Crime Handbook* on Police Accountability, Oversight, and Integrity (the Handbook), which defines police accountability as a system of internal and external checks and balances aimed at ensuring that the police carry their duties effectively and are held responsible when the fail to do so. Such a system ensures that police always uphold integrity and serves to deter misconduct and enhance public confidence in policing. Effective police accountability requires structures be put in place to maintain both internal discipline and regulations of police conduct as well as external oversight and control of police.

129. On this basis UN member countries have established oversight bodies to oversee police services such as the Independent Office of Police Conduct (IOPC) in the United Kingdom and Independent Police Investigative Directorate (IPID) in South Africa.

130. Counsel equally reiterated guided by Section 6 of the *IPOA Act* and Section 87 of the *National Police Service Act* that the IAU primarily concerns disciplinary action against police officers. It is however argued that this Unit has been caught up in conflict of interest as colleagues attempt to tamper with investigations into misconduct of their fellow colleagues thus interfering with the 5th respondent's mandate.

131. Counsel further submitted that a reading of Section 6 of the *IPOA Act* informs that the legislative intent was for the 5th respondent to exercise jurisdiction over the IAU. It was argued also that the *IPOA Act* takes precedence over any other law that subsisted before its enactment such as the *National*

Police Service Act. Reliance was placed in *James Gacheru Kariuki & 19 others v County Government of Mombasa & 56 others* [2019] eKLR where it was held that:

> " The doctrine of implied Repeal serves as a precautious measure against existence of two contrasting statutes. The general rule is normally, that when parliaments repeal legislation, they generally make their intentions both express and clear; however sometimes parliament may enact laws that are inconsistent with existing statutes. This preposition was established by smith J in *Kutner v Philips* (1891] 2 QB 2 267 (QB) where the court stated:-
>
> > "[i]f ...the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later, that is, the later statute impliedly repeals the earlier one to the extent of the inconsistency."

132. Like dependence was placed in *A.O.O.& 6 Others v Attorney General & Another* [2017]eKLR and *Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party)* [2019]eKLR.

133. Counsel further argued that in the context of Section 25 of the IPOA Act, the 5th respondent cannot delegate its functions to the IAU as alleged. Counsel cited the case of *Republic v Chief Executive Officer, Independent Policing Oversight Authority & 2 others Ex parte Harish Kanji Patel* [2019]eKLR where it was held that:

> " There are no express powers given to the 1st Respondent to delegate its functions to the Internal Affairs Unit of the National Police Force, and on the contrary, one of its functions under section 6 (d) of the *Independent Policing Oversight Authority Act* is to "monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken". Therefore, an implied power to delegate its functions to the Internal Affairs Unit cannot also exist, as the said Unit is one of the subjects of the exercise of the 1st Respondents' functions and powers."

134. On the second issue, Counsel submitted that Article 35 of the *Constitution* obligates institutions such as the 5th respondent to divulge information, as is one of the tools that empowers citizens to hold the government accountable. Equally, the respondents are required to regularly publish statistical data on the number of complaints of extra judicial killings and enforced disappearances including the remedial actions undertaken. Unfortunately, this is a reality that the victims and families of the victims have not benefited from. As a result, Counsel submitted that the government failure to keep, track and publish statistical data on the number of reports on extrajudicial killing and enforcement violates the victims' right to access to information which is crucial for them to enforce their rights and fundamental freedom.

135. Reliance was placed in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others* [2013] eKLR where the Court held that right to access to information under Article 35(3) of the *Constitution* provides that the state has a pro-active duty to disclose information in public interest as well as provide access to information held by the state. The court specifically held that:

> " The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively

publish information in the public interest-this, I believe, is the import of Article 35(3) of the *Constitution* of Kenya which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State."

2nd Interested Party's Submissions

136. The 2nd interested party's submissions are not in the Court file or Court Online Platform (CTS).

Analysis and Determination

137. Having regard to the pleadings and submissions by the Parties Advocates this Court considers the following to be the issues for determination in this Petition:

i. Whether there has been a proliferation of cases of enforced disappearance and extra-judicial killings in the Country and if so, whether the Court should make orders directed at the Attorney General and Parliament to undertake necessary legal reforms to ratify the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICEPPD) and legislation that will criminalize and prescribe sentences for enforced disappearance.

ii. Whether the cases of enforced disappearances and extra judicial killings as a result of police action should be investigated by the 3rd respondent's IAU or solely the 5th respondent.

iii. Whether this Court should direct the 3rd, 4th, 5th and 6th respondents to furnish the petitioners and interested parties with the sought information.

iv Whether the act of enforced disappearance constitutes a Crime against Humanity under the Rome Statute.

v Whether this Court can order that the 8th respondent to refer the matter to the International Criminal Court.

vi. Whether the petitioner is entitled to the relief sought.

