

**USE OF EXCESSIVE FORCE BY POLICE IN TANZANIA UNDER THE
FRAMEWORK OF PROPORTIONALITY PRINCIPLE**

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**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAWS (PhD)**

DEPARTMENT OF PUBLIC LAW

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CERTIFICATION

The undersigned certify that they have read and hereby recommend and approve for acceptance by the Open University of Tanzania a thesis entitled; **“Use of Excessive Force by Police in Tanzania under the Framework of Proportionality Principle”** in fulfilment of the requirements for the degree of Doctor of Philosophy in Law (PhD).

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.....

Signature

.....

Date

DEDICATION

To all people who experienced any kind of violence for demanding their rights or fighting for their dreams, especially women. May our Lord give them true hope
Isaya 43: 2.

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The culmination of my PhD journey was attributed to many individuals and institutions without whom this thesis would not have seen the light of day. First, I thank my Lord God for His abundant love, health and strength, enabling me to accomplish this Ph.D. While it is difficult to mention all those who have contributed to this PhD, a few represent the rest.

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ABSTRACT

The use of force by police officers against civilians in executing their duties is regulated through the principle of proportionality, which requires force to be equal to the situation that the police officers face. There are various laws in Tanzania which regulate the use of force. The thesis addresses the question as to whether there is adequate legal prohibition of excessive use of force and adherence to the proportionality principle by police officers in Tanzania. The study applies doctrinal legal research methodology, using analysis of laws, cases and instruments as primary sources and empirical legal research methodology involving data collected in the field. The study's findings are that there is inadequacy of the laws prohibiting excessive use of force in Tanzania, lack of accountability of police officers and absence of reparations to victims of excessive use of force. It is recommended that the Government adopts legislation which addresses torture and the use of force. The Government should also ensure victims of excessive use of force obtain reparations and that national laws should conform to international standards. The Parliament should annex into procedural rules a requirement of compulsory involvement of civil society organisations in the investigation to counteract excessive use of force. Finally, judicial authorities should *suomottu* inquire about the causes of deaths and disappearances of persons during detention or imprisonment.

Keywords: *Police, Excessive Force, Proportionality Principle, Legal.*

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The Basic Rights and Duties Enforcement Act, Cap. 3R.E. 2019

The Commission for Human Rights and Good Governance Act, Cap. 391 R.E. 2010

The Criminal Procedure Act, Cap. 20 R.E 2019

The Government Proceedings Act, Cap. 5 R.E. 2019

The Judicature and Application of Law Act, Cap. 338 R.E. 2019

The Law of the Child Act, Cap.13 2009 R.E. 2019

The Legal Aid (Criminal Proceeding) Act, G.N 166 of 1969

The Penal Code, Cap.16R.E 2019

The Police Force and Auxiliary Service Act, Cap. 322 R.E 2010

The Prevention of Terrorism Act, Cap. 19 R.E. 2002

The Proceeds of Crime Act, Cap. 258 R.E. 2019

The Tanzania Evidence Act, Cap. 6 R.E 2019

INTERNATIONALL AND REGIONAL LEGAL INSTRUMENTS

International Instruments

The Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

The Convention on the Elimination of Discrimination against Women, 1979

The International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

The International Convention on Elimination of Racial Discrimination, 1965

The International Covenant on Civil and Political Rights, 1966

The International Covenant on Economic, Social and Cultural Rights, 1966

The Optional Protocol to the Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, 2002

The Rome Statute of the International Criminal Court, 1998

The Universal Declarations of Human Rights, 1948

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The African Charter on Human and People's Rights, 1981

The Luanda Guidelines: A Right Based Approach to Arrest and Pre- trial Detention in Africa, 2014

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The Basic principles for the Use of force and firearms by Law Enforcement Officials No 9, 1990

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International Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle fu Getreide und Futtermittel, ECLI: EU:C:1970:114

Kreutzer case, 1882

Meadow v Minister for Justice, Equality, and Law Reform, [2010] 2IR 701; [2011] 2 ILRM 157

ABBREVIATIONS AND ACRONYMS

ACHPR	The African Charter on Human and Peoples Rights, 1981
ACJ	The African Court of Justice
ACRWC	The African Charter on the Rights and Welfare of the Child, 1979
AG	Attorney General
AU	The African Union
BC	Before Christ
BPUFF	The Basic Principles on the Use of Force by Public Officials, 1988
BRADDA	The Basic Rights and Duties Enforcement Act, Cap. 3 1994 R.E 2019
CAP	Chapter
CEDAW	The International Convention on Elimination of Discrimination Against Women, 1979
CHADEMA	Chama Cha Demokrasia na Mendeleo
CHRAGG	The Commission of Human Rights and Good Governance, Cap. 391 R.E 2010
CPA	The Criminal Procedure Act, Cap. 20 R.E 2019
CRC	The International Convention on the Right of the Child, 1989
CURT	The Constitution of the United Republic of Tanzania, 1977 Cap. 1
DEVAW	The Declaration on Elimination of Violence Against Women, 1993
DPP	The Director of Public Prosecution
EU	The European Union

