



**Centre for  
Human Rights**  
UNIVERSITY OF PRETORIA

**ACCOUNTABILITY FOR VIOLATIONS OF THE RIGHT TO LIFE BY STATE  
AGENTS IN GHANA**

submitted in partial fulfilment of the requirements of the Master of Laws degree

Human Rights and Democratisation in Africa

by

**Nahaja R. Adam**

prepared under the supervision of

Prof. Almeida Machava

Universidade Eduardo Mondlane, Mozambique

and

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University of Pretoria, South Africa

at the

Faculty of Law, Universidade Eduardo Mondlane

**29 October 2021**

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## **DEDICATION**

*To the late Professor Christof Heyns*

*and*

*every black woman who has ever been told to dim their light: don't do it!*

## ACKNOWLEDGMENT

*When Tems said 'crazy tings are happening' she must have been talking about this degree cooossssss! anyway,*

*I am grateful to my two supervisors Prof Almeida Machava and Dr. Thomas Probert for being the overall amazing supervisors that they have been*

*Estaphania Rangel and the staff of Comissão de Direitos Humanos cannot go unmentioned*

*I would also like to acknowledge the role my family played throughout this process and for being my research assistants when I needed Ghanaian legislation.*

*This research would not be possible without my friends and support system especially Zwe and Melissa. Thanks Queeeennnnnsssss*

*Ijaz really did what needed to be done and I am thankful for that*

*I think it is equally important to thank all the artistes whose music helped to get through this research and degree. I really went through it*

*Lastly, I would like to thank the late Prof. Heyns for all the work he did in this area and for the role he played in sustaining my interest in the right to life.*

## ACRONYMS

CHRAJ	Commission on Human Rights and Administrative Justice
EMCI	Ejura Ministerial Committee of Injury
ICCPR	International Covenant on Civil and Political Rights
IGP	Inspector-General of Police
IPCB	Independent Police Complaints Board
IPID	Independent Police Investigative Directorate
IPOA	Independent Policing Oversight Authority
NHRI	National Human Rights Institution
SLP	Sierra Leone Police
SOP	Standard Operating Procedure
SSR	Security Sector Reform

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# CHAPTER 1: INTRODUCTION

## 1.1 Introduction

This chapter provides the overview of the dissertation and sets out the background of the research, the research problem and questions as well as a review of the existing literature on the issue of accountability for violations of the right to life. The limitation of the research, methodology and structure of the dissertation is also discussed in this chapter.

## 1.2 Background

Ghana as a country has had its fair share of violence and in the past couple years, the issue of extrajudicial killings by the police and military have become a part of our lives as a nation.<sup>1</sup> With a violent history such as Ghana's where there has been a total of four coup d'états which were rife with killings and disappearances of people without remedies, an uninterrupted democratic rule for twenty-eight years should have meant an end to this phenomenon. However, that has not been the case. Extrajudicial killings by the police and the military are still prevalent in our democracy. During the enforcement of the COVID 19 pandemic regulations the issue of extrajudicial killings, excessive use of force and police brutality was on the rise again.<sup>2</sup>

In June 2021, two people were shot and killed by some soldiers in Ejura in the Ashanti region during a protest organised to register their displeasure for the killing of a young activist who was involved in the Fix the Country protest by unknown assailants.<sup>3</sup> During the last elections in December 2020, two people were shot and killed with other people sustaining injuries in Techiman when the police and military fired shots at a crowd after the announcement of the results of the parliamentary

---

<sup>1</sup> 'The Police, the people, the politics Police accountability in Ghana' (2007) CHRI 29; 'United States Department of State Country Report on Human Rights 2020- Ghana <https://www.state.gov/wp-content/uploads/2021/03/GHANA-2020-HUMAN-RIGHTS-REPORT>(accessed 12 August 2021); United States Department of Justice Human Rights Report Ghana <https://www.justice.gov/eoir/country/ghana-topical> (accessed 12 August 2021).

<sup>2</sup> DO Nkrumah, EY Ofosuhen & K Gyasi 'Covid-19 Pandemic and Presidential Directives: The Brutalities of The Ghana Police Service' (2020) 33 *African Journal of Criminology & Victimology Special Edition: Impact of Covid-19* 15.

<sup>3</sup> Two protesters shot dead in Ghana' <https://www.africanews.com/2021/06/30/two-protesters-shot-dead-in-ghana/> (accessed 4 August 2021).

elections.<sup>4</sup> Prior to this, during a COVID-19 safety operation in Accra, Eric Ofotsu was shot and killed by a Staff Sergeant of the Ghana Armed Forces in Ashaiman.<sup>5</sup> According to eyewitnesses, the people around when the incident occurred told the soldier that Eric was a man who had mental health issues and slept and worked at the Ashaiman Municipal Assembly but the soldier still went ahead to shoot and kill him in the full glare of all who were present.<sup>6</sup>

Again in July 2020, a young Nigerian man was shot and killed by the Police at Gomoa Buduburam.<sup>7</sup> The Buduburam Police Commander claimed that the intention was not to kill him but rather disarm him since he was in possession of a machete and threatened to kill anyone who came close to him.<sup>8</sup> The wife of the deceased however stated that her late husband told her that someone had threatened to kill him and was anxious that the person would kill him and at a party they attended together, he left to tail the person who threatened him.<sup>9</sup> According to her, she later got a call and was informed that her husband had sustained a knife wound and was admitted at the hospital. After she insisted on seeing him, she was locked in a room.<sup>10</sup>

In July 2018, seven young men who were members of the Asawase Zongo community in the Ashanti Region were shot and killed by the police.<sup>11</sup> These young men were said to have been suspected armed robbers who were involved in the murder of the deceased police officer Lance Corporal Daniel Tiekou who was killed while on duty.<sup>12</sup> Following the murder of these seven young men, members of the Asawase Zongo community held protests at various places in the Ashanti Region insisting that those young men were not armed robbers but were innocent

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<sup>4</sup> BM Ali 'Two shot dead at Techiman South Constituency' <https://www.graphic.com.gh/news/general-news/two-shot-dead-at-techiman-south-constituency.html> 9 December 2020 (accessed 26 July 2021).

<sup>5</sup> 'Eyewitness account of how an unarmed man was shot by a soldier at Ashaiman' <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Eyewitness-account-of-how-unarmed-man-was-shot-by-a-soldier-at-Ashaiman-916852> (accessed 26 July 2021).

<sup>6</sup>As above.

<sup>7</sup> JK Bimpeh '27 year old man shot dead by Police at Buduburam' <https://www.primenewsghana.com/general-news/27-year-old-man-shot-dead-by-police-at-buduburam.html> (accessed 26 July 2021).

<sup>8</sup> 'Police kills 27-year-old Nigerian man at Gomoa Buduburam' <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Man-shot-dead-in-Buduburam-chased-people-with-cutlasses-Police-1011502> (accessed 26 July 2021).

<sup>9</sup>Bimpeh n 7.

<sup>10</sup> As above.

<sup>11</sup> No evidence found against 7 "murdered" Asawase youth- Committee' <https://www.graphic.com.gh/news/general-news/kumasi-7-suspected-robbers-gunned-down-over-police-officer-s-death.html> (accessed 26 July 2021).

<sup>12</sup> As above.

members of their community.<sup>13</sup> During the protests, the Ashanti Regional Police Command insisted that the young men were indeed armed robbers but following the reports of a committee set up to investigate the incident, it was found that these men were in fact innocent and there was no evidence suggesting that they were armed robbers.<sup>14</sup>

These cases are few of the many instances of extrajudicial killings by the police and military and there are some cases that go as far back as 1999 without anyone being held accountable for these violations of the right to life.<sup>15</sup> Additionally, the Human Rights Committee in their concluding observations on the implementation of the International Covenant on Civil and Political Rights (ICCPR) highlighted the issue of excessive use of force and unlawful killings by law enforcement personnel.<sup>16</sup> The fact that people do not get held accountable for these violations seems likely to contribute to the ongoing prevalence of this form of violation.

### 1.3 Research Problem

The right to life is guaranteed in article 6 (1) of the ICCPR, article 4 of the African Charter on Human and Peoples' Rights (African Charter) and article 13(1) of the 1992 Constitution of Ghana. This right has been described as the supreme right which is non-derogable even in public emergencies that threaten the life of a nation.<sup>17</sup> The right to life is the bedrock of all other rights, without which they are meaningless. This right is made up of two components; the substantive and procedural component.<sup>18</sup> The substantive component of the right to life entails ensuring that unlawful deaths do not happen while the procedural component deals with pursuing accountability for any potentially unlawful deaths that occur.<sup>19</sup> Accountability may take different forms but at the core of it, it questions the events

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<sup>13</sup> D Kenu 'Seven shot dead by police not armed robbers' <https://www.graphic.com.gh/news/general-news/seven-shot-dead-by-police-not-armed-robbers.html> (accessed 26 July 2021).

<sup>14</sup> NA Agyeman Asante 'No evidence 7 murdered Asawase youth were robbers-C'ttee' <https://citinewsroom.com/2018/11/no-evidence-7-murdered-asawase-youth-were-robbers-cttee/> (accessed 26 July 2021).

<sup>15</sup> n1 above.

<sup>16</sup> Human Rights Committee, Concluding Observations on Ghana's initial report on its implementation of the ICCPR.

<sup>17</sup> United Nations Human Rights Committee General Comment 36: The Right to Life (Article 6) paragraph 2.

<sup>18</sup> T Probert & C Heyns 'The role of national commissions of inquiry in securing the supreme human right' in T Probert & C Heyns (eds) *National Commissions of Inquiry in Africa Vehicles to Pursue Accountability for Violations of the Right to life?* (2020) 4.

<sup>19</sup> As above.

leading to the arbitrary deprivation of life and in the best case scenario serves as a way to ensure that lives are not lost arbitrarily in the future.<sup>20</sup>

The African Commission's general comment number 3 on the right to life states that a state's failure to investigate killings by state agents is in itself a violation of the right to life.<sup>21</sup> However in Ghana, such investigations remain rare: only those incidents that garner significant media attention tend to prompt proper investigations. These investigations usually take the form of a commission of inquiry in accordance with chapter 23 of the constitution, or the setting up of a committee to investigate the events.<sup>22</sup> After the commission of inquiry or committee depending on the circumstance issues a report, nothing gets done and perpetrators are not held accountable for their actions. In a majority of cases, the police or military issue a statement saying the incident will be investigated but no information is ever provided on said investigations or the outcomes of these investigations.

Another issue of concern is the domestic legal framework on the use of lethal force. Article 13 of the constitution states

(1) No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted.

(2) A person shall not be held to have deprived another person of his life in contravention of clause (1) of this article if that other person dies as the result of a lawful act of war or if that other person dies as the result of the use of force to such an extent as is reasonably justifiable in the particular circumstances. -

- (a) for the defence of any person from violence or for the defence of property; or
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (c) for the purposes of suppressing a riot, insurrection or mutiny; or
- (d) in order to prevent the commission of a crime by that person.

The constitution allows the use of lethal force for the purpose of suppressing riots and in order to prevent the commission of a crime. The Criminal Offences Act in

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<sup>20</sup> n18 above, 9.

<sup>21</sup> African Commission General Comment No.3 on the right to life para 15

<sup>22</sup> EB Donkor '3 -Member committee to investigate Ejura disturbances' <https://www.graphic.com.gh/news/general-news/3-member-committee-to-investigate-ejura-disturbances.html> (accessed 6 August 2021); n 15 above.

section 36 also provides that a person who by law may arrest and detain another person with or without a warrant can use the force necessary to do so and in respect of a felony, kill the other person if there are no other means of arresting, detaining or taking that person.<sup>23</sup>

In terms of police accountability and oversight, the Inspector-General of Police (IGP) is the head of the police service and is responsible for disciplinary actions in line with the Police Service Act. Section 23 of the Police Service Act also makes provision for a member of the public to lodge complaints in writing against police officers for bribery, corruption, oppression or intimidation, neglect or non-performance of their duty or any other misconduct. The act makes no mention of excessive use of force as a ground for reporting a police officer for misconduct.

The Police Council also has the power to recommend disciplinary actions for police officers but the Council itself is one whose composition has been heavily critiqued as having a lot of executive influence.<sup>24</sup> This dissertation seeks to explore Ghana's accountability architecture for right to life violations by the police and military. It further considers a better architecture in line with international standards and best practices.

#### **1.4 Research Questions**

1. What is the legal framework for the right to life and accountability for violations of the right to life by state agents under international law?
2. What is the Ghanaian law position on the right to life and accountability for violations of the right to life by state agents?
3. How can Ghana's laws on accountability for violations of the right to life by state agents be enhanced through a comparative study with other jurisdictions?

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<sup>23</sup> Criminal Offences Act, 1960 (Act 29).