Whether there has been a proliferation of cases of enforced disappearance and extra-judicial killings in the Country and if so, whether the Court should make orders directed at the Attorney General and Parliament to undertake necessary legal reforms to ratify the International Convention for the Protection of All Persons from Enforced Disappearance and legislation that will criminalize and prescribe sentences for enforced disappearance.

138. The Petitioners made reference to statistics of numerous unresolved cases of enforced disappearance and extra judicial killing by police contained in the documented reports by human rights organizations. For instance, in 2016, the Petitioners stated that Human Rights Watch documented 34 cases of enforced disappearance and 11 cases of extra judicial killings. It is in that year lawyer Willy Kimani, his client Josphat Mwendwa and taxi driver Joseph Muiruri lives were terminated extra-judicially. In 2017, the petitioners stated that Amnesty International reported 67 deaths that were caused by police during the 1st round of voting that took place that year. The Independent Medical Legal Unit (IMLU) on its part reported 152 people had died from extra-judicial killing. On its part, the Kenya National Commission on Human Rights has documented 1040 cases of extra judicial killings since 2013. Further in the year 2022, a discovery of 30 bodies were found in River Yala.

139. The above statistics may not have been obtained from 'official records' but they serve one fundamental purpose, they signify the great public concern that this issue has generated over the years.

140. The matter has even been raised in Parliament in the recent past. The Senate Standing Committee on the Justice, Legal and Human Rights Report, 'Report on the inquiry into extra judicial killings and Enforced Disappearance in Kenya' highlighted the magnitude of this problem.

141. The Respondents who would ordinarily be the custodians of 'official records' did not find it necessary to specifically counter those statistics with any official data. Instead, they argued in the replying affidavit of George Mwangi Okal sworn on 28th November, 2022; that there is no evidence of extra judicial killings or enforced disappearance that is captured in the reports. That even for the bodies retrieved from River Yala, there is no evidence to connect them to the police that petitioner provided.

142. It is indeed true that there may not be implicating evidence but the question that this Court would like to pause is, has this country witnessed an upsurge in cases where people are being deprived liberty mysteriously followed by absence of information as on their whereabouts whereby in some instances they resurface, in others they never show up at all while some end up dead? If the answer is yes, then the petitioners have a cause of action that is prosecutable.

143. Given the Report of the Senate, Reports by human rights organization, the extensive media coverage that the issue has always generated, this Court is one that is capable of being judicially noticed pursuant to Section 60 (1) (o) of the *Evidence Act* which permits the court to recognize or acknowledge facts that constitute matters of general or local notoriety without the need for any further proof or verification.

144. In view of the foregoing and based on the facts provided, I find the petitioners' claim that over the years there has been a proliferation of unresolved enforced disappearances and extra judicial killings as a .....a fact.

145. The significance of this finding points to serious violation of human rights in the Country.

146. Article 21 (1) of the *Constitution* provides that it is the fundamental duty of the State and every State organ to observe, respect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

147. Further, under Article 21 (4) the *Constitution* provides that the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

148. Under Article 21 (1) the duty on the State is not just required to observe and respect human rights; its mandate includes promote and fulfil; that is to facilitate the enjoyment of the rights by preventing abuse and ensuring access to justice for the victims of such violations.

149. The question therefore becomes, what has been the response by the State in regard to the increasing cases of enforced disappearances and extra-judicial killings, has the State put in place sufficient and effective mechanisms to address this worrying trend?

150. In response to the prayer that the State should be required to initiate the process of ratifying the International Convention for the Protection of All Persons from Enforced Disappearance; the Respondents through State Counsel Christpher Marwa argued that the ratification process specified under Section 7, 8, 9 and 10 of the *Treaty-Making and Ratification Act* must be strictly followed before the said Convention can form part of the laws of Kenya pursuant to Article 2 (5) and (6) of the *Constitution*.

151. Further, the 2nd and 8th Respondent argued that it would amount to breach of separation of powers which obliges the Court to accord the Executive and Legislative arms the deference to discharge their mandate under the Constitution and the law citing the South African case of *Doctors for Life International v Speaker of the National Assembly & others* (supra).

152. Article 259 (1) of the *Constitution* is explicit on how the Constitution is to be interpreted; it requires that the interpretation must be done in manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance. Does the suggested interpretive approach by the State promote those ideals especially in a country is witnessing heightened cases of extra judicial killings and mysterious disappearances with nothing tangible by way of investigations being reported?