GN	Government Notice
GPA	The Government Proceedings Act, Cap. 5 R.E 2019
HR	Human Rights
HRC	The Human Rights Council
ICCPR	The International Covenant on Civil and Political Rights, 1966
ICERD	The International Convention on the Elimination of All Forms of Racial Discrimination, 1965
ICESCR	The International Covenant on Economic Social and Cultural Rights, 1966
IGP	The Inspector General of Police
LHRC	The Legal and Human Rights Centre
OAU	The Organization of African Unity
PCCB	The Prevention and Combating of Corruption Bureau
PFASA	The Police Force and Auxiliary Service Act, Cap. 322 R.E 2019
PFSR	The Police Force Service Regulation, 1995 G.N. No. 193
PGO	The Police General Order
RE	Revised Edition
SAHRC	The South Africa Human Right Commission
TEA	The Tanzania Evidence Act, Cap.6 R.E 2019
TLR	Tanzania Law Reports
UDHR	The Universal Declaration of Human Rights, 1948
UHRC	The Uganda Human Rights Commission

UN	United Nations
UNCHR	The United Nation Commission For Human Rights
URT	The United Republic of Tanzania
US	The United State of America

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

This research analyses the use of excessive force by police in Tanzania under the framework of the proportionality principle. It investigates the reasons behind the excessive use of force by police officials in Tanzania. One of the functions of the State is to protect its individuals from any harm that can be occasioned to them. One way of how the State exercises that function is through regulation of the use of coercive force by the police force during the enforcement of the laws.

However, the police force, in exercising their functions, has sometimes resorted to the use of force. This allegation has given rise to this research which looks at the application of the proportionality principle in enforcing the laws by police officers in Tanzania. The regulation requires that the force used is to be equal to the resistance advanced or the circumstances in which the force is needed to mitigate. There is a seemingly grey area when it comes to balancing the use of force by the police officials in Tanzania and the situation that is at hand to the extent that there are situations in which the police officers cause unwarranted bodily harm to individuals and sometimes even death. Thus, this thesis treks along the lines of the balance between the use of force by police officials and the proportionality principle in its framework.

This part, therefore, provides for, among other things, the background of the study, the problem statement, the literature review on the issue under research and the study's objectives. It also highlights the objectives sought, the pertinent research

questions to be addressed and the research methodology showing how the data to prove the research questions have been obtained.

1.2 Background to the Study

A police force is a duly constituted body of persons empowered by the State to enforce the law.¹ Police powers of the State authorize them with a defined legal area and territory responsibility, which differs from the military or other sectors which deal with defence and security.² The police must ensure proper law enforcement, justice and fair execution of the law.³ Police institutions are among the state bodies which have the mandate for the defence and security of people and their properties.⁴ There are specific rules which guide their conduct and guide them as provided under part four of the Police and Auxiliary Service Act.⁵ Such guidance is provided by Police General Order (P.G.O.), the Constitution,⁶ legislations⁷ And Conventions for Human Rights Protection at the international and regional level.⁸

Police in Tanzania, like other African countries, started in 1880 during the German colonial system. At that time, police were deployed for border protection and

¹ The Police Force and Auxiliary Service Act Cap. 322, "The force shall be employed in and throughout the united republic for the preservation of peace, maintenance of law and order; prevention and detention of crime, apprehension and guarding of offenders and the protection of property and for the performance of all such duties shall be entitled to carry arms".

² Chapter Nine of The United Republic of Tanzania Constitution, Cap.2 R.E. 2008.

³ Shivji, I. G, A Study of Police Powers and Political Expression, Research and Education for Democracy in Tanzania, Mkuki and Nyota Publishers, Dar Es Salaam, 2001, pp. 1-19 states, "To understand policing perception, one has to look at not only the colonial ancestry of police force, both legal and institutional but also the legal and political order established during three decades for the party-state system.

⁴ Police, in relation to any contiguous country, means a member of the police force established by or under any law of that country and includes any person having powers of arrest under any law of that country, under The Police Force and Auxiliary Service Act Cap. 322.

⁵ The Police and Auxiliary Service Act, Cap 322. R.E. 2010

⁶ The Constitution of the United Republic of Tanzania Cap. 2 R.E. 2008 as amended Article 13 equality before the law, Article 14 right to life they are not allowed to kill etc.

⁷ The Criminal Procedure Act, Cap. 20 R.E. 2019 and The Police Force and Auxiliary Service Act Cap. 322 R.E. 2010, and others.