<sup>24</sup> K Aning Resurrecting the Police Council in Ghana. In: Bryden, A and Chappuis, F (eds.) *Learning from West African Experiences in Security Sector Governance* (2015) 28.

## **1.5 Research Methodology**

This dissertation adopts a qualitative approach, which is in the form of desk research focusing on national laws and policies, books, relevant international instruments, academic papers and other instructive writings.

## **1.6 Limitation of Study**

This dissertation focuses specifically on the right to life and use of force by law enforcement in extra-custodial situations with a brief discussion on assemblies. The rationale for this is the limited word count of the dissertation and the fact that the problem statement does not include the use of force in custodial settings although it is equally important. Additionally, in making reference to the numerous instances of arbitrary and extrajudicial killings by the police and military, most of the data and information is gathered from media reports online and organisational websites. Primary sources of information on the military's rules of engagement for policing in Ghana were also not obtained because they are only released upon instruction.

## **1.7 Significance of study**

This research may inform the formulation of new policies on police accountability in Ghana and possibly the amendment of existing laws, in this instance the Criminal Offences Act and the 1992 Constitution of Ghana on the provisions on the use of force and policing. It also serves the further purpose of shedding light on the non-conformity of Ghanaian law in this area with international legal standards and treaties the country is a party to and has duly ratified.

## **1.8 Literature Review**

Policing in Ghana and the effects of colonialism on policing has been discussed by Boateng and Darko where they state that the paramilitary approach of the Gold Coast police forces affected their relationship with the local people because their main use was protecting trade routes, promoting the interest of the colonisers and protecting them from the local people who were viewed as threats.<sup>25</sup> Upon attaining independence, the Gold Coast Constabulary was renamed the Ghana Police Service and retained all the units and divisions and the same mandates and objectives.<sup>26</sup> The police continues to use excessive force and brutal practices to protect the ruling class and political elite just as it did with the colonisers and they

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<sup>25</sup> F D Boateng & I N Darko 'Our past: The effects of colonialism on policing in Ghana' (2016) 18 *International Journal of Police Science & Management* 13.

<sup>26</sup> As above.

state that unless efforts are made to decolonise the police, there will always be the problem of legitimacy which depends on a number of factors, one of which is accountability.

Atuguba engages the issue of oversight of the security sector where he posits that the Police Council and the Parliamentary Select Committee on Defence and the Interior are responsible for reform and oversight.<sup>27</sup> The Parliamentary Select Committee is clothed with the powers of investigation and inquiry into activities and administration of ministries, departments, public organizations and corporations as Parliament may determine and the investigation and inquiry may extend to proposals for legislation. He also emphasizes the role that the Commission on Human Rights and Administrative Justice (CHRAJ) has to play in checking security agencies as the national human rights institution. He further states that there must be effective oversight of police forces in democracies to ensure that they serve the public interest and maintain security whilst preserving the rights of the citizenry and parliament as a representative of the people have the natural duty to oversee the policies and acts of the police.<sup>28</sup>

On the issue of accountability for right to life violations, Probert explores the concept of accountability and its importance for the protection of the right to life. He establishes that accountability mechanisms are essentially a state's retrospective response to restore the norm of state obligation to respect and ensure respect for the right.<sup>29</sup> The prospective actions are those actions that guarantee the right to life like providing emergency services and acts of crime prevention.<sup>30</sup> Probert argues that prospective and retrospective actions play a mutually reinforcing role in fulfilling the right to life if applied properly. He also states that accountability is a logical necessity in order for human rights to be more than mere aspirations on a paper. The accountability process as he calls it begins with an investigation whose purpose is to find out what happened, who was responsible, who was affected and whether there was a failure of a systematic nature. The next step is to remedy the suffering of the victim by reparation or restitution and finally there must be legislative, institutional or practical reform to reduce the likelihood of the recurrence of the event.<sup>31</sup> Any investigation conducted must be prompt,

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<sup>27</sup> RA Atuguba 'The Constitutional and Legal Framework for Oversight of The Security Sector in Ghana: Outstanding Matters for The Ghana Police Service' (2010) 24 *University of Ghana Law Journal* 205.

<sup>28</sup> As above, 213.

<sup>29</sup> Probert & Heyns (n 18 above) 19.

<sup>30</sup> As above.

<sup>31</sup> As above.

impartial, thorough and transparent. He also says that the mere existence of an accountability mechanism does not necessarily mean impunity does not exist, or that simply having the tools for accountability will mean they will be used well or successful in achieving the desired outcomes.<sup>32</sup>

Nkrumah, Ofosuhenne and Gyasi speak to the issue of the brutalities of the Ghana police in light of the COVID 19 presidential directives. With the enactment of the Restrictions Act (Act 1012) which formed the legal basis for the directives issued by the President, the military and police were used to enforce these restrictions. The personnel deployed were authorised to use minimal force where necessary and to arrest uncooperative persons to be tried by the courts.<sup>33</sup> They argue that in enforcing these directives using their discretion selectively, a lot of people were treated unjustly with some being abused. They detailed the case of a man who went to buy foodstuffs from a market in Kumasi, who was mercilessly beaten by armed security officials while market women who were deemed to be essential workers were allowed to transact business in the market.<sup>34</sup> The question then is who were these essential service providers supposed to provide their services to and how? They also document the incident of a policeman mishandling a military officer who was not in uniform and a journalist who was beaten with a vehicle fan belt and horsewhips at a police checkpoint while they were distributing personal protective equipment.

## **1.9 Structure**

This dissertation consists of five chapters with the current chapter being an introduction to the study. It gives the background of the research, the research problem and questions and proceeds to review the existing literature on the issue of accountability for violations of the right to life by state agents. The chapter further discusses the limitations of the research, and methodology.

The second chapter of the research examines the right to life and accountability under international law. It discusses the use of force by law enforcement and the international law rules on policing assemblies. The chapter then discusses accountability for unlawful killings and the various mechanisms available to pursue accountability in that regard.

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<sup>32</sup> n19 above, 30.

<sup>33</sup> n2 above, 14.

<sup>34</sup> n3 above, 16.



The third chapter then analyses the right to life under Ghanaian law. It undertakes a historical analysis of the right to life and policing in Ghana to aid and give a better context on the use of force by the military and the police in undertaking law enforcement duties. The chapter also focuses on the available internal and external accountability mechanisms under Ghanaian law and how they can work together to enforce the supreme right.

The fourth chapter conducts a functional comparison of the external accountability mechanisms in Sierra Leone and Ghana to show how Ghana can enhance its external accountability mechanisms.

The final chapter sets out the conclusion and suggests recommendations.

## CHAPTER 2: THE RIGHT TO LIFE AND ACCOUNTABILITY UNDER INTERNATIONAL LAW

### 2.1 Introduction

This chapter explores the right to life under international law in the context of the use of force, the international law position on the use of force generally and use of force in law enforcement in non-custodial environments. The chapter then proceeds to discuss the subject of accountability for extrajudicial killings.

### 2.2 The Right to Life under international law

The Universal Declaration of Human Rights (Universal Declaration ) has served as the source of inspiration for most, if not all international human rights documents adopted after 1948 with some specifically making reference to the Universal Declaration .<sup>35</sup> The Universal Declaration which was adopted by the United Nations reflects the universality of human rights and sets a common standard of achievement for all persons and nations.<sup>36</sup> The Universal Declaration was held to be a legally binding document by the International Court of Justice in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case where the policy of apartheid was held as being a violation of the principles of the Charter.<sup>37</sup> In article 3 of the Universal Declaration, it states that 'everyone has the right to life, liberty and security of the person'. This article gives expression to the right to life and the extent to which it should be upheld.

The right to life is one of the few rights that has been classified as *jus cogens* under international law, meaning it is binding on all and is universal in nature.<sup>38</sup> Bianchi nevertheless suggests that there is an almost intrinsic relationship between human rights and peremptory norms.<sup>39</sup> The crux of the right to life under customary international law is that no one should be deprived of this right in an arbitrary manner.

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<sup>35</sup> D Shelton 'Introduction' in D Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013) 59.

<sup>36</sup> I Bantekas & L Oette *International Human Rights Law and Practice* (2020) 133.

<sup>37</sup> W Steven *The Idea of International Human Rights Law* (2019) 69.

<sup>38</sup> K Parker & LB Neylon 'Jus Cogens: compelling the law of human rights' (1989) 12 *Hastings International and Comparative Law Review* 431.

<sup>39</sup> A Bianchi 'Human rights and the magic of jus cogens' (2008) 19 *European Journal of International Law* 491.

The ICCPR provides a better expression of the right to life than what is provided under the Universal Declaration, where it states in article 6(1) that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. The right to life like most rights is not an absolute one and a person can be deprived of their life in a manner that is not arbitrary. The African Charter on Human and Peoples' Rights in article 4 affirms that 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' This right has been interpreted in a number of decisions by the African Commission amongst which is the case of *Forum of Conscience v Sierra Leone*<sup>40</sup> which described the right to life as the 'fulcrum of all other rights' and 'the fountain through which other rights flow'. The African Court also called the right to life 'the cornerstone on which the realisation of all other rights and freedoms depend' in the case of *The African Commission v Kenya*.<sup>41</sup> The European Convention on Human Rights has a similar provision on the right to life in article 2 where it states;

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

The Grand Chamber in *McCann and others v. United Kingdom* interpreted this article holding that it ranks as one of the most fundamental provisions in the Convention and during times of peace is not subject to any derogation under Article 15 of the convention and the provisions of this article must be strictly construed.<sup>42</sup> Article 2 was also described as one of the basic values of a democratic society in *Guiliani and Gaggio v Italy*.<sup>43</sup>

General Comment No. 3 on the African Charter on Human and Peoples' Rights on the right to life provides a guide as to the nature and scope of the right and the range of its application and implementation at the domestic level.<sup>44</sup> Similarly,

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<sup>40</sup> (2000) AHRLR 293 (ACHPR 2000).

<sup>41</sup> (2017) AFCHPR 28.

<sup>42</sup> European Court of Human Rights, judgement 27 October 1995.

<sup>43</sup> European Court of Human Rights, judgement 24 March 2011.

<sup>44</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 1.

General Comment No. 36 on article 6 which replaced the earlier General Comments numbers 6 and 14 adopted in 1982 and 1984 serves as an interpretation of article 6 of the ICCPR.

General Comment 36 provides that the right to life should not be interpreted narrowly because it concerns the right of individuals to be free from acts and omissions that are intended to or may be expected to cause their unnatural or premature death.<sup>45</sup> General Comment 3 is also to be interpreted broadly as the state is said to have a positive duty to protect individuals and groups from the real and immediate risks to their lives attributable to the actions and inactions of third parties.<sup>46</sup> General Comment 3 makes it a point to incorporate groups because of the concept of peoples' rights that is unique to the African Charter.

General Comment 3 recognises the fact that the right not to be arbitrarily deprived of one's life is not only part of customary international law and the general principles of law but is also recognised as a *jus cogens* norm, and finds expression in the constitutions and other legal provisions of a majority of African and other States.<sup>47</sup> It further posits that all national legal systems criminalise murder, and in that vein arbitrary killings committed or tolerated by the State are a matter of the utmost gravity.<sup>48</sup> Under the African human rights system, the right to life cannot be derogated from at any time, including times of emergencies, a situation of armed conflict, or in response to threats such as terrorism.<sup>49</sup> Additionally, states are responsible for violations of this right by all their organs and other public or governmental authorities at all levels, be it national, regional or local.<sup>50</sup>

Deprivation of life according to General Comment 36 involves an intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by any act or omission and this goes beyond injury, to bodily or mental integrity or threat.<sup>51</sup> Deprivation of life is also said to be arbitrary if it is inconsistent with international law or domestic law.<sup>52</sup> This notwithstanding, a deprivation of life may be authorised under domestic law and still be arbitrary because "arbitrariness" must be interpreted broadly to include elements of inappropriateness, injustice,

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<sup>45</sup> General Comment No. 36 para 3.

<sup>46</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 41.

<sup>47</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 5.

<sup>48</sup> As above.

<sup>49</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 7.

<sup>50</sup> As above.

<sup>51</sup> General Comment No. 36, Paragraph 6.