153. Our Constitution does not require all international laws to undergo the process of ratification so as to be considered as part of the laws of Kenya.

Article 2 (5) of the *Constitution* provides that:

> "The general rules of International law shall form part of the law of Kenya"

154. The general rules of international law, commonly known as 'jus cogens' or 'peremptory norms' are a body of rules that are considered superior and binding on every state objectively rather than voluntarily. Article 53 of the *Viena Convention on the Law of Treaties* defines a peremptory norm/jus cogens as follows:

> 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

155. In the Article; *Jus Cogens Re-examined: Value Formalism in International Law* reported in European Journal International Law https://academic.oup.com/ejil/article/28/1/295/3097823 author lists the following as the features that define 'jus cogens' namely: a norm from which no derogation is permitted, a norm of general international law, a norm accepted and recognized by international community of states as whole, from which no derogation is permitted, peremptory norms are universally applicable, they are superior to other norms of international law, they serve to protect fundamental values of international community.

156. The *International Convention on Prohibition of All persons Against Enforced Disappearance* protects in a single manner multiple violations of rights and fundamental freedoms that have for long time been recognized by the international humanitarian law as jus cogens. Enforced disappearance may affect the right to life, freedom from torture and inhumane treatment, right to a fair hearing (deprivation of judicial protection) which are all non-derogable and the right to liberty. These rights and fundamental freedoms are part of inventory of international norms that States cannot contract out in treaties. Indeed, the gravity of enforced disappearance by itself qualifies the status of jus cogens particularly due to the fact that it deprives the victim the right of access to justice. This position was echoed by the Inter-American Court on Human Rights in the case of Altos v Peru judgment of 14th March, 2021 where the Judges at paragraph *41* observed that torture, extra-judicial summary or arbitrary execution and forced disappearance are all prohibited since they violate non-derogable rights recognized by international human rights law.

157. The Convention simply re-enacts in a unified manner rights and fundamental freedoms that international humanitarian law does not permit derogation under any circumstances as constituting 'enforced disappearance' which for all purposes is thus 'jus cogens.'

158. The Inter- American Commission on Human Rights in the case *Arges Sequeira Mangas v Nicaragua* Case No. 11.218 Report N 52/97, Inter-Am. C.H.R OEA/Ser. L/V/II.95 Doc. 7 rev at 692 (1997) discussing the right to life as part of jus cogens held thus:

> "The Inter-American Commission on Human Rights would like to highlight the right to life understood as fundamental right of the human person set forth in the American Convention on Human Rights and in several international instruments, both regional and international, is jus cogens and is therefore non-derogable. The concept of jus cogens derives from a higher order of standards established in ancient times and cannot be breached by the laws of man or nations..."

159. It is my humble view that *ICPPED* restates and fuses the principles of international law that States have generally customarily recognized as *jus cogens* hence does not require a formal ratification under Article 2 (6) of the Constitution to form part of the laws of Kenya since objectively the convention by its very nature binds the State as customary International law as (jus cogens). That means *International Convention for Protection of All Persons from Enforced Disappearance* applies automatically by dint of Article 2 (5) of the Constitution and forms part of the laws of Kenya and this shall make a declaration to that effect.

160. It is thus the function of the State through Parliament to consider under Article 21 (4) of the *Constitution* to "enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms', thereunder.

161. That interpretation in my view promotes the purposes, values and the principles of the Constitution, advances the rule of law and human rights and fundamental freedoms as required in Article 259 (1) of the *Constitution*.

> Whether the cases of enforced disappearances and extra judicial killings as a result of police action should be investigated by the 3rd respondent's IAU or solely the 5th respondent.

162. There was serious contestation on this issue. It was submitted that when both the Independent Police Oversight Authority (IPOA) and Internal Affairs Unit (IAU) conduct parallel investigations; it brings confusion and sometimes leads to unproductive results. The petitioners and interested parties were united in stating that IAU's parallel investigations especially in matters involving serious injury or death as a result of police conduct is a usurpation of the 5th respondent's mandate under the enabling Act hence undermines the rule of law and also, the principle of impartiality.

163. The petitioner and interested parties cited some instances of evidence tampering and concealing of matters by the Unit to protect officers that have been implicated or even obstructing investigations.

164. The 5th respondent was categorical that the IAU's conduct of the parallel investigations is unlawful and an interference with its mandate.

165. In view of the above, it is necessary to set out the relevant provisions of the law to enable the Court lay a basis for the resolution of this issue.

166. The preamble of the *IPOA Act* provides that it is 'An Act of Parliament to provide for civilian oversight of the work of the Police; to establish the Independent Policing Oversight Authority; to provide for its functions and powers and for connected purposes.'