⁸ The Universal Declaration of Human Rights, 1948, The International Covenant on Civil and Political Rights, 1966, The International Convention Against Torture, 1984 and; The African Charter on Human and Peoples Rights, 1981 and others.

colonial services. During the German era, the Germans did not strictly establish a police force; instead, they used Jumbes and Adidas, the local administrators. They used laws and orders to protect their colonial territory. The police were there to protect foreigners and not local communities though they belonged to the local community.⁹

Britain took control of Tanganyika from 1919-1961. As a new colonial master different from German, it needed to establish new institutions for colonial protection. Among them was the police force, which was named Tanganyika Police Force. The police institution was established by Police and Prisons Proclamation in May 1919—the institution aimed to protect the colonial master, just like the German one. Africans were discriminated against and not preferred to whites at that time.¹⁰ The police were located and found mainly in urban areas and some rural areas, primarily to protect settlers' farms. Tanganyika gained its independence in 1961. After that, in 1964, Tanganyika and Zanzibar united to form the United Republic of Tanzania. The police force was a vital organ to both governments. In 1992, Tanzania developed a multi-policy institution to serve everyone from Tanzania mainland to Zanzibar.¹¹ However, at the time of independence in Tanganyika in 1960, African police personnel were recruited in senior roles.

Tanzania Police Force is a national body under the Ministry of Home Affairs governed by the Inspector General of Police (I.G.P.). The Tanzania police force is

⁹ Brodgers, M.E, 'The Emergence of the Police- The Colonial Dimension' *British Journal of Criminology*, Vol.27. pp. 4-14.

¹⁰ Saudin, A Review on Policing Study, Unpublishable, 2000, p.3.

¹¹ Shivji, I.G, A Study of Police Powers and Political Expression, Research and Education for Democracy in Tanzania, Mkuki and Nyota Publishers, Dar es Salaam, 2001. pp.1-19.

divided into units controlled by individual commissioners: instance Administration and Resource Management, Operation, Criminal Investigation, Dar-es-salaam Special Police Zone, and Zanzibar Police Force. The Police Force and Auxiliary Service Act govern the police force.¹² The Police force consists of members of the following rank; the Inspector General as the Inspector General of Police, Commissioner, Deputy Commissioner, Assistant Commissioner, Senior Superintendent, Superintended, Assistant Superintended, Inspectors, Inspector General, Assistant Inspector, Non-Commissioned Officers, Sergeant Major, Staff Sergeant, Sergeant Corporal, Constables, Constable, Recruit Police Cadet.¹³

The Police force was established under the Constitution of the United Republic of Tanzania as one of the organs of the State,¹⁴ The purpose of the police Force is to enforce the law, protect peace and security, and investigate and apprehend criminals. The police force covers the administration of the whole country. Police officers must follow all the rules and regulations under the laws. The police, likewise, need to know and follow up on the rules, which are amended from time to time. The police officer is not allowed to go against these rules unless; a suspect goes contrary to the law, and it is the only way to protect the rights of others. However, violating these rights by a police officer should be completely discouraged.¹⁵

The leader of the Police Force is the Inspector General of Police and has powers as stipulated under the Police Force and Auxiliary Service Act.¹⁶ The I.G.P. shall

¹² The Police Force and Auxiliary Service Act, Cap. 322, R.E. 2010, Section 3.

¹³ *Ibid*, Section 4.

¹⁴ The United Republic of Tanzania Constitution, Cap. 2 R.E., 2008.

¹⁵ The Police Force and Auxiliary Service Act, Cap 322. S.5.

¹⁶ *Ibid*, Section 7.

receive orders or directions from the Minister of Home Affairs on the administration of the force. Subject to the orders given by the Minister, the Act and any regulation made after that, the I.G.P., from time to time, makes orders, transfers, classification, duties, inspection, and training of arms. The I.G.P. works with Commissioners appointed for specific tasks, and the Commissioner can inspect work. The Commissioners are accountable to the I.G.P. for administration following the Constitution of the United Republic of Tanzania, for operation and training, criminal investigation, administration to Zanzibar, to orders from I.G.P.

The Inspectors of police in each Region are accountable to the I.G.P. in administering the area concerned in line with all the rules and regulations under the Police Force and Auxiliary Service Act, The Penal Code, the Evidence Act and the Prisons Act. The inspectors need to cooperate with Regional Commissioner and either leader to inform the I.G.P. of any emergency, to take management of money and all matters regarding money and all matters concerning police force. The command of police in any region is vested in the Assistant Commissioner, who shall have authority, direction and management of the police in the Region and is answerable to the I.G.P. in matters related to training, discipline and economy of the members of the police force.¹⁷

The police institution is divided into several units. The criminal investigation unit deals with wrongs against the State, wrongs against humans, wrongs against property, administration and finance, and the legal sector like the section that involves Forensic Bureau investigation, registration of arms, and regional

¹⁷ The Police Force and Auxiliary Service Act, Cap 322, S. 8 (2-6).

investigations. The Commissioner for Investigation appoints police officers to join the investigation unit, administer the whole department, advise on training for certain officers and inform the Inspector General of all criminal incidences. The Commissioner's work is to assist all the functions of the department.¹⁸

The Field Force Unit is a special department with special emergency training. This sector works hand in hand with regular police officers during particular tasks. They are in different regions to complete the Police Force. The police in this sector receive training from the police college Moshi before being distributed to the other areas.¹⁹ The health unit deals with health administration, police institutions, and society when needed. To provide health services to different police stations to keep health records for police and to cooperate with other health institutions nationally and internationally for health development, policy formulation and implementation for health purposes.