<sup>52</sup> General Comment No. 36, Paragraph 12.

lack of predictability and due process of law, as well as elements of reasonableness, necessity, and proportionality as opposed to the narrow approach of interpreting arbitrariness to mean contrary to law or against the law.<sup>53</sup> This interpretation of arbitrary has been adopted by the African Commission and adds that deprivation of life is also arbitrary if it is based on the grounds of discrimination or discriminatory practices which makes it unlawful.<sup>54</sup>

In cases where private individuals are acting in self-defence or another person is coming to their defence, a deprivation of life will be considered to be arbitrary if it is not necessary taking into account the threat posed by the attacker and the lethal force used was not an approach of last resort after exhausting all other methods which have proven to be inadequate.<sup>55</sup> The force used in self-defence cannot exceed the amount strictly needed for responding to the said threat in order to justify the use of potentially lethal force, which must involve imminent death or serious injury directed only at the attacker.<sup>56</sup>

States parties are also obliged to respect and ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life under both general comments.<sup>57</sup> The duty to protect the right to life by law also means that where states know or should have known of potentially unlawful deprivation of life, they must investigate and prosecute such incidents where it is appropriate to do so.<sup>58</sup> This duty includes allegations of excessive use of force with lethal consequences.<sup>59</sup> The duty to investigate is also triggered in circumstances where there was a serious risk of deprivation of life caused by the use of force, even if the risk did not materialise.<sup>60</sup> The duties imposed on states in this regard are of a high threshold, rightfully so because the right to life as already established is one of great significance.

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<sup>53</sup> n52 above.

<sup>54</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 12.

<sup>55</sup> General Comment No. 36, para 12.

<sup>56</sup> As above.

<sup>57</sup> General Comment No. 36, para 4; General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 7.

<sup>58</sup> General Comment No. 36, para 27.

<sup>59</sup> As above.

<sup>60</sup> As above.

## 2.3 Use of Force for Law Enforcement

The law on the use of force by law enforcement can also be referred to as the law of law enforcement and this subject is governed primarily by a combination of customary international law rules and general principles of law.<sup>61</sup>

The two general principles of law that regulate police use of force are the principles of necessity and proportionality.<sup>62</sup> There is the emergence of a third principle to regulate this area of law which is the principle of precaution.<sup>63</sup> The Code of Conduct for Law Enforcement Officials adopted in 1979 and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted in 1990 espoused these principles earlier on in these soft-law instruments and are instructive on this subject.<sup>64</sup> The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials expatiates the rules of use of force stated in article 3 of the Code of Conduct for Law Enforcement Officials.<sup>65</sup> Although being soft law instruments, many of the principles in these instruments are regarded as binding international law on the subject.<sup>66</sup>

The definition of law enforcement, which is crucial to the understanding and application of these principles is given in the Code for Law Enforcement officials as;

"Includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services."<sup>67</sup>

This definition makes it apparent that in some countries or cases, the military would be considered as law enforcement officials for the purposes of regulating the use of force. The African Commission adopts a definition analogous to this where it defines a law enforcement official as 'any actor officially tasked with exercising a law enforcement function, including police, gendarmerie, military or private security

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<sup>61</sup> S Casey-Maslen & S Connolly 'Core Principles Governing Use of Force for Law Enforcement' in S Casey-Maslen & S Connolly (eds) *Police Use of Force under International Law* (2017) 79.

<sup>62</sup> As above.

<sup>63</sup> As above.

<sup>64</sup> S Casey-Maslen (ed) *Weapons under International Human Rights Law* (2014) 6.

<sup>65</sup> Preamble of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990.

<sup>66</sup> Casey-Maslen & Connolly (n 61 above) 80.

<sup>67</sup> Commentary on Article of the Code of Conduct for Law Enforcement Officials adopted by UN General Assembly Resolution 34/169 of 17 December 1979.

personnel' whose primary duty is to protect the safety of the public.<sup>68</sup> This provision is particularly important for African states because the military have been known to undertake policing functions and it is imperative that in the exercise of these functions, the principles on the use of force by law enforcement applies to them equally. General Comment No. 3 also states that 'members of the armed forces can only be used for law enforcement in exceptional circumstances and where strictly necessary.'<sup>69</sup> The definition of exceptional circumstances or an example which could serve as a guide as to what amounts to exceptional circumstances, was not made mention of and as such leaves room for states to decide what circumstances are considered exceptional which defeats the point of this key provision.

Article 3 of the Code of Conduct, which is a principle of customary international law states that 'law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.' This article espouses the two principles at the heart of use of force; necessity and proportionality. Law enforcement officials must adhere to these principles at all times during policing to prevent the arbitrary deprivation of life.

### **2.3.1 The Principle of Necessity**

The principle of necessity is to the effect that force used in law enforcement must be strictly necessary. This principle is made clear in Article 3 and the commentary to this article posits that the force used in policing must be reasonably necessary for the prevention of crime, effecting or assisting in the lawful arrest of offenders or suspected offenders.<sup>70</sup> In the African Commission's General Comment 3, force may only be used in law enforcement when all other means are insufficient to achieve the objective of protecting life.<sup>71</sup>

The use of firearms is considered an extreme measure within the meaning of Article 3 of the Code of Conduct and can only be used when a suspected offender uses armed resistance or puts the lives of others at risk and other less extreme forms of restraint used are insufficient.<sup>72</sup> From the principle of necessity as espoused, there are three duties that are imposed on law enforcement officials.

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<sup>68</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 27.

<sup>69</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 29.

<sup>70</sup> Commentary on Article 3 of the Code of Conduct for Law Enforcement Officials.

<sup>71</sup> n68 above.

<sup>72</sup> Commentary on Article 3 of the Code of Conduct for Law Enforcement Officials General Resolution 34/169, 1979.

The first is to use non-violent means wherever possible, the second is to use force only for legitimate law enforcement purposes and lastly to use only the minimum necessary force that is reasonable in the prevailing circumstances.<sup>73</sup>

The duty to use non-violent means is referred to in Principle 4 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials where it states 'Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms'. Law enforcement officials, according to this principle, may use force and firearms only after they have tried other means and these means remain ineffective or without any promise of achieving the intended result. Some recommended non-violent means of policing include controlled confrontation where there is a symbolic influence of the police authority like their presence or vehicle, verbal persuasion, providing reassurance and the use of body language.<sup>74</sup> Policing generally and how it is conducted must be reinvented in order to actually meet the needs of law enforcement and reduce the use of force especially in situations that demand de-escalation and not the use of lethal force.

Casey-Maslen also suggests that equipping law enforcement officials appropriately with the provision of shields, helmets and bulletproof vests can minimise the extent to which they use force in carrying out their duties.<sup>75</sup> This position however does not deal with the root of the issue which is how policing itself is conducted. There are some states in the United States that have some of the best policing equipment and with a hefty percentage of state funding allocated to the police, yet, the police still use excessive force and lethal force in the performance of their duties.<sup>76</sup>

The second obligation that falls under the principle of necessity is using force only for legitimate law enforcement purposes. A legitimate law enforcement purpose is one that is required for the performance of duty.<sup>77</sup> This obligation requires that force cannot be used as a means of extrajudicial punishment, to perpetuate discrimination especially against minorities or against people who are not resisting or acting in a malicious manner.<sup>78</sup> Unlawful arrests and detentions are also not

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<sup>73</sup> Casey-Maslen & Connolly (n 61) above 82.

<sup>74</sup> As above.

<sup>75</sup> As above, 85.

<sup>76</sup> Criminal Justice Expenditures: Police, Corrections and Courts '<https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures>' (accessed 21 September 2021).

<sup>77</sup> Article 3 of the Code of Conduct for Law Enforcement Officials

<sup>78</sup> Casey-Maslen & Connolly (n 61 above), 85.



considered legitimate law enforcement purposes within the meaning of this obligation.<sup>79</sup> The use of force against minority groups in policing is one that has gained a lot of attention recently with the killing of George Floyd and the conduct of the police during the BlackLivesMatter protests and this principle makes it abundantly clear that using force to perpetuate discrimination and discriminatory practices is unlawful.

The third leg of the requirement of necessity which is that only the minimum force necessary must be used in the circumstances and no more.<sup>80</sup> The European Court in the case of *Bouyid v Belgium*,<sup>81</sup> interpreted this principle together with the right to freedom from torture and inhuman or degrading treatment seeing as the use of physical force where it is not necessary diminishes a person's dignity. This element of the principle of necessity also dictates that even in circumstances where the suspect is potentially violent, they should be arrested and not killed.<sup>82</sup>

### **2.3.2 The principle of Proportionality**

The principle of proportionality is stated in detail in Basic Principle 5 where it states, 'Whenever the lawful use of force and firearms is unavoidable, law enforcement officers shall act in proportion to the seriousness of the offence and legitimate objective to be achieved.' The commentary to Article 3 of the Code of Conduct also provides that national law that restricts the use of force must be in line with the principle of proportionality as espoused under Article 3. Law enforcement officials are prohibited from using force unless it is strictly unavoidable in order to protect life under the African Commission's General Comment 3. The African Commission specifies the only object of the use of force as the protection of life which is not the case in other international instruments. The principle of proportionality is not to be confused as a tit for tat response between an individual or group and law enforcement, rather, it dictates that in using force there must be recourse to the threat posed and the nature of the offence that has been committed or is about to be committed.<sup>83</sup>

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<sup>79</sup> n78 above.

<sup>80</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns', UN doc. A/HRC/26/36, 1 April 2014 para 59.

<sup>81</sup> Application No. 23380/09, European Court of Human Rights, judgment 28 September 2015.

<sup>82</sup> Casey-Maslen & Connolly (n 61 above), 86.

<sup>83</sup> As above, 92.

In accessing proportionality, it must only be when the use of force has already been deemed to be necessary to achieve a legitimate law enforcement objective.<sup>84</sup> This is to say that, where the force used is necessary but not proportionate, it renders said use of force unlawful. The Basic Principles allow the intentional use of lethal force only in circumstances that will protect life, for self-defence or the defence of others against the imminent threat of death or serious injury.<sup>85</sup> In *Nachova v Bulgaria*,<sup>86</sup> the European Court held that where a suspect who does not pose a grave threat to life is escaping arrest, they may not be shot even if a failure to use lethal force results in an inability to arrest them.

Law enforcement official must wear name tags and all weapons should be uniquely marked and states should require law enforcement agencies to document every use of force involving less-lethal or related equipment.<sup>87</sup> In situations where it is lawful to use lethal force, officials must identify themselves and give a clear warning with sufficient time for the warning to be observed, of their intention to use firearms.<sup>88</sup>

### **2.3.3 The principle of Precaution**

The principle of precaution operates as a precursor to the principles of necessity and proportionality. It was expressed in *McCann v United Kingdom*, where the court in holding that there had been a violation of article 2 of the European Convention stated that, in scrutinising the use of force by the soldiers in that case, the court had to also look at whether the operation was planned and controlled by the authorities so as to ensure as much as possible that minimal lethal force is used.<sup>89</sup> The Inter-American Court also made mention of this principle in 2006 in the case of *Montero-Aranguren and Others v Venezuela*,<sup>90</sup> where it stated that the use of force by the authorities must be planned and restricted.

The African Commission also mandates states to take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including but not limited to the provision of appropriate equipment and training.<sup>91</sup> Principle 5(b)

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<sup>84</sup> n83 above.

<sup>85</sup> Basic Principle 9.

<sup>86</sup> Application No. 43577/98, European Court of Human Rights, judgment 6 July 2005.

<sup>87</sup> UN Human Rights Guidance on less-lethal weapons in law enforcement 2020 9.

<sup>88</sup> Basic Principle 10.

<sup>89</sup> n42 above.

<sup>90</sup> Judgment (Preliminary Objection, Merits, Reparations and Costs) 5 July 2006.

<sup>91</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 27.

of the Basic Principles requires that, when using force in situations where it cannot be avoided, law enforcement officials must minimise damage and injury and preserve human life. This is at the heart of the precautionary principle and in furthering the objective of preserving life, principle 5(c) mandates that, law enforcement officials must also ensure that medical aid and assistance is given to any injured person as soon as possible. The duty to assist injured persons also applies to suspected offenders.<sup>92</sup>

### **2.3.4 Policing Assemblies**

The right to freedom of assembly is guaranteed in a number of international human rights instruments including Article 11 of the African Charter, Article 21 of the ICCPR, Article 11 of the European Convention on Human Rights and Fundamental Freedoms, and Article 20 of the Universal Declaration. The right to assemble may be expressed through demonstrations, processions, protests, rallies, walk outs, through social media and a host of other means. The right to assemble is a valuable tool that has been used to recognise and realise a plethora of rights.<sup>93</sup> Policing assemblies in this context is relevant because this is another instance where law enforcement officials have been documented to use excessive and lethal force.

In the African Commission's guidelines for the policing of assemblies by law enforcement in Africa, it states specifically that as a general rule, the military should not be used to police assemblies and must only be used in exceptional circumstances.<sup>94</sup> Only law enforcement officials trained in policing assemblies should be deployed for this purpose.<sup>95</sup> The use of force in policing assemblies is described as an exceptional measure and as far as possible, non-violent methods must be used before resorting to the use of force and firearms.<sup>96</sup> Where the use of force is unavoidable, law enforcement officials are to minimise damage and injury and render assistance to injured persons 'at the earliest possible moment'.<sup>97</sup>

In General Comment 3 as well, a provision is made for policing assemblies and law enforcement officials are not to use force when people are demonstrating even

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<sup>92</sup> Casey-Maslen & Connolly (n 61) above 96.