167. Section 4 of the *Independent Police Oversight Authority Act* establishes the Independent Police Oversight Authority (IPOA) as an independent body by providing thus:

Independence of the Authority.

1. In the performance of its functions the Authority shall subject to Section 34, not be subject to any person, office or authority.

2. The Authority shall observe the principle of impartiality and rules of natural justice in the exercise of its powers and the performance of its functions.

3. Every Government officer or institution shall accord the Authority such assistance and protection as may be necessary to ensure its independence, impartiality, dignity and effectiveness.

4. No person or body may interfere with the decision making, functioning or operations of the Authority.

5. Parliament shall ensure that the Authority is adequately funded for it to effectively and efficiently perform all of its functions.

168. Accordingly, the objectives of the 5th respondent under Section 5 are:

a. hold the Police accountable to the public in the performance of their functions;

b. give effect to the provision of Article 244 of the Constitution that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and

c. ensure independent oversight of the handling of complaints by the Service.

169. The functions are outlined in Section 6 of the *Act* as follows:

a. investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations;

b. receive and investigate complaints by members of the Service;

c. monitor and investigate policing operations affecting members of the public;

d. monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken;

e. conduct inspections of Police premises, including detention facilities under the control of the Service;

f. co-operate with other institutions on issues of Police oversight, including other State organs in relation to services offered by them;

g. review the patterns of Police misconduct and the functioning of the internal disciplinary process;

h. present any information it deems appropriate to an inquest conducted by a court of law;

i. take all reasonable steps to facilitate access to the Authority's services for the public;

j. subject to the Constitution and the laws related to freedom of information, publish findings of its investigations, monitoring, reviews and audits as it sees fit, including by means of the electronic or printed media;

k. make recommendations to the Service or any State organ;

l. report on all its functions under this Act or any written law; and

m. perform such other functions as may be necessary for promoting the objectives for which the Authority is established.

170. In addition, Section 25 of the *Act* provides as follows:

Deaths and serious injury in custody.

1. The Authority shall investigate any death or serious injury including death or serious injury while in Police custody, which are the result of Police action or were caused by members of the Service while on duty.

2. The Police shall upon a death or serious injury as contemplated in subsection (1) take all necessary steps to secure evidence which may be relevant for the investigation, including pictorial and written evidence, and shall in writing notify the Authority, and supply it with the evidence and all other facts relevant to the matter, including, if available, the names and contact details of all persons who may be able to assist the Authority should it decide to conduct an investigation.

3. A Police officer who contravenes subsection (2) commits an offence.

171. I will now proceed to set out the mandate of the Internal Affairs Unit of the Police.

172. Part X of the *National Police Service Act* provides for the 'offences against discipline by police officers.'

Section 87 provides as follows:

Internal Affairs Unit

1. There is established an Internal Affairs Unit (hereinafter referred to as "the Unit") of the Service which shall comprise of—

    a. an officer not below the rank of assistant Inspector-General who shall be the Director;

    b. a deputy director; and

    c. such other staff as the Unit may require.

2. The functions of the Internal Affairs Unit shall be to—

    a. receive and investigate complaints against the police;

    b. promote uniform standards of discipline and good order in the Service; and

    c. keep a record of the facts of any complaint or investigation made to it.

2A. Without prejudice to subsection (2), the unit may where necessary, investigate and recommend appropriate action in respect of any Found engaging in any unlawful conduct.

3. In the performance of its functions, the Unit shall be subject to Article 47 of the Constitution.

4. The Unit shall investigate misconduct and hear complaints—

a. from members of the Service or members of the public;

b. at the direction of a senior officer;

c. on its own initiative; or

d. on the direction of the Inspector-General; or

e. at the request of the Independent Police Oversight Authority.

5. Notwithstanding subsection (4)(e) the Authority may at any time intervene and take over the investigations when they have reason to believe the investigations are inordinately delayed or manifestly unreasonable.

6. The Unit may recommend the following disciplinary actions to the Inspector-General—

a. the interdiction of an officer;

b. the suspension of an officer;

c. the administration of a severe reprimand or a reprimand to control or influence the pay, allowances or conditions of service of an officer; or

d. any other lawful action.

6A. The Inspector-General may in exceptional cases and in the interest of the service, authorise the unit to undertake disciplinary proceedings against any officer who has been a subject of its investigations, and may for that purpose direct a Deputy Inspector-General or the Director of the Unit to appoint an officer to preside over such proceedings.

7. The Unit shall be located in separate offices from the rest of the Service.

8. The Director shall assign a senior investigating officer in every county who shall be responsible for police internal affairs in that county.