Police Railway Unit deals with all railway cooperation in Tanzania and Zambia - Tanzania Zambia Railway (TAZARA). The aim is to administer security to the railway sector, to properties and personnel, to administer the rules and regulations in the train and at all train stops, financial escort to T.R.C. and TAZARA funds from one place to another, and supervisory work for the security of civilians and their properties. Other units include Airport Division, Air Wing Unit, Anti-Drug Unit, Anti-Robbery Unit, Anti-Terrorism Unit, Dogs and Horses Unit, Marine Unit, Police Training Institutions, Police Vehicle Maintenance Unit, Traffic Unit and Police

¹⁸ Commonwealth Human Rights Initiative, *The Police, The People, The Politics; Police Accountability in Tanzania*, 2006, pp. 27-13.

¹⁹ *Ibid.*

building Brigade.²⁰

Generally, the State must protect its citizens for the country's peace, security and triangularity. This is important in protecting human rights for the country's development. Therefore, it is a constitutional right that all individuals should be protected from brutality. The police force, as law enforcers of state coercive instruments, is vested with powers and trained to use force in specified circumstances. Such circumstances include but are not limited to arrest, investigation, and restricting unruly and controlling disruptive demonstrations. It is an accepted principle that the use of force should be justifiable under the above circumstances to avoid brutality and violation of human rights. However, justifiable use of force requires effective laws to control and prohibit excessive use of force by law enforcers in their duties. With clear rules and regulations, the peace and security of the country may be protected.

The impact of excessive use of force has not affected only the countries concerned, but its effects are felt globally. In this context, in 1945, the United Nations (U.N.) adopted the Charter of the United Nations.²¹ to protect international peace and security. The Charter provides for the procedures upon which states are required to follow to use force²² They are excluding individual persons. Thus, there was a gap in prohibiting excessive use of force by a particular person. To address this concern, the U.N. adopted the Universal Declaration of Human Rights (UDHR) in 1948 to protect human rights. The rights mainly which are involved in the use of force by law

²⁰*Ibid.*

²¹²¹The Nation Charter, 1945.

²²*Ibid*, Article 52.

enforcement officials include the right to life,²³ the right to freedom from torture and other forms of ill-treatment,²⁴ right to liberty and security of the person,²⁵ right to a fair trial to freedom of peaceful assembly.²⁶ Other rights include the right to an effective administrative and judicial remedy.²⁷ and the right and obligation to protect and fulfil human rights. However, the prohibitions provided under UDHR needed to be more adequate because UDHR is not a binding document.

From 1966 onwards, international organizations made various efforts to provide binding provisions on the use of force. The International Covenant on Civil and Political Rights (ICCPR) of 1966 was adopted to protect civil and political rights. However, the ICCPR only covered the effects of the use of force and did not prohibit the use of excessive force. For that reason, there was a need to have a single document to guide the use of force by law enforcers. In this context, in 1990, the U.N. adopted the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.²⁸ (BPUFF). These Principles determine and set parameters to regulate the lawfulness of the use of force by law enforcement personnel and establish standards for accountability and review.²⁹ Though the document is not legally binding to the member states, it is nevertheless of value as it clarifies some issues under the Code of Conduct for Law Enforcement Officials.³⁰

²³The Universal Declaration of Human Rights, 1948, Art 3.

²⁴The Universal Declaration of Human Rights, 1948, Article 5.

²⁵*Ibid*, Article 3.

²⁶*Ibid*, Article 20.

²⁷*Ibid*, Article 8.

²⁸The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990.

²⁹The Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a single document under international.

³⁰The Code of Conducts for Law Enforcement Officials, 1979.

Nevertheless, the effect of excessive use of force by law enforcers is also felt in African countries. To address this, the African Charter on Human and People's Rights³¹ (ACHPR) was adopted as a regional regulatory mechanism in Africa. The ACHPR recognizes all the rights protected at the international level. However, it has no direct bearing towards a prohibition on the use of force by police officials, but, Article 45(2) of the ACHPR avails the power of the Commission of Human and Peoples' Rights to formulate or lay down principles and rules aimed at solving legal problems relating to human and people's rights.

As a result, Resolution No. 259 of the Commission of Human and Peoples' Rights in Africa agreed to place police and human rights as the priority of the Commission. The aim was to determine the reasons for the non-compliance of police officers with basic human rights standards in their duties, including the use of force and disproportional force. The Luanda Guideline³² It was adopted by African Commission in Luanda to regulate the use of force by law enforcement officials. This Guideline incorporates all the rules and principles stipulated under the ACHPR and BPUFF.

On the other hand, like any other country, Tanzania is also affected by the excessive use of force by law enforcement organs. The empirical Evidence shows that excessive force is used in various situations, such as during arrest,³³ under detention

³¹The African Charter on Human and People's Rights, 1981.

³²The Luanda Guidelines on the Condition of Arrest, Police Custody and Pre-Trial Detention in Africa, 2014.