<sup>93</sup> General Comment No. 37 on article 21, para 2.

<sup>94</sup> African Commission Guidelines for Policing Assemblies by Law Enforcement Officials in Africa, para 3.

<sup>95</sup> n93 above, para 80.

<sup>96</sup> n93 above, para 21.

<sup>97</sup> As above.

if acts of violence occur except it is in accordance with the principles of necessity and proportionality and firearms should not be used to disperse an assembly.<sup>98</sup>

The Basic Principles also make a special provision for policing assemblies. Principle 13 reiterates the fact that everyone is allowed to partake in lawful and peaceful demonstrations in exercise of their civil and political rights and force and firearms can only be used in accordance with the basic principles. Law enforcement officials are to avoid the use of force to disperse unlawful but non-violent protests, and where that is not practicable only minimum force must be used and this force must be necessary within the circumstance.<sup>99</sup> General Comment 37 posits that in policing assemblies, law enforcement officials should act with the view of minimising potential injury and should seek to de-escalate situations that might result in violence.<sup>100</sup> Where a protest becomes violent, law enforcement officials may use firearms after less dangerous means used are not practicable but it must be necessary and kept at the minimum.<sup>101</sup>

Policing assemblies presents a few unique challenges because of the numbers of the people and the difficulty with crowd control sometimes. This notwithstanding, the use of force and firearms as a means of first instance is forbidden under international law and in the event that force has to be used, it must be done in line with the international standards of necessity, proportionality and precaution.

## **2.4 Accountability for violations of the right to life by state agents**

The accountability aspect of the right to life is also said to be the procedural obligation of the right to life. The European Court read the obligation to protect the right to life with the state's duty to secure the rights and freedoms of all persons within their jurisdiction in Article 1 of the Convention to birth this obligation.<sup>102</sup>

Where there is a violation of the right to life, states have a duty to provide accountability, transparency and reparations for the violation, and this duty is provided for in the requirement that states must respect, protect and fulfil the right to life.<sup>103</sup> The purpose of accountability is to bring justice to victims of the violation

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<sup>98</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 28.

<sup>99</sup> Basic Principle 13.

<sup>100</sup> n 93 above paras 75 & 78.

<sup>101</sup> Basic Principle 14.

<sup>102</sup> *McCann & Others v United Kingdom*.

<sup>103</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 15.

and to ensure that the violation does not occur again.<sup>104</sup> Accountability has been termed as a 'conglomerate of process' involving various actors who share responsibility be it internal, public, independent or international.<sup>105</sup>

In fulfilling the procedural requirement of the right to life, states are expected to properly investigate suspected unlawful killings and prosecute perpetrators. There is the added requirement of transparently explaining the processes and outcomes to the victims and to provide reparations to the victims and implement reforms to address past wrongs and prevent continuing harms.<sup>106</sup> The absence of accountability breeds impunity and a failure to investigate potentially unlawful death in itself amounts to a violation of the right to life.<sup>107</sup>

The UN's Impunity Principles also state that where states fail to fulfil the obligation to investigate violations, take appropriate measures in respect of perpetrators by ensuring that they are prosecuted, tried and duly punished and to provide victims with effective remedies and reparations, impunity arises.<sup>108</sup> Flowing from this, the concept of accountability has three components; investigation, remedy and reform.

#### **2.4.1 Investigation**

Principle 19 of the Impunity Principles states that

'States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.'

This gives the general overview of what the duty to investigate is made up of and alludes to the importance of investigations of violations to securing of rights. Investigations are to be prompt, thorough, independent and impartial. Similarly, General Comment No.3 states that investigations conducted into alleged violations must be prompt, impartial, thorough and transparent.<sup>109</sup>

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<sup>104</sup> Probert & Heyns (n18 above) 20.

<sup>105</sup> United Nations Office on Drugs and Crime Handbook on police accountability, oversight and integrity 12.

<sup>106</sup> P Alston et al *Alston and Heyns on unlawful killings* (2020) 486.

<sup>107</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 15.

<sup>108</sup> United Nations Updated Set of Principles for the Protection and Promotion of Human rights through action to Combat Impunity, principle 1.

<sup>109</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, paras15 &16.

The Minnesota Protocol on the Investigation of Potentially Unlawful Death contains the international legal standards on the duty to investigate suspicious deaths and the requirements of an effective investigation. The duty to investigate a potentially unlawful death is triggered when the state knows or ought to have known of the occurrence within its jurisdiction where reasonable allegations of a potentially unlawful death have been made.<sup>110</sup> The duty to investigate any potentially unlawful death includes all cases where the state has caused a death including instances where the state has caused a death stemming from a law enforcement official using force.<sup>111</sup> The duty to investigate is not only triggered upon the receipt of a formal complaint by the state.<sup>112</sup> In *Kelly and Others v United Kingdom*,<sup>113</sup> the court held that authorities must act on their own motion once the matter has been brought to their attention and not leave it to the victim's next of kin to lodge a formal complaint.

Investigations under international law must be prompt and authorities must conduct investigations 'as soon as possible and proceed without unreasonable delays.'<sup>114</sup> However, investigations must not be rushed or unduly hurried simply to meet the requirement of promptness but the failure to investigate promptly does not relieve a state of the duty to investigate at a later time.<sup>115</sup>

An effective and thorough investigation must also determine whether or not there was a breach of the right to life and must seek to identify not only direct perpetrators but also all others who were responsible for the death.<sup>116</sup> The investigative mechanism in charge of the investigations must also have adequate legal power to compel witnesses, require the production of evidence and sufficient financial and human resources.<sup>117</sup>

Investigations must also be independent and impartial and this requires that investigators and investigative mechanisms must be and must be seen to be independent of undue influence institutionally and formally as well as in practice and perception.<sup>118</sup> Investigations of unlawful killings must be carried without undue

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<sup>110</sup> Basic Principle 14, 32.

<sup>111</sup> Minnesota Protocol on the Investigation of potentially unlawful death (2016) (Minnesota Protocol) para 16.

<sup>112</sup> Minnesota Protocol, para 15.

<sup>113</sup> European Court of Human Rights judgment 4 August 2001.

<sup>114</sup> Minnesota Protocol, para 23.

<sup>115</sup> As above.

<sup>116</sup> Minnesota Protocol, para 26.

<sup>117</sup> Minnesota Protocol, para 27.

<sup>118</sup> Minnesota Protocol, para 28.

influence that may arise from institutional hierarchies and chains of command.<sup>119</sup> The transparency of investigations is also key and connotes openness to public scrutiny and victims' families.<sup>120</sup>

Where all these elements are present in an investigation, they are deemed to be proper and reinforce the protection for the right to life and have the added effect of contributing to the right to truth as envisioned in Principle 2 of the UN updated set of principles to combat impunity.

### **2.4.2 Remedy**

The right to a remedy or reparation as a component of accountability is an essential one reflected in Principle 31 of the impunity principles where it states

‘Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.’

Reparations are to be proportional to the gravity of the violation and the harm caused to the victim and they should be treated with respect and appropriate measures should be taken to ensure their safety.<sup>121</sup>

States must make sure that appropriate remedies are given to the families of victims or their beneficiaries in cases of extrajudicial killings and this legal obligation is further set out in General Comment 31 and states that without reparation, the obligation to provide an effective remedy is not discharged.<sup>122</sup> The remedy must be full and effective and beneficiaries of victims have the right to adequate, effective and prompt reparations as well.<sup>123</sup> It is not clear what will amount to appropriate remedies but in making that determination, it will have to be on a case-by-case basis, taking into account the peculiar circumstances of each case. Depending on the nature of the case, it can then be determined which specific type of remedy best works to make the remedy appropriate.

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<sup>119</sup> Minnesota Protocol, para 30.

<sup>120</sup> Minnesota Protocol, para 32.

<sup>121</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 19

<sup>122</sup> General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant, para 19.

<sup>123</sup> n18 above, 502.

The General Comment states further that full reparation includes restitution, compensation, rehabilitation, guarantees of non-repetition, and satisfaction. Satisfaction for the purposes of accountability includes government verification of the facts and public disclosure of the truth, an accurate accounting for and of the violations of the law and sanctions against those responsible for the violations.<sup>124</sup> This list cannot be construed to be exhaustive because this cannot sufficiently cover all the potential needs of a victim's family and depending on the circumstances, other remedies not expressly mentioned would suffice.

### **2.4.3 Reform**

Reform can be said to be the final limb of accountability which connotes a guarantee of non-recurrence of the violation of the right to life. Probert describes reforms and legislative or policy provisions as a mutually-reinforcing virtuous circle, one where both work towards the same goal of protection of the right to life.<sup>125</sup>

Reforms are critical to the accountability process; without this, the purpose of accountability will be lost, in that future actions are not regulated to prevent violations of the same or similar nature and consequence.<sup>126</sup> The impunity principles and General Comment No. 3 state that, states must undertake institutional reforms and other measures to ensure respect for the rule of law and sustain a culture of respect for human rights, store or establish public trust in government institutions.<sup>127</sup>

### **2.4.4 Accountability Mechanisms**

Effective accountability involves a number of state and non-state actors including parliament, the judiciary, civil society, NHRIs, and law enforcement agencies themselves.

Accountability mechanisms can either be internal, (through an internal chain of command including internal disciplinary systems) external, (when it is outside of the internal disciplinary system), independent (accountability to the public directly or indirectly) or public otherwise known as civilian oversight (where it does not

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<sup>124</sup> n123 above.

<sup>125</sup> Probert (n 18 above) 37.

<sup>126</sup> As above.

<sup>127</sup> United Nations Impunity Principles, Principle 36; General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 21.



represent any particular entity and is primarily concerned with the quality and non-arbitrariness of policing like NHRIs) depending on the people involved and the methods used.<sup>128</sup>

The African Commission highlights the fact that there needs to be effective accountability mechanisms such as systems of police investigation and accountability which include an independent oversight mechanism and such mechanisms must be put in place if they are absent.<sup>129</sup> The African Commission's Resolution 103a notes that accountability and police oversight are the core of democratic governance and are crucial to the rule of law.<sup>130</sup>

The Paris Principles suggest that the mandates of national institutions should be as broad as possible and this scope can make way for holding law enforcement officials accountable where there has been a violation of rights, in this case the right to life.<sup>131</sup> The various mechanisms complement each other and may overlap sometimes, but they must all work effectively to secure accountability. Independent, impartial and properly constituted commissions of inquiry or truth commissions are another mechanism that the African Commission suggests so far as as they do not grant or result in impunity for international crimes.<sup>132</sup>

As far as international mechanisms are concerned, where there have been violations of the right to life, states must ensure that victims have access to effective remedies and are under an obligation to cooperate with international mechanisms to guarantee accountability for victims.<sup>133</sup>

## **2.5 Conclusion**

The international human rights framework recognises the right to life as the right not to be arbitrarily deprived of life and goes a step further to interpret this right very broadly. The definition of arbitrariness is a standard definition which goes a step further than the usual definition of arbitrariness which means unlawful, and this plays an important role in securing the right described as the supreme right.

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<sup>128</sup> United Nations Office on Drugs and Crime Handbook on police accountability, oversight and integrity 12.

<sup>129</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 16.

<sup>130</sup> African Commission Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa ACHPR/Res.103a(XXXX)06.

<sup>131</sup> Principles relating to the Status of National Institutions resolution 48/134 20 December 1993.

<sup>132</sup> General Comment No. 3 on the African Charter on Human and Peoples' Rights, para 17.

<sup>133</sup> As above.

International law dictates that, force can only be used lawfully when it meets the test of necessity and proportionality and is exercised with the principle of precaution in mind to try as much as possible to minimise the use of lethal force. The definition adopted for law enforcement official is one that makes it possible to hold any person who undertakes policing functions accountable for any excessive and unlawful use of force and this is particularly important in the African context because of the policing functions that the military undertake. Although the law on when to use the military can be improved, including them in the definition of law enforcement officials is a significant step in the right direction towards holding them accountable for unlawful killings.

With regard to accountability, this chapter explored the issue of accountability under international law and the various elements which are investigations, remedy or reparations and reform. Reparations, as argued, can only be deemed to be sufficient on a case-by-case basis depending on the peculiar situation of the victim and their family. Investigations according to the international standard must be prompt, impartial, thorough and transparent in order to be properly so called. The chapter touched on the accountability mechanism recognised under international law as recommended for pursuing police accountability. The African Commission makes specific mention of commissions of inquiry and independent police oversight aside the judiciary as a mechanism for providing accountability and putting an end to impunity for violations of the right to life by state agents. Deducing from the Paris Principles, the use of NHRIs can be effective as an oversight mechanism since they are to have a broad mandate on matters concerning human rights.