9. The Units shall report directly to the Assistant Inspector-General who shall subsequently report directly to the lnspector-General.

10. There shall be an effective relationship and regular reporting by the Internal Affairs Unit to the Independent Police Oversight Authority, Coroners, the Chief Firearms Licensing Officer as well as the Commission.

11. The Unit shall not be subject to the control, direction or command of the Kenya Police, Administration Police or the Directorate.

173. In resolving this matter, it is necessary to not only closely pay attention to the exact wordings of the Statutes outlined above but also the principles of statutory interpretation. Further, there may also be a need to pay regard to the history behind the creation of an independent oversight body to oversee the police with a mandate such as the one entrusted to the 5th Respondent.

174. In *Republic v Kenya Medical Laboratories Technicians and Technologists Board Ex-Parte Archdiocese Nairobi Kenya Registered Trustees* [2018] KEHC 9303 (KLR) the Court reasoned as follows:

23. It is an elementary rule of statutory construction that no one provision of the statute is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument. It is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the legislation and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the purposes of the legislation.

24. Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual which is certain to subvert the societal goals and endanger the public good.

25. Words, spoken or written, are the means of communication. Where they are possible of giving one and only one meaning there is no problem. But where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, after enacting statutes becomes functus officio so far as those statutes are concerned. It is not their function to interpret the statutes. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

26. Therefore, a court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

27. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add

words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself..."

175. My reading of the above provisions of *IPOA Act* is that the 5th respondent is authorized to undertake the fundamental function of investigation in relation to the police in two major ways: investigation of complaints lodged against police officers whether disciplinary or criminal in nature.

176. The Second aspect can be gleaned from Section 6(d) Act; the 5th respondent has additional function which is to monitor, review and audit investigations and actions taken by the IAU in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken. What does this mean? This clearly shows that the 5th Respondent has supervisory role to hold police accountable on matters pertaining to complaints against their conduct.

177. The mandate of IAU under Section 87 of the *National Police Service Act* is limited to disciplinary cases lodged against police officers only and even then, the 5th respondent actually oversees IAU with a view to ensure that it does its work in an unaccountable manner when dealing with matters pertaining to police misconduct.

178. This supervisory role of IPOA aligns well with objectives set out by Parliament. The objectives of the *IPOA Act* as captured in the Act include holding the police accountable, promote professionalism and discipline and ensure independent oversight.

179. *IPOA Act* was thus meant to establish an independent body that ensures in serving the people, police officers remain accountable through civilian oversight. Consequently, whereas in the past, police service was not monitored by civilians, IPOA ensures that as a national security organ, it remains accountable to the sovereign authority to the people by ensuring it renders professional service that goes hand in hand with accountability as envisaged in Article 244 of the *Constitution*.

180. This model has been adopted in many other Constitutional democracies. South Africa is an example.

181. Discussing a comparable matter in *McBride v Minister of Police and Another* (CCT255/15) [2016] ZACC 30 the South African Constitutional Court reasoned as follows:

> 23. ... This Court has a duty to satisfy itself that the declaration of invalidity of the various impugned sections was properly made.[25] It also has to satisfy itself whether the impugned sections are inimical to the independence of IPID. This requires this Court to examine each of the impugned provisions to determine whether they are congruent with, or subversive of, IPID's independence as demanded by section 206(6) of the Constitution.
>
> 24. IPID is an independent police complaints body established in terms of section 206(6) of the Constitution. Section 4(1) of the *IPID Act* requires it to function independently of SAPS. This is to ensure that IPID is able to investigate cases or complaints against the police without any fear, favour or prejudice or undue external influence. Section 4(2) of the *IPID Act* requires that each organ of state assist the Directorate to maintain its impartiality and to perform its functions effectively. Importantly, section 2 of the *IPID Act* requires IPID to play an oversight role over SAPS and Municipal Police Services. Given the nature, scope and importance of the role played by police in preventing, combating and investigating crime, IPID's oversight role is of cardinal importance. This is aimed at ensuring accountability and transparency by

SAPS and Municipal Police Services in accordance with the principles of the Constitution.... [41] All this should be seen against the extensive powers IPID has to investigate the police. Section 28 of the *IPID Act* authorises the Directorate to investigate a whole variety of matters involving the police and complaints of assault, torture, rape, discharge of firearms, death while in police custody and as a result of police action. Section 28(1)(g) authorises the Directorate to investigate corruption within the police, whilst section 28(2) empowers the Directorate to investigate systemic corruption within the police force. There have in recent years been alleged instances of police brutality and killings perpetrated against civilians. Undoubtedly, these are very serious matters which affect the public. Naturally, the public has a direct interest in seeing these matters being vigorously pursued and properly investigated. IPID is given this responsibility. It is cast in the role of a watchdog over the police. It is therefore necessary to its credibility and the public confidence that it be not only independent but that it must also be seen to be independent to undertake this daunting task without any interference, actual or perceived, by the Minister.