³³ See Mosenda, J., "Why Police Reforms in Tanzania were Inevitable", *The Citizen*, July 21 2022, available at <https://www.thecitizen.co.tz/tanzania/news/national/why-police-reforms-in-tanzania-were-innevitale-3887248>, last accessed on July 22 2022.

³⁴And special operation.³⁵ All these incidents lead either to death or permanent disability of the victims. In this context, Tanzania enacted various laws prohibiting the excessive use of force by police officials. These laws include but are not limited to the Constitution of the United Republic of Tanzania, which stipulates principles on the use of excessive force by law enforcers through provisions on the Bill of Rights. The Constitution prohibits the use of force under different conditions protecting human dignity,³⁶ right to a fair trial,³⁷ right to justice³⁸ accountability and right to remedy for victims of the violation of human rights.³⁹ It also provides for a mechanism in which human rights violations can be addressed through the provisions of the Basic Rights and Duties Enforcement Act.⁴⁰

Likewise, the Penal Code⁴¹ Prohibits the use of excessive force by law enforcers during their duty.⁴² In this context, an individual police officer will be held liable for a criminal offence where excessive force is used in the prevailing circumstances. Similarly, the Criminal Procedure Act⁴³ It allows the use of force, but such force should not be exercised towards an individual to the extent of diminishing a person's dignity. Essentially, the Police Force should not cause that person's death unless it is believed, on reasonable grounds, that it is necessary to protect life and prevent

³⁴ Said, K., "How the Police Force Became the Single Biggest Threat to Public Safety in Tanzania", *Elephant: Politics*, July 24 2020, available at <https://www.theelephant.info/features/2020/07/24/how-the-police-force-became-the-single-biggest-threat-to-public-safety-in-tanzania/>, last accessed on July 22 2022.

³⁵ See Bergh, B *et al.*, "Torture and Torture Practices in Tanzania: Knowledge, attitudes and Practices among Medical Professionals", *Torture*, Vol. 29, No.2, 2019, p. 74, available at <https://irct.org/assets/uploads/tanzania.pdf>, accessed on July 15 2022.

³⁶ The United Republic of Tanzania Constitution, 1977, Article 12(2).

³⁷ *Ibid*, Article 13 (b)(d)(e).

³⁸ *Ibid*, Articles 107A, 107B, 108.

³⁹ *Ibid*, Article 130.

⁴⁰ Cap 3 R.E. 2019.

⁴¹ The Penal Code, Cap, 16 R.E. 2019.

⁴² *Ibid*, sections 18A, 18B and 19.

⁴³ The Criminal Procedure Act, Cap, 20 R.E. 2019.

serious injury.⁴⁴

Despite these above rules, regulations and principles, incidences of excessive use of Force in Tanzania have contributed to gross violation of human rights, including the death of victims.⁴⁵ Hence, this thesis critically examines the application of non-use of excessive force provisions and compliance by police officers in Tanzania. It focuses on two themes; the proportionality principle and the use of excessive force by police officials, explicitly focusing on the use of excessive force in situations of armed conflict, riots, strikes, and the like by police officials when detaining and arresting suspects.

1.3 Statement of the Problem

The problem that this study seeks to address is the increase in incidents of excessive use of force by police officers leading to injuries and death of victims. The pain originates from the nature of the act/offence itself and is not measurable. Meaning when excessive use of force is employed, it is not easy for an actor to measure as it depends on the will and wisdom of the actor. The problem is further caused by the absence of law-setting demarcation and limitations as to when excessive use of force can be said to exist. The lack of a universal definition of excessive use of force by police officers in their duty further exacerbated the problem. The absence of clear interpretation may lead to different applications by police officers.

Consequently, the excessive use of force is applied differently by police officers depending on the nature of the incidence. This may give rise to human rights

⁴⁴*Ibid*, Sections 11 and 21.

⁴⁵Legal and Human Rights Centre, Tanzania Human Rights Report, Tanzania, 2021, p.21-24; see also Legal and Human Rights Centre, Tanzania Human Rights Report, Tanzania, 2020, p.26.

violation claims by the citizens. As a result, hostile relationships may be created between citizens and the police force, likely to disturb the peace and security of the country. These are some of the incidences of police use of excessive force; on November 10, 2021, the police arrested a 20-year-old suspect named Kasim Issa on suspicion of television theft. They took him to the Goba police station, asked him to call his mother for information, and told her to send eight hundred thousand so he could be released. The accused refused, and then he was beaten hard with wire on his head, and every time he refused to let them send the said money, he was beaten badly. Later, they took the man to the hospital, and Doctor stated his recovery was only by the power of God.⁴⁶ Similarly, seven police officers were arrested in Mtwara in March 2022 for killing a businessperson, Musa Hamisi. And many other incidences of police use of excessive force were analyzed in the finding chapter.