States have a duty to make sure that state agents who violate the right to life are held accountable in order to protect the right to life itself as accountability has been shown to be a vital aspect of the right to life itself, without which the right is meaningless.

## **CHAPTER 3: RIGHT TO LIFE AND ACCOUNTABILITY FOR VIOLATIONS OF THE RIGHT TO LIFE BY STATE AGENTS UNDER GHANAIAN LAW**

### **3.1 Introduction**

Ghana has been a democratic republic since 1960 with four constitutional democracies since then and with each constitution came some provisions on human rights. Under the 1992 constitution, Article 13 provides for the right to life with its limitations. This chapter discusses the right to life under Ghanaian law and accountability for violations of the right by state agents taking into account the international legal standards discussed in the previous chapter of which Ghana is bound. The chapter further discusses police oversight as an accountability mechanism for violations of the right to life by state agents and how some of these mechanisms can be made more effective to protect the right to life.

### **3.2 Overview and historical perspective on the right to life under Ghanaian law**

After gaining independence on 6 March 1957, the independence Constitution of 1957 was handed down to the newly independent Ghana by the outgoing British colonial government.<sup>134</sup> The independence constitution was a short document with no reference to human rights except a provision on the prohibition of racial and religious discrimination, a rather interesting provision because Gold Coast was a racially homogenous country with no signs of religious intolerance.<sup>135</sup> According to Parkinson, after Nkrumah and opposition parties had come to an agreement on the addition of a bill of rights in the 1957 constitution, the Colonial Office vetoed the proposal because it did not think a bill of rights was important as far as the transfer of power was concerned.<sup>136</sup>

The 1960 republican constitution also contained no bill of rights but it had Article 13(1) which required the president to make a declaration to do justice to all citizens and promote liberty. Article 13(1) however was interpreted by the Supreme Court

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<sup>134</sup> AKP Kludze, 'Constitutional rights and their relationship with International Human Rights in Ghana' (2008) 41 *Israel Law Review* 677.

<sup>135</sup> As above.

<sup>136</sup> C Parkinson *The emergence of domestic human rights instruments in Britain's overseas territories* (2008) 131.

in *Re Akoto & 7 others* as being merely declarative and the court likened it to the Queen's coronation oath holding that it could not be construed as a bill of rights.<sup>137</sup> The framers of the 1969 Constitution provided for the right to life for the first time under Ghanaian law enforceable by the courts.<sup>138</sup> In 1972 there was a coup d'état which saw the end of the 1969 constitution and upon return to a constitutional democracy in 1979, article 20 of the constitution on the right to life stated;

(1) No person shall be deprived of his life intentionally except in the execution of the sentence of a Court in respect of a criminal offence under the law of Ghana of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this article if he dies as the result of a lawful act of war, or if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case, that is to say,

(a) for the defence of any person from violence or for the defence of property; or

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

(c) for the purposes of suppressing a riot, insurrection or mutiny; or

(d) in order to prevent the commission by that person of a criminal offence.

The wording of this is similar to Article 2 of the European Convention on Human rights except the inclusion of the provision on the use of lethal force for the defence of property. The use of lethal force is also allowed in effecting an arrest and suppression of a riot. It is interesting to note that the framers of the 1979 constitution may have drawn inspiration from the European Convention in the drafting of article 20. The 1979 constitution also did not last so long after it was overthrown by a coup in 1981 making way for a military dictatorship that lasted 12 years, then came the 1992 constitution.<sup>139</sup>

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<sup>137</sup> [1961] 2 GLR 523.

<sup>138</sup> M Oquaye, 'Human Rights and the Transition to Democracy under the PNDC in Ghana' (1995) 17 *Human Rights Quarterly* 561.

<sup>139</sup> The 1992 constitution was actually promulgated in 1993.

The constitutional provision on the right to life in the 1992 constitution is found in article 13 which is essentially a restatement of article 20 of the 1979 constitution. There are only a few grammatical changes to article 13(2) but everything else remained the same as article 20 of the 1979 constitution. In the case of *Joseph Kwasi Quarshie v The Republic*<sup>140</sup> the Court of Appeal speaking through Justice Amadu Tanko stated that;

'An individual's right to life has been described as the most fundamental of all human rights. Thus, the value of life is immeasurable for any human being, and it is by no means fortuitous that the right to life is enshrined in Chapter 5 of the 1992 Constitution.'

The courts have never been invited to interpret the use of force element in the provision of Article 13 under the 1992 constitution or under the 1979 constitution when it was still in force. This notwithstanding, an interpretation whether literal or purposive of Article 13 falls short of international standards on the use of lethal force especially for the defence of property and in arresting a person because it does not take into account the principles of necessity and proportionality.

### **3.3 Policing in Ghana**

Beek describes policing in pre-colonial Ghana as collective and informal and it was not viewed as a separate social practice but rather formed part of political, religious and moral activities.<sup>141</sup> Policing was a function of traditional leadership where there was a designated chief who was in charge of mobilising strong young men, who were in charge of enforcing the laws of their community, and they did so as volunteers.<sup>142</sup> In the Asante kingdom, there was a unit called akwansrafo whose duties were to collect taxes and patrol trade routes.<sup>143</sup> JB Danquah noted that policing in the Asante kingdom was similar to the later colonial style of policing except it was without writing.<sup>144</sup>

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<sup>140</sup> [2018] DLCA4660.

<sup>141</sup> J Beek *Producing stateness: police work in Ghana* (2016) 22.

<sup>142</sup> F D Boateng & I N Darko 'Our past: The effects of colonialism on policing in Ghana' (2016) 18 *International Journal of Police Science & Management* 13.

<sup>143</sup> As above.

<sup>144</sup> Beek (n141 above) 24.

In 1831, the British colonial government through Captain George Maclean established an official police force to enforce the Peace Treaty between the Fante chiefs and the Asante King.<sup>145</sup> This police force was made up of 129 militia and police whose main function was inspection tours and escort duties for the colonial government and in 1873 an ordinance was made that made the activities of the Gold Coast Police formal and legally binding.<sup>146</sup> The Gold Coast Armed Police in 1873 then became the Gold Coast Constabulary in 1875 while they fought the Asantes in the Sagrenti war with the help of 700 Hausa men from northern Nigeria.<sup>147</sup> The constabulary was later split into Civil Police which the Fantes were in charge of and Armed Police with the Hausas in charge because they were said to be martial and more obedient.<sup>148</sup> The constabulary earned the nickname *buga buga* loosely translated to mean 'beat beat' for their paramilitary style of policing that involved the use of violence.<sup>149</sup> Presently, the Armed Forces undertakes some policing duties in Ghana including policing assemblies and were instrumental in enforcing COVID 19 directives (in both instances there have been recorded incidents of the use of lethal force).

Colonial policing had three main objectives; to provide security for the trade in European goods, to help with the expansion of colonial territory into the hinterlands for agricultural and mineral resource exploitation and to protect the ruling class.<sup>150</sup> The legitimacy of the Gold Coast Police was declining and the shooting of the three ex-soldiers by a European police officer sparked the riots that led to the agitation for independence.<sup>151</sup> After independence the Gold Coast Constabulary was renamed the Ghana Police Service and Kwame Nkrumah started a policy to Africanise the Ghana Police Service which was to make Ghanaians the only people who occupy positions that the colonisers used to occupy.<sup>152</sup> This policy was bound to fail at changing the way the police operates because it merely focused on changing race of the leaders and not changing the way the institution functions especially in a newly democratic independence state. The Ghana Police remains

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<sup>145</sup> Boateng & Darko (n142 above) 15.

<sup>146</sup> Beek (n141 above) 25.

<sup>147</sup> As above.

<sup>148</sup> K Osei-Adubofour 'The Lack of Political Impartiality of the Police in Ghana and its Effect on the Public's Trust and Confidence in the Police and on Public Perception of Police Legitimacy' unpublished PhD thesis, Northeastern University 2017 16.

<sup>149</sup> Boateng & Darko (n 142 above).

<sup>150</sup> As above.

<sup>151</sup> Beek (n141 above) 31.

<sup>152</sup> n142 above

controlled by the ruling class who use aggressive, brutal and disproportionate policing styles after so many years of independence.<sup>153</sup>

Currently, the Ghana Police Service's existence is given rise to in chapter 14 of the 1992 Constitution under the public service.<sup>154</sup> Chapter 15 of the Constitution is dedicated to the Police Service where it is stated in article 200 that no person or authority can raise any police service except under the authority of an act of Parliament. The Ghana Police Service Act, 1970 (Act 350) in section 1 states its function as prevention and detection of crime, apprehension of offenders, maintain public order and safety of persons. In undertaking the function of maintaining public order and safety of persons, the police are charged with the protection of the rights enshrined in the constitution, making it one of the reasons why it is the first point of call for all persons when there has been a violation of their rights, even before the Commission of Human Rights and Administrative Justice.

As stated earlier, the Ghana Army undertakes some policing functions and in article 210 of the 1992 Constitution, it provides that the Armed Forces (made up of the Air Force, Navy and Army) must be equipped to defend the country and any other functions for the development of Ghana as the President may determine. It is based on this provision that the army undertakes policing functions in Ghana. The provisions of Section 7 and 4 of the Security and Intelligence Agencies Act, 2020 (Act 1030) have also been used as justification for the use of the military to undertake policing functions to safeguard the internal security of Ghana.

### **3.4 Standards on the use of force by law enforcement officials**

#### **3.4.1 Criminal Offences Act**

The Criminal Offences Act in chapter one of part two deals extensively with the use of force. In section 32, the Act states that force can only be justified when it is used in accordance with the limits prescribed under chapter one, or when force used is within the amount and kind reasonably necessary for the purpose of which it is permitted.<sup>155</sup> This section expresses the principles of necessity as applicable under Ghanaian law. Section 36 also provides that a person who by law may arrest and detain another person with or without a warrant can use the force necessary to do so and in respect of a felony, kill the other person if there are no other means

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<sup>153</sup> n152 above.

<sup>154</sup> Article 190(1) of the 1992 Constitution.

<sup>155</sup> Criminal Offences Act, 1960(Act 29).

of arresting, detaining or taking that person. The interpretation section of the act defines a felony as a first degree or second-degree felony and must be construed in accordance with section 296 of the Criminal and other Offences (Procedure) Act.

In the Criminal and other Offences (Procedure) Act, a felony is defined based on the proscribed punishment, and the punishment for a first-degree felony is life imprisonment or less where an enactment does not state a specific punishment.<sup>156</sup> In the case of a second degree felony, where an enactment does not state a specific punishment, the punishment for a convicted person is a term of imprisonment not exceeding ten years.<sup>157</sup> Under the criminal offences act, some of the crimes that are felonies are attempted murder,<sup>158</sup> manslaughter<sup>159</sup>, abetment of suicide<sup>160</sup>, and abortion<sup>161</sup> to mention but a few. In essence, a person can use lethal force with or without a warrant in trying to arrest, detain or take a person who abets suicide or commits an abortion. The use of a felony as a yardstick to measure the threat level that an individual poses as the basis for the use of lethal force is an erroneous one because, a felony represents the status of a crime and cannot validly operate as an indication of a threat level a person poses. This law clearly falls short of the standards of arbitrariness in relation to the use of force under international law and equally falls short of common sense.

### **3.4.2 Ghana Police Service Standard Operating Procedure (SOP)**

In the Ghana Police Service Standard Operating Procedure on the use of force, it states that the use of force policy is in line with the Criminal and other offences (Procedure) Act, (Act 30) and the Juvenile Justice Act, (Act 653).<sup>162</sup> The policy provides that police officers should not use force more than necessarily required in the execution of their legitimate duty.

In the section on the procedure for the use of force, it states that 'Police Officers shall only use force that is reasonable, necessary and proportionate to the resistance level of the offender.'<sup>163</sup> The definition of resistance is given as 'any type of rejection of a legal order from a Police Officer issued to establish public peace and order.' This definition is very vague and leaves a lot of room for abuse by police

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<sup>156</sup> Section 296 of the Criminal and other Offences (Procedure) Act, 1960 (Act 30).

<sup>157</sup> Section 296 of the Criminal and other Offences (Procedure) Act, 1960 (Act 30).

<sup>158</sup> Section 48 of the Criminal Offences Act.

<sup>159</sup> Section 50 of the Criminal Offences Act.

<sup>160</sup> Section 57 of the Criminal Offences Act.

<sup>161</sup> Section 58 of the Criminal Offences Act.

<sup>162</sup> Ghana Police Standard Operating Procedure Number GPS-SP004-15.