42. A question might be asked whether the statutory framework created by the impugned sections conduce to engendering public confidence in the independence of IPID. This Court dealt with this issue of public confidence in Glenister II,[49] and reiterated it in Helen Suzman Foundation, where it stated:

> "This Court has indicated that 'the appearance or perception of independence plays an important role' in evaluating whether independence in fact exists. . . . By applying this criterion we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary. We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence."[50]

43. To my mind, the cumulative effect of the impugned sections has the potential to diminish the confidence the public should have in IPID. As the amicus curiae emphasised in its submissions, both the independence and the appearance of an independent IPID are central to this matter. The manner in which the Minister dealt with Mr McBride demonstrates, without doubt, how invasive the Minister's powers are. What exacerbates the situation is that he acted unilaterally. This destroys the very confidence which the public should have that IPID will be able, without undue political interference, to investigate complaints against the police fearlessly and without favour or bias. IPID must therefore not only be independent, but must be seen to be so. Without enjoying the confidence of the public, IPID will not be able to function efficiently as the public might be disinclined or reluctant to report their cases to it."

182. I am persuaded that in enacting *IPOA Act*, Parliament intended to create a body that will operate independently in ensuring accountability of police actions and its mandate was not to be superseded or tampered with by internal bodies with the Police Service itself. Indeed, the framing of Section 25 of *IPOA Act* makes it clear that in cases of death or serious injury while in police custody which are the result of police action or were caused by members of the service while on duty it is the responsibility of IPOA to investigate limiting the police role to preserving the evidence and informing IPOA.

183. It is thus unlawful for such complaints against the police especially that relate to death or serious injury while in custody or caused by police while on duty to be subjected to police investigations as that is a specific role assigned to IPOA by the law.

184. The allegation that the 5th Respondent lacks capacity to carry out complex investigations was refuted by the 5th respondent and further, there was no evidence tendered to substantiate that claim. That role exclusively lies with the 5th respondent which is not tainted with conflict of interest that may erode public confidence on the integrity of such investigations.

185. The 3rd and 8th Respondent have thus been misconstruing Section 87 of the *National Police Service Act* as enabling IAU to investigate complaints of death or serious injury while in police custody or as a result of police action while on duty. Such parallel investigations generate uncertainty in the law and unwarranted clash that affects service delivery and the rule of law principle. As was held in *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti* [2018] KEHC 9435 (KLR);

> "7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution..."

Whether this Court should direct the 3rd, 4th, 5th and 6th respondents to furnish the petitioners and interested parties with the sought information.

186. A scrutiny of this case reveals that the petitioners and interested parties sought information concerning the statistics of the enforced disappearances and extra judicial killings from the respondents, but this request for this information went unanswered.

187. The petitioners submitted that the 3rd, 4th, 5th and 6th respondent have a legal duty to supply the 3rd Petitioner with the information concerning the status of the 3rd petitioner's case.

188. The respondents opposed that request for information alleging national security concerns. They submitted that the right under Article 35 of the *Constitution* is not absolute and can be limited if the conditions under Article 24 of the *Constitution* are satisfied.

189. Article 35 of the *Constitution* provides as follows:

1. Every citizen has the right of access to—
    a. information held by the State; and
    b. information held by another person and required for the exercise or protection of any right or fundamental freedom.
2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
3. The State shall publish and publicise any important information affecting the nation.

190. The Court in *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] KEHC 2183 (KLR) discussing this right noted as follows:

> "31. The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state,

state officer or public body... It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information."

191. The Court went on to note as follows:

"

"34. On the above basis, the right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted by the Constitution and is protected by the same Constitution. In the case of Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others (supra) the Court stated of what the state should bear in mind when considering the request to access information.;

> "34. The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State...

36. The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."

The Court then went on to state at paragraph 56;

> "[56]... State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a).... they cannot escape the constitutional requirement that [they provide access to such information as they hold to citizens."

192. Correspondingly in *Khalifa & another v Principal Secretary, Ministry of Transport & 4 others; Katiba Institute & another* [2022] KEHC 368 (KLR) it was held that:

84. Under our law... the disclosure of information is the rule and exemption from disclosure is the exception.

85. A reading of section 6 reveals that there are reasonable and justifiable limitations on the right of access to information. The purpose of section 6 is to protect from disclosure certain

information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

86. However, the burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. As was held in *President of the Republic of South Africa & others v M & G Media Limited* CCT 03/11 {2011} ZACC 32:

> "The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of... the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions ... Hence ...the evidentiary burden rests with the holder of information and not with the requester."