1.4 Literature Review

This part analyses the literature on the themes; some are closely related to the study, which marks a benchmark for comparing what has been covered on the proposed theme. The literature identifies different perspectives and ideas from various studies that converge and diverge from the current research, and hence the researcher identifies the knowledge gap. The literature is on the central theme, the prohibition of excessive use of force by police officers under the principle of proportionality, and the strategies to regulate excessive use of force by police officers while performing their duties. Literature is divided into clusters; the first deals with the adequacy of the law in prohibiting excessive use of force, and the second deals with

⁴⁶Police jijini Dar wamemjeruhi mtuhumiwa yupo mahututi ICU(<http://www.jamiiforams.com/threads/polisi-jijini-dar-wamemjeruhi-mtuhumiwa-yupo-mahututi-icu.1931270/>).

strategies to regulate the excessive use of force by police.

The author explains the law as a set of binding rules governing the behaviours of members of a nation. In any organized society, there is a government and an agency for law enforcement.⁴⁷ Police, as one of the agents, are authorized to enforce laws and have the power to arrest and detain criminal suspects. The police force aims to ensure rules have been followed and respected. Due to that power, police officers have frequently been brutal and arbitrary. The consequences of using force are physical violence and sometimes severe and fatal.⁴⁸

Due to the above violations and incidences, after the Second World War, the regulations of police became severe. This led to international human rights law and criminal justice standards. Due to this development, the author examines how states' use of force prompts respect for their rules and ensures order and to what extent police use of force complies with international law and law enforcement.⁴⁹ The author's findings, the use of force cause a violation of human rights and are no data to solve the problem of police use of force. How can an author address the use of force if there is no demographic and circumstance of these incidences? He stated that the Obama administration and the government planned to have a comprehensive report of police use of force. Several individual police departments also were engagement reforming the use of force and accountability. They detail the use of force in an arrest and even when they force the public.⁵⁰

⁴⁷Maslen, C, &Connolly, S, (Ed), Police Use ofForce Under International Law, Cambridge University Press, England, 2017, pp. 1-30.

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰*Ibid.*

Several European countries, like German and the United Kingdom, have already collected information about police use of force. And officers face formal discipline governing the use of force, i.e., necessity, proportionality for and use of force, the use of firearms and the specific rules of "shooting to stop". Therefore, the use of force is only permissible where a threat of death or serious injury is imminent; a danger of damage to the property also does not suffice. At last, the author proposed for duty to investigate, prosecute and how accountability can influence better policy use of force.⁵¹

The current study and the author converge on the theme police use excessive force and violate human rights. We all struggle to find solutions to minimize the excessive use of force. The author did not discuss reparation as a mechanism prohibiting excessive force use. Whether it will suffice to reduce the use of excessive force by being accountable to the victims of excessive use of force. The current study examines the international laws on the prohibition of excessive use of force by police officers, regional and sub-region instruments and national laws and whether they are adequate, which were not the author's focus. To assess how states use force and enforcement mechanisms will be enough to prohibit the excessive use of force.

Schauer states that in the United States, and there are many allegations of police use of excessive force that generate headlines. The incident of death at police hands stimulated debates. The death of black people raises concern about justice for all. Assessment of some Latino and African American groups shows police lack

⁵¹ Maslen, C, & Connolly, S, (Ed), *Police Use of Force Under International Law*, Cambridge University Press, England, 2017, pp. 1-30.

confidence and police use excessive force on suspects. Police shootings are done due to race and historical issues of trust.⁵² The author states there is no accountability for police officers' shootings, misconduct and use of excessive force.

However, there is a variety of strategies suggested by field researchers and members of the law. One is community policing, and still to be dangerous work. There are fewer incidences of police use of excessive force to ensure accountability. Further, it is observed that even those well-trained police officers are hardly observed the rules if this is one of the methods to limit the excessive use of force. The Federal Bureau of Investigation (F.B.I.) stated that police departments and officers do not handle the incident aftermath well with transparency and clarity even when force is reasonably applied.⁵³

The author states there is no precise data on lethal and non-lethal force. He says further there is a big problem of excessive force and a corresponding lack of accountability. The issue is what can change police culture and accountability. The researcher has commented that some field officers' responsibilities are failing. To review this, there is a need to investigate the use of force by officers and their duties under their command. Excessive force stems from a lack of investigation, behaviours, training and supervision.⁵⁴

The author concentrates on police training procedures, what constitutes excessive force, and what happens when the community disagrees with the police and the

⁵²Schauer, P, *Police Training and Excessive Force*, Greenhaven Publishing, United States, 2018, pp. 1-16.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

justice system. Only transparency will reveal the truth about the excessive use of force; the way to ensure transparency is through bodily cameras to record police interactions with citizens. The excessive use of force is more commonly used in America compared to European countries like France, Sweden and Denmark.⁵⁵ Also, the accountability system for police officers is not simple, as they work under Brotherhood to protect each other by covering and falsifying arrests report. Legal change is a need to legislate and make accountable those police officers who use excessive force. The author states that excessive force is never reasonable; excessive force currently surpasses decades. Training on the job may change the use of Excessive Force.⁵⁶ The author confirms excessive use of force, which is never reasonable.