<sup>163</sup> Para 3.1 of the Ghana Police Standard Operating Procedure Number GPS-SP004-15.



officers given the fact that almost every law enforcement function can be justified by the police as being one that establishes public peace and order. Resistance in the SOP has been categorized into active resistance and passive resistance.<sup>164</sup> Active resistance is defined as ‘when an individual resists by using a weapon, tools or other objects, or physical force, and in this way prevents Police Officers from performing their official duties’ It goes further to state that inciting others to resist forms part of active resistance. Passive resistance on the other hand is described as ‘when an individual disregards a legal order from a Police Officer, or places himself in a position that prevents the officer from performing his duty.’ It is interesting to note that proportionality is equated to the level of resistance of the offender and that situation alone. It gives a sense that the objective to be achieved in every situation that force is to be used must be to arrest or detain a person and that alone but force has been used by the police in many instances for policing protests.

Force is said to be justified under the SOPs where it is used by police officers to defend themselves and others against imminent threat of death or serious injury, to prevent the commission of a serious crime, and against a person who resists arrest, fights, escapes or endeavours to escape from lawful custody.<sup>165</sup> What amounts to a serious crime is not specified here, although in section 36 of Act 29, specific mention is made to a felony. After justifiable force has been used, police officers are to ensure that medical aid is rendered to any injured or affected person or persons in need of assistance as soon as possible and relatives or close friends of the injured or affected person are informed. In most cases, these rules are not adhered to because families and friends of victims or concerned people at the scene of the incident are the ones who try to get medical care for these people.<sup>166</sup> Though it’s not often followed, it’s nonetheless an example of good practice in the drafting of the guidelines that this obligation is present.

### **3.5 Accountability framework**

The concept of accountability is one of the principles that forms the basis of Ghanaian law and is central to a constitutional democracy like Ghana practices, it is for this reason that in the preamble of the constitution it states that

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<sup>164</sup> Para 2 of the Ghana Police Standard Operating Procedure Number GPS-SP004-15.

<sup>165</sup> Para 3.2 of the Ghana Police Standard Operating Procedure Number GPS-SP004-15.

<sup>166</sup> JK Bimpeh ‘ 27 year old man shot dead by Police at Buduburam’ <https://www.primenewsghana.com/general-news/27-year-old-man-shot-dead-by-police-at-buduburam.html> (accessed 26 July 2021) in this case like many others, the police did not disclose to the victim’s wife that they used lethal force instead they said he died from a knife injury.

'We the people of Ghana...in a spirit of friendship and peace with all peoples of the world; and in solemn declaration and affirmation of our commitment to; justice, freedom, probity and accountability...do hereby adopt, enact and give to ourselves this constitution.'

Conceptually speaking accountability can be collective, where the entire institution is held accountable as a whole or individual where a specific police officer is held accountable for their actions or omission.<sup>167</sup> Accountability mechanisms can also be internal or external. There have been debates on the efficacy of internal versus external mechanisms. Cheng argues that excessive external controls can obstruct an administration's ability to work effectively and efficiently and relying on internal mechanisms without external oversight cannot check abuse and misuse of power.<sup>168</sup> External mechanisms have the advantage of being more accessible and transparent with minimal chances of intimidation.<sup>169</sup> Internal mechanisms if organised properly can be effective in maintain integrity but poor administration and the culture of mutual protection works as a disadvantage to this.<sup>170</sup> What is certain is that, both internal and external mechanisms are needed to ensure accountability.

### **3.5.1 Internal Accountability**

#### *The Ghana Police Service (GPS)*

The Police Service Act, 1970 (Act 350), the Police Service (Administration) Regulations, 1974 (L.I. 880) and the Police Force (Disciplinary Proceedings) Regulations, 1974 (L.I. 993) regulate the internal discipline and accountability for police officers. Section 17 of Act 350 stipulates a list of things that amount to misconduct for a police officer ranging from absence from duty without leave, insubordination, unlawfully using police property for purposes other than official duty, becoming a member of a trade union, in occupation sleeping on duty, drinking alcohol on duty, permitting the escape of a prisoner through negligence amongst others.<sup>171</sup> This section makes no mention of the use of excessive or lethal force as a form of misconduct which will attract any of the penalties under section 18 of Act 350.

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<sup>167</sup> R Atuguba & K Agyebeng 'The structure of the Ghana Police Service and its effects on accountability' Commonwealth Human Rights Initiative 2006 7.

<sup>168</sup> J Cheng 'Police and Accountability' (2005) 78 *Police Journal* 14.

<sup>169</sup> EEO Alemika 'Enhancing police accountability systems in Nigeria: the missing links' (2011) 8 *Cleen Foundation Monograph Series* 11.

<sup>170</sup> As above.

<sup>171</sup> Section 17 of the Police Service Act, 1970 (Act 350).

The applicable penalties in respect of misconduct include dismissal with a forfeiture of retirement benefits, removal which is defined as termination without or without a reduction in retirement benefits, reduction in rank, reduction of salary, deferment of increment or the imposition of a fine to mention but a few.<sup>172</sup> Section 23 of the Police Service Act also makes provision for a member of the public to lodge complaints in writing against police officers for bribery, corruption, oppression or intimidation, neglect or non-performance of their duty or any other misconduct. Again, there is no mention of excessive use of force as a ground for reporting a policer officer for misconduct.

It is possible to interpret oppression to include excessive and lethal use of force as a ground for reporting a policer officer for misconduct but this leaves a lot to the discretion of the disciplinary board. The lack of an express provision belittles the weight that the excessive and lethal use of force by police officers carries.

However, in Regulation 22 of L.I. 993, it states that

Where a member of the Force is convicted of a criminal charge in any Court, the facts shall be reported to the Inspector-General who, if satisfied that the conviction has brought such a degree of disrepute on the Force as to warrant the dismissal or removal of the person so convicted, shall refer the matter to the appropriate disciplinary authority for the imposition of such penalty as the disciplinary authority may think fit.

Flowing from this, there is a possibility that in the event that a police officer uses lethal force to cause the death of a person and they are convicted by a court, it can be grounds for their dismissal or removal. Admittedly, this is a complicated route to take in pursuing accountability because in most cases, it is the police that handles the prosecution of cases. The combined effect of rule 2 and the schedule of the E.I 4 gives police prosecutors the power to prosecute.<sup>173</sup> In a report on the work of police prosecutors, it was noted that in 2016 out of a total of 29,778 criminal cases that were recorded, 90 percent of these cases were handled by police prosecutors in the District and Circuit Courts.<sup>174</sup>

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<sup>172</sup> Section 18 of the Police Service Act, 1970 (Act 350).

<sup>173</sup> Appointment of Public Prosecutors Instrument 1976 (E.I 4).

<sup>174</sup> Accountability, Rule of law and Anti-corruption Programme Report on the work of police prosecutors, 2018.

The Ghana Police also has a public complaints unit within the GPS where any member of the public is entitled to make a complaint in writing, signed by them and addressed to the superior police officer in charge of the district unit the police officer belongs to.<sup>175</sup> This unit is called the Police Intelligence and Professional Standards Unit (PIPS) and is headed by a Senior Police Officer of or above the rank of an Assistant Commissioner of Police. PIPS receives complaints and investigates these complaints only because that is the only power that it has.<sup>176</sup> PIPS's mandate is to investigate issue of bribery, corruption, oppression or intimidation by a police officer, neglect and non-performance of duties and police misconduct.<sup>177</sup>

The better option to ensure accountability internally will be to amend the L.I 880 and Act 350 and to incorporate provisions on excessive use of force as another act constituting misconduct which triggers punishment under section 18 of the Act. Although this type of accountability will be punitive rather than restorative, other provisions could be amended to insert matters concerning reparations from the individual police officer or the service to the victim or victims and their relatives.

#### *The Ghana Armed Forces*

For officers of the military, internal accountability is regulated by the Armed Forces Act, 1962 (Act 105) and the Armed Forces (Discipline) Regulations (C.I 12). Part II of the Armed Forces Act is dedicated to persons subject to the code of service discipline and service offences. Section 12(1) lists the persons who are subject to discipline including every officer of each regular force. The offences mentioned include offences relating to security, offences relating to prisoners of war, offences relating to operations, offences relating to mutiny, disobedience of lawful command, insubordinate behavior, desertion, scandalous conduct, stealing, drunkenness amongst a host of others but nothing concerning the use of force is mentioned. In C.I 12, rule 105.10 states that in carrying out an arrest, only the force that is reasonably necessary for that purpose must be used and where the force used is excessive, the person using said force is answerable in law. The C.I does not mention what will amount to being answerable or the punishment in that regard. As a rule of statutory interpretation anyway, the C.I cannot create any offences that will contravene Act 105 in that case, if the Act itself does not create an offense for excessive use of force, the C.I cannot do same. Essentially, similar to the Police Act, there is no provision made for accountability for excessive or lethal use of

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<sup>175</sup> Atuguba & Agyebeng (n167 above) 27.

<sup>176</sup> As above.

<sup>177</sup> As above.

force by military officers in undertaking policing functions. The only provision that can be used to hold an officer accountable will be section 32 (1) of Act 105 which states

Every officer who behaves in a scandalous manner unbecoming of an officer shall be guilty of an offence and on conviction shall suffer dismissal from the Armed Forces with or without disgrace.

This provision is wide in scope because what amounts to scandalous behavior is not defined in the Act so it falls on the tribunal to decide whether or not the lethal use of force on a civilian during policing will amount to behaving in a scandalous manner.

Special Rapporteur Alston noted in his report on police accountability mechanism to the Human Rights Council that, although police investigations and internal affairs officers form an integral part of the system of accountability, these measures will most often be insufficient to meet the state's international obligations because they can be inadequate because of their nature of being susceptible to bias and in the case of unlawful killings, too easy to cover up wrongdoings.<sup>178</sup>

### **3.5.2 External Accountability**

In Ghana, external accountability mechanisms include the Presidency with the use of the powers under article 278 of the Constitution to set up commissions of inquiry, the Police Council, the Parliamentary Select Committee on Defence and Interior, the Ministry of Interior and Ministry of National Security, the Commission on Human Rights and Administrative Justice (CHRAJ), and the Judiciary.<sup>179</sup>

#### *Executive Oversight*

Executive oversight includes the Presidency and the various ministries in charge of the security services, in this case the Ministry of Defence and the Ministry of the Interior. The President has the power to set up Commissions of Inquiry by a constitutional instrument into any matter of public interest in accordance with article 278 of the Constitution. Parliament can also request that a commission of inquiry be set up to inquire into a matter of public interest under this article as well. Under previous Ghanaian Constitutions, there have been commissions of inquiry set up to look into matters concerning the police dating as far back as 1971 with the Boyes

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<sup>178</sup> Report to the Human Rights Council (A/HRC/14/24/Add.8, 28 May 2010) para16.

<sup>179</sup> Atuguba & Agyebeng (n167 above) 30.

Report that was set up to look into the Ghana Police Service and advice on its structure and effective organisation.<sup>180</sup> In 2001 as well there was also a commission of inquiry into the Accra Stadium disaster where the police fired teargas into a crowd at the stadium causing a stampede which led to the death of 126 spectators.<sup>181</sup>

The Ministry of National Security and the Ministry of Interior are both ministries that have administrative responsibility over the Ghana Police Service and Armed Forces respectively. These ministries have the power to set up committees to investigate issues relating to the use of force and violations of the right to life. In September 2021, the Ministerial Committee of Inquiry into the occurrences at Ejura issued its report after the President issued a directive to the Minister of Interior to investigate the matter.<sup>182</sup>

#### *The Police Council*

The Police Council was created in the wake of Ghana's new constitutional democracy in 1993 to ensure a policy reorientation and proper oversight and accountability of the Ghana Police Service.<sup>183</sup> Article 201 of the 1992 Constitution establishes the Police Council whose membership is made up of the Vice President who is the Chairman, the Minister for Internal Affairs, the Inspector General of Police, the Attorney-General, a lawyer nominated by the Ghana Bar Association, a representative of the Retired Senior Police Officers Association and two members of the Police Service appointed by the President. Article 203(3)(e) states that the Police Council with the approval of the President may make regulations for the effective administration of the police service the power to delegate discipline to other persons of power. In essence what this provision does is to give the Police council the power to hold police officers accountable or delegate the power to do so to other persons.

The Council can receive complaints from individuals and organisations alike to hold officers accountable for unlawful killings. The Police Council has been heavily critiqued as having a lot of Executive influence, because almost all the appointments of the composition of are made by the President, making it difficult

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<sup>180</sup> EK Aning 'An overview of the Ghana Police Service' (2006) 4 Journal of Security Sector Management 14.

<sup>181</sup> As above.

<sup>182</sup> The report was issued concerning the killings during a protest in Ejura by the military mentioned in n3 above.