87. In order to discharge its burden under section 6, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 6 is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemptions claimed.

88. Any restriction on information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest. To establish that a restriction on access to information is necessary to protect a legitimate national security interest, a government must demonstrate that: (a) the expression or information at issue poses a serious threat to a legitimate national security interest; (b) the restriction imposed is the least restrictive means possible for protecting that interest; and (c) the restriction is compatible with democratic principles.

89. A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

90. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest."

193. Turning to the 3rd petitioner's case, it is manifest that the 3rd and 4th respondents chose not respond to his enquiries yet he was seeking information in regard to a complaint filed at Nyali Police Station. The 5th and 6th respondent exonerated themselves by alleging that the 3rd petitioner's case was not within their knowledge.

194. The petitioners and interested parties were not required to give reasons for seeking the information. If the respondents had any valid reason to deny the information pursuant to Section 6 of the *Access to Information Act*, they had a duty to justify this refusal to grant the information before the Court. Reading the respondents' affidavits one sees only bare general excuses by the 3rd and 4th respondent's that do pin-point the exact reason why the information on the enforced disappearances and extra judicial killings cannot be supplied. All what the respondents stated was a generalized response that reported cases are ordinarily provided in the reports the respondents release to the public from time to time.

195. This Court is not satisfied that the 3rd and 4th respondents have a valid justification to refuse to supply the information that was sought concerning enforced disappearances and extrajudicial killings as the reasons for claiming it falls within Section 6 of the *Access to Information Act* were not matched with specific reasons of national security that the release of the information will offend. My view is that no justifiable reason has been provided to refuse to grant the Petitioners and the Interested Parties the information that was sought as the State which bears the burden of proof as to why the information cannot be disclosed did not discharge this legal burden.

196. Moreover, the 3rd and 4th respondents are under a Constitutional and statutory obligation to investigate the criminal complaint lodged by the 3rd Petitioner. It is the right of the 3rd Petitioner to be updated him on the progress of this investigation. The respondents have acted unreasonably by denying him information about a complaint he personally lodged with the 3rd Respondent.

Whether the act of enforced disappearance constitutes a Crime against Humanity under the Rome Statute.

197. The *Rome Statute of the International Criminal Court* under Article 7 (1) defines crimes against humanity as follows:

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> a. Murder;
>
> b. Extermination;
>
> c. Enslavement;
>
> d. Deportation or forcible transfer of population;
>
> e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> f. Torture;
>
> g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

i. Enforced disappearance of persons;

j. The crime of apartheid;

k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

198. Article 7(2) (i) further expounds on enforced disappearance as follows:

> " Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

199. The *International Crimes Act* was enacted to effectuate the *Rome Statute* in Kenya.

200. Its preamble states that it is 'An Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions'.

201. The *Act* under Section 4(2) provides that the relevant Parts of the *Rome Statute* that are applicable to Kenya are: Part 2, 3, 5, 6, 7, 8, 9 and 10 and Articles 51 and 52.

202. Part 2 of the *Rome Statute* includes the crimes against humanity.

203. The Act under Section 6(4) defines Crimes against humanity as follows:

> " crime against humanity" has the meaning ascribed to it in article 7 of the *Rome Statute* and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the *Rome Statute* or in this Act.

204. The Inter-American Court of Human Rights in the Case of *Blake v Guatemala* (1998) dealt with the case of Nicholas Blake who was a U.S. based journalist who disappeared in Guatemala in 1985 while investigating mass killings during the country's civil war. Nicholas Blake was abducted by members of the Guatemalan military and later executed. For years, the Guatemalan government denied knowledge of his fate. While finding the State responsible for Nicholas Blake enforced disappearance the Court determined as follows:

> " The Court
>
> a. declares that the State of Guatemala violated, to the detriment of the relatives of Mr. Nicholas Chapman Blake, the judicial guarantees set forth in Article 8(1) of the *American Convention on Human Rights*, in relation to Article 1(1)

of the same, in the terms established in paragraphs 96 and 97 of the present judgment.

b. declares that the State of Guatemala violated, to the detriment of the relatives of Mr. Nicholas Chapman Blake, the right to humane treatment enshrined in Article 5 of the *American Convention on Human Rights*, in relation to Article 1(1) of the same, in the terms established in paragraphs 112, 114, 115 and 116 of this judgment;

c. declares that the State of Guatemala is obliged to use all the means at its disposal to investigate the acts denounced and punish those responsible for the disappearance and death of Mr. Nicholas Chapman Blake;

d. declares that the State of Guatemala is obliged to pay a fair compensation to the relatives of Mr. Nicholas Chapman Blake and reimburse them for the expenses incurred in their representations to the Guatemalan authorities in connection with this process;

e. orders that the reparations stage be opened."