One of the reasons for excessive use of force is a lack of confidence in police officers, secrecy, countless incidence, lack of supervision, investigation and training. The author suggests community policing and legal change meaning the enactment of laws to curb police use of excessive force. The study analyses the use of excessive Force in Tanzania, and one of its analyses is to examine if police training, enactment of laws, accountability and reparations can change the use of excessive force by police. The author concludes that job training is the solution to not being trusted; however, still, the current study needs to be examined.

National Academies of Science wrote a book that explains policies and practices to minimize police use of force internationally. The book which was suggested by the

⁵⁵*Ibid.*

⁵⁶*Ibid.*

national academic of Science, Engineering and Medicine, the Division of Behavioural and social sciences and Education, the Committee on Law and justice committee on Evidence to advance reform in the global security and justice sector. In these book different organized theories, policies and practices to minimize police use of force internationally were considered.⁵⁷ The committees state it is common to hear about injuries and death from the use of force by police officers across countries around the globe.

Despite international, regional and local legislation, there is a continuation of excessive use of force by law enforcement. Reports verified killings, injuries to citizens, and use of force in riots and demonstrations are many, and press reports worldwide. However, reliable dates for those incidents are both lacking. There are many international and regional civil societies and institutions aimed at helping the government to improve policing practices and reduce the excessive use of force. One of them is the U.S. Department of State provides foreign assistance and support to criminal justice systems and police organizations.⁵⁸

This report aims at finding out what is known about the effective practices of law enforcement officials and their implementation and identify promising actions to be taken by international donors in their efforts to strengthen the effectiveness of law enforcement agencies. Focus on international donors and how they enhance effective practices for police officers.⁵⁹ The committee and the current study converge on the issue there is no data on police violence and injuries due to the use of excessive

⁵⁷ National Academies of Science, Policies and Practices to Minimize Police Use of Force International, National Academic Press, United States, 2022, pp. 1-30.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

force. The committee writes on ways to limit the excessive use of force by police officers due to the incidences of human rights violations. One suggested way is effective practice (responsibility) to police institutions. Because despite the legislation under international, regional and local, there is still the problem of using excessive force.

The current study examines the use of force by law enforcement officers under the framework of the proportionality principle. To find out the problem, is it the law or the police institution on excessive force? It examines legislation like the above study and the principle of proportionality and how it helps regulate the excessive use of force by police officers. The researcher appreciates the contribution of the committee to affirm there is a problem with the excessive use of force by law enforcement officials and found out the problem is the institution. The current study's focal point differs from the committee, though it has the same target of prohibiting excessive use of force.

The author deals with an examination of issues and concepts which are related to policing. Mainly the problems like using deadly force with a firearm from an institutional angle. The author analyses training, protocols, and policies for reducing the excessive use of force in public and criminal justice systems. The author gives out the practical implications that minimize the use of force.⁶⁰ One of his suggestions is to recognize people who know policing training and related research to train police officers on using force. Also, the author states the book is helpful to

⁶⁰ Albrecht, J & Heger, G, Police Use of Force, Global Perspective and Policy Implications, Springer International Publishing, German, 2023, pp. 1-10.

students, scholars, academicians, researchers, government and community leaders and criminal justice and law enforcement administrators.

Albrecht and Heger, analyze the use of deadly force by police in Canada and the United States, its impacts like injuries and death of victims, and theoretical considerations. They discuss various incidents and the effects on police officers not being trusted..⁶¹ The authors talk about the use of force continuum under the Chapter on police training, stress inoculation training escalation and escalation tactics and factors which contributed to police use of force: assaults, alcohol, consumption, the assailant and characteristics of respondents.

The authors concentrate on the use of excessive Force in Canada and the United States. The cases study which different to the current research though the problems are the same. In additional, they concentrate more on the use of training as one of the ways to limit the usage of excessive force. The current study examines police training as one method and another method like the use of adequate laws, legal accountability to police officers and reparations as one of the methods to limit the excessive use of force by police in Tanzania.

The scholar Heselhaus⁶² writes on the use of force at the international level. The author states that war was not subject to legal regulations but was used as one method to change territorial boundaries. During the 20th Century, states agreed to change the use of force system except for self-defence and peaceful negotiations.

⁶¹ Albrecht, J & Heger, G, Police Use of Force, Global Perspective and Policy Implications, Springer International Publishing, German, 2023, pp. 1-10.

⁶² HeselhausS., International Law and the Use of Force, available at <http://www.eolss.net/Eolss-sampleAllChapter.aspx> (Accessed March 12 2015).

Under international law, the concept of the use of force has always explained the relationship between states and not put consideration to the domestic use of force by state authorities against civilians. Under international law, the State's use of Force by State agents is ruled by treaties on human rights. Thus, the prohibition of using force internationally is at the core effects of preventing war and is more complex under an international legal framework. The development of technologies, biological and chemical weapons had a lot of impact on human life.