<sup>183</sup> Atuguba & Agyebeng (n 167) above.

to call it truly independent.<sup>184</sup> The Council is viewed as only being concerned with promotions, demotions and dismissals.<sup>185</sup> Although promotions, demotions and dismissals are also a mode of accountability these methods alone will not work for unlawful killings by state agents. It will be prudent to use their powers of delegation to create a commission or committee of inquiry under article 203(3)(e) to investigate allegations of unlawful killings by state agents and to pursue accountability in that regard.

#### *The Parliamentary Select Committee on Defence and Interior*

The Parliamentary Select Committee on Defence and Interior is an 18-member committee that is responsible for examining all questions relating to defence and internal affairs.<sup>186</sup> All matters relating to defense and internal affairs includes the operation of the Ghana Police and military especially when it involves unlawful killings of civilians. The Committee has the power to investigate and inquire into activities of ministries, departments, public organisations and corporations.<sup>187</sup> The Committee also has the powers of a High Court for the purposes of enforcing the attendance of witnesses, compelling the production of documents.<sup>188</sup>

It is abundantly clear that, this parliamentary committee has the powers and ability to investigate unlawful killings, provide a remedy for victims and through legislation or other means bring reforms to prevent future violations of the right to life by state agents.

#### *The Commission on Human Rights and Administrative Justice (CHRAJ)*

The 1992 Constitution in Article 216 establishes CHRAJ and in Article 218(a) states that the Commission must have the duty to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of their official duties. From this article CHRAJ has a triple mandate of being the national human rights organisation, an anti-corruption agency and the ombudsman. The Commission is made up of a commissioner and two deputies and the powers of the Commission is similar to that of the High Court.

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<sup>184</sup> K Aning 'Resurrecting the Police Council in Ghana' in A Bryden & F Chappuis (eds.) *Learning from West African Experiences in Security Sector Governance* (2015) 27.

<sup>185</sup> As above.

<sup>186</sup> Atuguba & Agyebeng (n 167 above) 20.

<sup>187</sup> As above.

<sup>188</sup> As above.

Using CHRAJ as an external accountability mechanism can be triggered either on the point of violation of the right to life under article 13 of the constitution, or the police and armed forces as public institutions contravening the code of conduct for public officials. In August of 2021, a petition was lodged by two Members of Parliament; Samuel Okudzeto Ablakwa and Emmanuel Armah-Kofi Buah asking the Commission to investigate the deaths that occurred during the 2020 elections.<sup>189</sup> In the petition, they state that the members of the police and army killed two civilians in the Techiman South Constituency and assaulted six other people.

To lodge a complaint with CHRAJ, the complaint must be submitted to the national office of the Commission, or a representative of the Commission at the regional or district branch of the Commission. The complaint can be made either orally, in writing, by facsimile or electronic mail.<sup>190</sup> A written complaint must be addressed to the Commissioner or the Commissioner's representative at the regional or district branch and must be signed, thumb printed or authenticated.<sup>191</sup> Where a complaint is made orally or by a person who cannot read and write, the complaint must be reduced into writing by an officer of the Commission or a person chosen by the complainant.<sup>192</sup> There is also a place on the CHRAJ website where complaints can be lodged.

The contents of the complaint must include the full name and contact address of the complainant, the body, organisation or person against whom the complaint is made, particulars of the complaint together with copies of relevant documents, the nature of injustice perpetrated as a result of the action, inaction or omission of the body, organisation or person against whom the complaint is made, the relief sought by the complainant and any other information relevant to the complaint.<sup>193</sup> Where the victim of a violation is dead or is for any reason unable to act for themselves, the complaint may be made by their personal representative or by a member of their family or another individual suitable to represent them.<sup>194</sup> The Commission at

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<sup>189</sup> J Ackah-Blay 'MPs ask chraj to investigate defence and interior ministries over election' <https://chraj.gov.gh/news/2-mps-ask-chraj-to-investigate-defence-and-interior-ministers-over-election-2020-deaths/> (accessed 13 October 2021).

<sup>190</sup> Order 1 Rule 2 of the Commission on Human Rights and Administrative Justice (Investigations Procedure) Regulations 2010.

<sup>191</sup> Order 1 Rule 3 of the Commission on Human Rights and Administrative Justice (Investigations Procedure) Regulations 2010.

<sup>192</sup> Order 1 Rule 5 of the Commission on Human Rights and Administrative Justice (Investigations Procedure) Regulations 2010.

<sup>193</sup> Order 2 Rule 1 of the Commission on Human Rights and Administrative Justice (Investigations Procedure) Regulations 2010.

<sup>194</sup> Section 12(6) of The Commission on Human Rights and Administrative Justice Act 1993.



the same time has no direct powers of enforcement of its decisions following an investigation, but it is empowered to bring an action before any court in Ghana to seek any remedy which may be available from that court.

CHRAJ received 7 complaints on inhumane treatment by the police in 2015.<sup>195</sup> CHRAJ recorded 38 complaints on the violation of the right to life in 2017 without specifying in their annual report the nature of these complaints.<sup>196</sup> In 2018, it reported a total of 38 complaints concerning the right to life across the country but no details were given in the report about these complaints.<sup>197</sup> In the 2019 report, it was indicated that there were 31 cases on the right to life across Ghana but no specific details were given about the cases.<sup>198</sup> Out of a total of 414 complaints about public institutions, 127 were about the police and 138 were from a classification of 'others' which the armed forces formed a part of. The report did not make mention of any specific cases on the excessive use of force as one of the issues however, it stated abuse of power as one of the main categories of complaints received.<sup>199</sup>

Given the fact that CHRAJ has offices in every region, in terms of accessibility it is the most convenient institution to lodge a complaint of unlawful killings by state agents, however their inability to enforce their own decisions may prove to be a challenge in pursuing accountability in a prompt manner.

### **3.5.3 Ghana's independent oversight**

Ghana has a number of external accountability mechanisms however aside these institutions there is no independent institution dedicated solely to issues of excessive and lethal use of force or issues of abuse of power by law enforcement. In the Human Rights Committee's concluding observations on Ghana's initial report in 2016, it stated that Ghana should establish an independent mechanism to investigate the alleged misconduct by police officers on the excessive and lethal use of force.<sup>200</sup> It has been a number of years and this has still not been implemented.

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<sup>195</sup> 23<sup>rd</sup> Annual Report of CHRAJ 2015 77.

<sup>196</sup> 24<sup>th</sup> Annual Report of CHRAJ 2017 78.

<sup>197</sup> 25<sup>th</sup> Annual Report of CHRAJ 2018 51.

<sup>198</sup> 26<sup>th</sup> Annual report of CHRAJ 2019 71.

<sup>199</sup> As above.

<sup>200</sup> Human Rights Committee Concluding Observations on the initial report of Ghana (2016), para 22.

The media has served as the source of some form of oversight in matters of excessive and lethal force but a majority of these instances do not get enough media attention to trigger an investigation by the authorities. In any case, the media cannot do the work of an independent body to investigate, provide reparations and ensure reforms because amongst other things it does not have the duty, legitimacy or mandate to do this.

### **3.5.4 A case study of the Ejura Ministerial Committee of Inquiry (EMCI)**

The EMCI was formed by the Minister of the Interior after the President issued a directive that the shootings and killings that happened in Ejura during a protest in the community be investigated.<sup>201</sup> The President only issued this directive after the incident had gained a lot of media attention following calls by the youth to fix the country. The three-member committee was given 10 days to investigate the case and submit their findings and recommendations for appropriate action.<sup>202</sup> The choice of the EMCI as a case study is based on the fact that it is the most recent committee of inquiry that dealt with the issue of unlawful killings by state agents in Ghana, and it presents the perfect opportunity to evaluate the results yielded by commissions of inquiry in pursuing accountability in Ghana.

The Committee took evidence from a total of 22 witnesses including the Ashanti Regional Minister, the General Officer Commanding the General Command of the Ghana Armed Forces, the Deputy Regional Police commander for Ashanti Region and the family members of the victims amongst others. The Committee reported in their finding that there was no proper security briefing and intelligence gathering and sharing between the Regional Minister who gave the order to deploy the military, the police and the military.<sup>203</sup> Essentially, they failed to operate with the principle of precaution which is a cardinal principle in policing assemblies.

The Committee also noted that the youth throwing stones at the military men did not amount to extreme provocation that required firing live ammunition at the crowd.<sup>204</sup> They unfortunately failed to discuss the issue of the use of excessive and lethal force under the law on the principles of necessity and proportionality but

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<sup>201</sup> Report of the Three Member Ministerial Committee of Inquiry into the unfortunate occurrences at Ejura in the Ashanti Region (2021) 2.

<sup>202</sup> As above.

<sup>203</sup> EMCI report (n 200 above) 55.

<sup>204</sup> As above.

recommended that there should be the development of a joint SOP for military and police operations.

As relates to remedy, the Committee recommended adequate compensation for the families of the two deceased persons and the three other injured persons as well.<sup>205</sup> The Committee which had a Justice of the Court of Appeal as its head did not come up with a sum of money to be paid as compensation but merely stated that compensation must be given.

The Committee further recommended the transfer of the District Police Commander of Ejura for his incompetence, the training of REGSEC, MUSEC AND DISEC officials in conflict and crisis management at least once a year and that all crowd control units be made to wear bodycams.<sup>206</sup> This recommendation engages the reform aspect of accountability but there is no information available as to whether this recommendation has been complied with.

It is noteworthy that nowhere in the report did the Committee recommend the prosecution of the officers who were responsible for the killings of the two victims. They merely recommended that military reviews the action of Lieutenant Martin Opoku Adusei and apply the appropriate sanctions. It is unclear what the appropriate sanctions will be in this case since military tribunal proceedings are not open to the public, and there are no express provisions in the Armed Forces Act that deals with sanctions for unlawful killings. The African Commission's General Comment 3 states that there must be transparency about the process and outcome of investigations and this recommendation falls short of this because of the nature of military tribunals.

Reparations cannot be said to be full and effective here as well because there were no guarantees of non-repetition as stated in General Comment 3 and there was no amount mentioned as compensation. Undoubtedly, the investigations conducted were prompt, impartial and transparent as the Committee was given 10 days to provide a report on the incident, and there was no objection raised as to bias by any of the parties. However, the work of the committee was not sufficient to meet all the three requirements of accountability which are investigation, remedy and reform because the reparations recommended were vague and the reforms are still yet to be implemented.

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<sup>205</sup> EMCI report (n 200 above) 53.

<sup>206</sup> As above.

To conclude, the work of the EMCI was a commendable effort in pursuing accountability through investigation but on reparations and reform, there was a lot left unsaid. The implementation of the findings of the EMCI and any other commission of inquiry for that matter is also imperative.

### **3.6 Conclusion**

The provision on the right to life under Article 13 of the 1992 Constitution is one that leaves much to be desired in respect of the use of force because of how permissive. It allows for the use of potentially lethal force for the protection of property and it does not conform with international standards. This provision was the same under the 1979 Constitution and was maintained in the 1992 constitution. This lays the foundation of the legal problems on the use of force by state agents.

Acts 29 and 30 are also problematic as they use a felony as a threat-based threshold as an indication of when to use lethal force which is a flawed standard. A felony merely indicates the status of a crime without it necessarily meaning a person who commits a felony poses a threat warranting the use of lethal force. The Police Act, L.I 688 and the Armed Forces Act also do not have express provisions on misconduct that deal with issues of the excessive and lethal use of force as has become a problem in Ghana.

On accountability, external accountability seems to be the better way to pursue accountability for unlawful killings because internal mechanisms alone are not sufficient to deal with matters of unlawful killings. It is observed that the various external accountability mechanisms though have their individual flaws, just as every system, nonetheless if utilized effectively will ensure the protection of the right to life. The case study of the EMCI highlighted the problem of reparations, reform and implementation in Ghana.

## **Chapter 4: A Comparative Analysis of Police Oversight for Unlawful Killings by State Agents in Sierra Leone**

### **4.1 Introduction**

This chapter undertakes a functional comparative of the external accountability mechanisms for violations of the right to life by state agents in Sierra Leone and Ghana. The purpose of this comparison is to understand how these mechanisms operate and to use this as a reference point to improve Ghana's accountability mechanisms.

The choice of Sierra Leone is based on the fact that it is one of three countries in Africa with a functioning independent external police oversight mechanism. South Africa has IPID and Kenya has IPOA when it comes to independent external police oversight mechanism in Africa.<sup>207</sup> Sierra Leone was chosen out of these three countries because it is located in West Africa, just like Ghana and the powers of both Police Councils are similar, which is significant to the kind of lessons that Ghana can draw.