205. The *Rome Statute of the International Criminal Court* under Article 7 (1) (i) and 7(2)(i) provides that enforced disappearances are a crime against humanity.

206. The *International Crimes Act* Convention which operationalizes this Convention in Kenya affirms that under Section 4(2) that Part 2 of the Convention is applicable in Kenya. The criminal act of enforced disappearances is thus a punishable crime that is prosecutable in Kenya as it is encompassed in the definition of crime against humanity as defined in the Rome Statute which the *International Crimes act* recognizes.

Whether this Court should order the 8th respondent to refer the matter of enforced disappearance and extra-judicial to the International Criminal Court.

207. The petitioners urged that the situation in Kenyan regarding cases of enforced disappearance and extra-judicial killings needs to be referred to the ICC by this Court as evidently there are no effective investigations being contracted to enable prosecution of the culprits hence victims of those crimes are being denied right of access to justice. The petitioners thus urged that this Court should thus make an order referring those cases to the ICC prosecutor so that effective investigations can be conducted for purposes of ascertaining the facts and identification of persons culpable to face prosecution.

208. The respondents were unanimous in opposition to the Petitioner's submissions insisting that this Court lacks jurisdiction to compel the 8th respondent to make this referral.

209. In addition, the 5th respondent maintained that it has the requisite capacity to investigate cases of enforced disappearances and extra judicial killings caused arising from police action citing numerous success cases it has undertaken before to date.

210. Further, it was underscored that a referral of cases is subject to the complementarity principle.

211. Article 14 of the *Rome Statute* provides as follows:

Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to

investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

212. The Article: *Informal Expert Paper: The Principle of Complementarity in Practice (Office of the Prosecutor, International Criminal Court 2003)* https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF explains complementarity principle follows:

> "The Statute recognizes that States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings. The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings. Moreover, there are limits on the number of prosecutions the ICC, a single institution, can feasibly conduct."

213. It is clear from the foregoing that a referral of a matter to the ICC is done by the government and ICC can only be invited when the national institutions are unwilling or are demonstrably unable to prosecute international crimes such as crimes against humanity. ICC thus compliments, it does not lead which means the national justice institutions must have failed for the intervention to happen.

214. In my humble view, Kenya has not reached this stage of a failed state that is incapable of handling these offences. Institutions such as the 5th Respondent have demonstrable a track of protecting genuinely and effectively the human rights of citizens by establishing facts, identifying perpetrators and ensuring the victims and relatives get justice. Courts in this country also continue to valiantly assert and uphold the rights and fundamental freedoms and constitutionalism every single day. There is thus no actionable evidence the national systems have failed to warrant a referral of this matter to ICC.

Whether the Petitioners are entitled to the reliefs sought

215. The Petition is successful, I grant the following reliefs:

a. A declaration is hereby issued that the International Convention of Prohibition of All Persons from Enforced Disappearances (ICPPED) is a fusion of the principles of international law that States customarily recognize as part of *jus cogens* that cannot be derogated from under any circumstances hence ICPPED Convention forms part of the laws of Kenya pursuant to Article 2 (5) of the *Constitution* of Kenya. Accordingly, the State, has a duty to take steps under Article 21 (4) of the *Constitution* to "enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms spelt out thereunder.'

b. A declaration is hereby issued that investigation into all incidents of death and serious injury that are a result of police action, caused by a member of the police on duty, or that which happens while in police custody is the exclusive mandate of the Independent Policing Oversight Authority and not any other investigatory body including the Internal Affairs Unit (IAU) under the National Police Service.

c. An order directed at the 3rd and 4th Respondent to furnish the Petitioners with information and data on:

i. Official number of complaints of extrajudicial killings and enforced disappearances received from 2010 to date.

ii. The consequences of such complaints, including number of prosecutions particularly officers that have been disciplined and criminally prosecuted. This should be done within 90 days of this court's judgment.

iii. An order directed at the 5th and 6th Respondents to furnish 3rd petitioner with the status of investigation or prosecution in respect of complaint lodged at Nyali Police Station vide OB. No.11/3/8/2021.

d. The 3rd Respondent shall open and maintain a dedicated register of all cases of enforced disappearance and extra-judicial killings

e. The Court makes no orders as to costs

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF MAY, 2025.

.....**.

L N MUGAMBI

JUDGE