### **4.2 Overview of Sierra Leone's law enforcement framework**

Sierra Leone attained independence from British rule on 27 April 1961 which subsequently ushered it into a democratic republic 10 years later with their first elected president as the head of state.<sup>208</sup> In 1978 the country became a one party state under the leadership of Siaka Steven with a new constitution.<sup>209</sup> While in the process of building the country, a civil war broke out between 1991 to 2002, and the existence of diamonds is said to be a major contributory factor to the longevity of the war.<sup>210</sup> During the war, the army fought side by side with the police but prior to the war and even after, the police struggled with legitimacy.<sup>211</sup>

At the end of the war, a Security Sector Reform (SSR) was initiated to make institutions like the Sierra Leone Police (SLP) more democratic and people centred

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<sup>207</sup> C Heyns et al 'Towards a lethal force monitor' (2021) 4.

<sup>208</sup> D Harris *Sierra Leone: a political history* (2014) 42.

<sup>209</sup> As above, 39.

<sup>210</sup> C Asangna 'An examination of the Sierra Leone war' (2017) 11 *African Journal of Political Science and International Relations* 107.

<sup>211</sup> JPC Charley & FI M'Cormack 'A force for good? Police reforms in post-conflict Sierra Leone' 43 *Institute of Development Studies Bulletin* 51.

to ensure public trust.<sup>212</sup> In a report by Amnesty International, it was recorded that SLP used excessive and lethal force in a number of instances especially in policing assemblies.<sup>213</sup> The incidents documented in the report had at least nine deaths and over 80 people injured and arbitrarily detained.<sup>214</sup> The issue of SLP's excessive and lethal use of force caught the attention of many international human rights organisations including Amnesty International.<sup>215</sup>

The reform process saw the birth of the Complaints, Discipline, and Internal Investigations Department within the SLP.<sup>216</sup> Articles 155 and 156 of the 1991 Constitution establishes the SLP and the Police Council respectively. In 2014, the Independent Police Complaints Board was created as an independent oversight mechanism whose focus was to receive, investigate and monitor complaints from the community about the SLP, to protect people from abusive police practices, and to enable public accountability for misconduct and human rights violations.<sup>217</sup>

#### **4.3 Independent Oversight in Sierra Leone and the Independent Police Complaints Board (IPCB)**

The IPCB is a creation of the Police Council under section 158 of the Constitution of Sierra Leone and is governed by the Independent Public Complaints Board Regulations 2013 (C.I 11). Under this legislation, the board is made up of a chair appointed by the President, a commissioner of the human rights commission, a representative of the bar association, the anti-corruption commission, the inter-religious council, the police council who is not a member of the police force, and a retired senior police officer.

The term of office of members of the board is three years and they can only be reappointed once.<sup>218</sup> A member can be removed from the board by the Police Council or the body that selected them on the sole ground of their inability to perform their functions.<sup>219</sup> The mode of selection and removal from the board is

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<sup>212</sup> I Bangura 'Democratically Transformed or Business as Usual: The Sierra Leone Police and Democratic Policing in Sierra Leone' (2018) 7 *Stability: International Journal of Security & Development* 2.

<sup>213</sup> Amnesty International 'A force for good? Restrictions on peaceful assembly and impunity for excessive use of force by the Sierra Leone Police' 2018 27.

<sup>214</sup> As above.

<sup>215</sup> As above.

<sup>216</sup> Bangura (n 211 above) 7.

<sup>217</sup> As above.

<sup>218</sup> Section 2 of C.I 11.

<sup>219</sup> As above.

important to the independence of the board and how it carries out its functions. The South African Constitutional Court made this point in the case of *McBride v Minister of Police and Another*.<sup>220</sup> The Applicant, the Executive Director of the Independent Police Investigative Directorate (IPID) was suspended by the Minister of Police pending disciplinary proceedings pursuant to the IPID Act and he took the matter to the High Court. The Constitutional Court in upholding the decision of the High Court stated that the ability of the Minister to unilaterally dismiss the applicant was inconsistent with the independence of the body expressly granted in the Constitution. The Court further stated that, IPID needed to be protected from undue influence or political pressure to ensure appropriate accountability and oversight.

Under section 3, the board is mandated to investigate; the death of any person while in custody, a shooting incident where a police officer has discharged a firearm or killed a person, incidents of injuries, assaults or wounding caused by a police officer, any matter of misconduct involving the police referred to it by the IGP amongst others. The board has the power of the High Court in the enforcement of attendance of witnesses and examination of oaths and compelling the production of documents.<sup>221</sup> The board has the power to commence an investigation by itself, upon the receipt of a complaint by a member of the public, a police office or public body.<sup>222</sup> A complaint can be made on behalf of a person who is dead by their personal representative or member of their family.<sup>223</sup>

Interestingly, the proceedings of the board can either be private or public as they see appropriate. The board can also hold people in contempt for failing to attend a hearing after being summoned, interrupting the board, misbehaves before the board, or does anything that would amount to contempt in a court.<sup>224</sup> The board essentially has the key features of a commission on inquiry, except it is created by the Police Council and reports to the Parliament of Sierra Leone.

The board has offices in three regions and reports to parliament annually. Anyone can lodge a complaint with the IPCB in writing or over the telephone.<sup>225</sup> In their 2017 annual report, the IPCB stated that 50% of complaints received were centred around police abuse, unlawful detention, and unfair treatment by the police.<sup>226</sup> 6%

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<sup>220</sup> 2016 (2) SACR 585 (CC).

<sup>221</sup> Section 6 of C.I 11.

<sup>222</sup> Section 9 of C.I 11.

<sup>223</sup> Section 11 of C.I 11.

<sup>224</sup> Section 26 of C.I 11.

<sup>225</sup> <http://www.ipcb.gov.sl/how-to-lodge-a-complaint/> (accessed 27 October 2021).

<sup>226</sup> IPCB Annual Report 2017 18.

out of the remaining 50% was about death in police custody and 14% on injuries and assault with another 4% on shooting incidents.

IPCB has a Memorandum of Understanding (MoU) with the SLP on amongst other things the notification of investigation undertaken by the IPCB, referrals of issuing falling outside the IPCB's mandate and general cooperation.<sup>227</sup> In this MoU the IPCB agrees to notify the SLP and the officer against whom a complaint has been made within 14 working days upon making the decision to conduct an investigation. To ensure that both the IPCB and SLP do not subject a police officer to the same investigation at the same time, the SLP agreed to conduct investigations on the same issue only after the IPCB has finalised its investigation.<sup>228</sup> This cooperation between the independent mechanism and the SLP's internal mechanism is what effective accountability mechanisms looks like.

#### **4.4 Lessons for Ghana**

Ghana has a number of external accountability mechanisms discussed in the previous chapter, but what is lacking is an independent oversight mechanism. The Ghana Police Council has the powers under Article 203 of the 1992 Constitution to create an independent oversight mechanism similar to investigate and deal with issues of excessive and lethal use of force and other related matters.

The Ghana Police could emulate the IPCB whose members are accountable to the Parliament and can only be removed by Parliament to ensure the body is truly independent. The members of the body must also have a renewable term of not more than twice as well to strengthen its independence.

The body must have the powers of a High Court for compelling witnesses and the production of documents, powers of contempt and the power to conduct an investigation on potentially unlawful killings its own motion. The mode of lodging a complaint should also be as easy and accessible as possible to guarantee a proper complaint system.

The body should also develop some form of agreement with the internal mechanisms of the police and army to help ensure good oversight. The body

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<sup>227</sup> MoU between IPCB and SLP available at <http://www.ipcb.gov.sl/slp/> (accessed 27 October 2021).

<sup>228</sup> As above.



should be well known by all members of the public together with their mandate so members of the public can make use of it as a viable option for accountability for violations of the right to life by state agents.

#### **4.5 Conclusion**

Sierra Leone's response to the issue of the legitimacy of the police and their exercise and lethal use of force birthed the IPCB, a board formed by the Police Council to deal with accountability for violations of the right to life. The board undertakes this mandate with the powers of a High Court giving it the ability to undertake investigations with these corresponding rights and duties.

Ghana on the other hand, has no such institution. The Police Council also has the power to create a commission or committee whose duty will be to investigate issues concerning unlawful killings, give remedies to victims and also suggest reforms to the GPS but such a body does not exist.

Using the features of Sierra Leone's IPCB discussed in this chapter, Ghana can develop an independent oversight mechanism to pursue accountability for unlawful killings by state agents.

## **Chapter 5: Conclusion and Recommendations**

### **5.1 Conclusion**

In the beginning, the research set out to interrogate three things; the international law framework on the right to life and accountability for violations of the right to life by state agents, the Ghanaian law position on the same subject and how Ghana's accountability mechanisms could be improved through a comparative study with other jurisdictions.

The research established that the right to life as a *jus cogens* norm means the right not to be arbitrarily deprived of life. The international law framework on the use of force and the right to life is found mainly in customary international law under the principles of necessity, proportionality and precaution, and treaty law. The meaning of arbitrary under international law is broad and includes elements of injustice and a lack of predictability. The law on the use of force by law enforcement officials is very clear on the fact that force can only be used when it is necessary and proportionate and is used with the principle of precaution in mind in the case of potentially lethal force. The definition of law enforcement official adopted includes military authorities exercising police powers. This definition is important since in many African countries and for the purpose of this research, the military has been identified as using excessive and lethal force in policing. In policing assemblies, the military is only to be used in exceptional circumstances. Where there has been any potentially unlawful death and in cases that involve state agents, there must be an investigation that is prompt, thorough and transparent. There must also be sufficient remedies and reforms to ensure non-repetition of the violation.

Using the international law standard as a guide, this research audited the various standards of the use of force applicable under Ghanaian law starting with article 13 of the 1992 Constitution. Article 13 falls short of international standards due to its wording where it allows for the use of lethal force in defending property. This is contrary to the principle of proportionality, which makes the use of force in that context unlawful. Article 13 also allows for the lethal use of force in order to effect an arrest, even when the person does not pose an imminent threat. This again does not meet the test proportionality. The Criminal Offences Act and Criminal and other Offences Procedure Act follow suit with provisions allowing the lethal use of force for preventing a person who has committed a felony from escaping or in order to detain, take or arrest them. Using a felony as a yardstick to measure the threat

level that a person poses is flawed which affects the application of the proportionality principle.

The internal and external accountability mechanisms available to pursue accountability were discussed with the most favourable mechanism being external mechanisms seeing as they are more effective. A case study of the Ejura Ministerial Committee was conducted to see the results it yielded in pursuing accountability for unlawful killings by state agents but unfortunately the recommendations are yet to be fully implemented.

Since Ghana lacks an independent body, whose sole mandate is dealing with issues of excessive and lethal use of force by state agents, Sierra Leone's IPCB was used to undertake a comparative to see how a body of this nature can be replicated in Ghana. The IPCB being a creature of Sierra Leone's Police Council makes it clear that the Ghana Police Council can do same because its structure and overall framework works well in ensuring accountability and they have similar powers under their respective constitutions making it easy to model in Ghana.

## **5.2 Recommendations**

1. The white paper on the report of the Constitutional Review Commission mentions the amendment of Article 13 of the 1992 Constitution on the issue of abolition of the death penalty in Ghana. It is recommended that the clauses in Article 13 on the lethal use of force also be amended just like the death penalty. For example, Article 13 should read

(1) No person shall be deprived of their life arbitrarily.

(2) A person shall not be held to have deprived another person of his life in contravention of clause (1) of this article if that other person dies as the result of a lawful act of war or if that other person dies as the result of the use of force to such an extent as is reasonably justifiable in the particular circumstances. -

(a) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or

(b) in order to prevent the commission of a crime by that person.

2. The Criminal Offences Act (Act 29) and the Criminal and other Offences Procedure Act (Act 30) must also be amended to fall in line with international law on the use of excessive and lethal force by law enforcement officials.<sup>229</sup> The Standard Operating Procedures and practices of law enforcement in Ghana must be made compatible with international law as well. For example, section 36 of Act 29 should read

(1) A person who by law may, with or without a warrant or any other legal process, arrest and detain another person

(a) may use force which is strictly necessary for the arrest, detention, or recapture of that person, and

(b) proportionate to the seriousness of the offence and the objective of arresting, detaining, or recapturing them.

3. The National Commission for Civic Education (NCCE) educate more people on the avenues available to them for potential violations of the right to life by state agents. These avenues include CHRAJ, the Police Council and even writing letters to their Members of Parliament.

4. Amend the Police Act and Armed Forces Act to include excessive use of force as a breach of the law which is a misconduct in and of itself that triggers an investigation and sanctions.

5. An independent mechanism or body that is tasked solely with the investigation of excessive and lethal use of force by state agents and misconduct must be created to deal with accountability and to ensure the protection of the right to life.<sup>230</sup>

6. The laws and regulations concerning the military and their tribunals should be made transparent, public and available to all.

**Word count: 19,808**

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<sup>229</sup> n200 above

<sup>230</sup> As above

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