The author further posits that the civilians lacked protection during the war. The influence of the moral community in understanding ethical principles was a step towards prohibiting the use of force under international law. However, many states still justify the use of force. The decision not to wage war was challenged not by United Nations Security Council but also subject to challenges from national and international bodies. Prohibiting the use of force became the core legal effort to prevent war, and today, the protection is under a global legal framework. The prohibition is attached to collective measures and peaceful means for settlement.

This literature is relevant to the study as it shows the background of the use of force in relation to the principle of proportionality, which is the core principle of using force. The use of force notion internationally focused on the use of force, and no document regulates the use of force by individual persons acting as an agent of state-only human rights treaties. However, the author concentrates on the use of force in wartime by states, not by the individuals as state agents, which is the main theme of the study.

Wade⁶³ Writes about the proportionality principle and the use of force. The author assesses the proportionality principle from a legal perspective and analyzes its use in balancing dual interests. The author states that the proportionality principle has prescribed that all statutes that affect human rights should be proportionate and reasonably made of three sub-principles, adequacy, necessity and proportionate, to protect a request. The author states that this principle is primarily applicable when there is a conflict of rights, the provision rights and the public interest rights or sometimes between the private and public interests' rights.

The book is on administrative law, powers and duties of administrators. The administrators can enforce the rules, and they have to balance the provision rights and public interests. Whenever force is used should follow the three sub principles necessary, proportionate and have to balance between the means and end. The literature is relevant to the study as it states the proportionality principle, which is the main theme of the study, the use of force. This is one of the literatures with a different perspective to the current research as it examines the principle of proportionality from a legal standpoint to balance interests.

Jonas,⁶⁴ Analyses the proportionality principle and human rights protection. The author explains that defining a right is equal to limiting it. Meaning it excludes what does not cover. The principle of proportionality is used in the interpretation of a right than a matter of limitation of a right. The author argues that in some states, 's proportionality principle is not a legal norm for human rights protection and is

⁶³Wade H., & Forsyth C.F., Administrative Law, Oxford University Press, United Kingdom, 2008, p.305.

⁶⁴ Jonas C., Fair Balance: Proportionality, Subsidiary and The Primarily in The European Convention of Human Rights, Martinus Nijhoff Publishers, Leiden Boston, 2009, pp. 18-97.

regarded as a threat to human rights protection. However, a careful and skillful application of the principle of proportionality requires sufficiently applicable, specific and precise principles of proportionality to protect human rights. The author argues that one must read particular contents of the principle to improve the understanding nature of the rights and their limitations.

On the other hand, Jonas provides that the legal doctrine of proportionality is relevant to give balance or limitation and restriction on the exercised rights and freedoms protected by the European Convention on Human Rights. He argues that conflicting norms may arise in protecting various rights, which may be addressed by invoking the proportionality principle to balance the contradictory norms.⁶⁵ In this case, the principle renders rights not to be strictly protected due to the need for public interests. Further, the author explains that the Human Rights Committee introduced the need for the proportionality principle into human rights to respect and ensure the rights of all individuals.

Ralph⁶⁶ Discusses human rights standards between human rights and policing in every aspect of the theory and practice of policing. Theories show that police officials are allowed to use force as it is among their officials' powers. One of the rights affected by using energy is the right to life. Due to this, States have obligations to secure this right as provided under Article 3 of the UDHR. The author stated the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁶⁷ They are designed to secure compliance with the principles of necessity

⁶⁵*Ibid*, p. 15.

⁶⁶ Ralph C., *Human Rights and Policing*, 2nd Revised Ed, Martinus Nijhoff Publishers, 2007, pp.19 – 39.

⁶⁷The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990.

and proportionality in police use of force to protect the right to life and that in the use of force, firearms should be used against persons only as a defence against an imminent threat, the threat of death or severe injury. When police officials comply with the provisions of the law, it becomes the essential element in protecting the right to life.⁶⁸

Ralph further states that policing comprises the deprivation of liberty. Police have the power to arrest and detain, and in this situation, the right which is affected is the right to freedom, as stipulated under Article 9 of the UDHR. During the arrest or detention, the accused's right to liberty is suspended, and they become vulnerable to ill-treatment and torture. The prohibition of torture is expressed under Article 5 of UDHR. Acts of torture amount to severe violations of human rights, and the prohibition of their ban is absolute. There are no circumstances in which torture is practised as lawful or in any way justifiable. To that effect, the Declaration on the Protection of All Persons from Being Subjected to Torture⁶⁹ and other Inhuman or Degrading Treatment or Punishment and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment⁷⁰ Comes into play.

The writer appreciated the contribution of Ralph on the theme of police use of force; he examined the human rights standards in theory and practice. He mentioned the laws that provide the standards for policing, especially for using force. The author also wrote about the effects of the use of force by police officials and the rights which are in danger. However, the writer concentrated on how the laws protect the

⁶⁸ Ralph, pp.19 – 39.

⁶⁹The Declaration on the Protection of all Persons from being Subjected to Torture, 1975.

⁷⁰The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

right to life, ill-treatment, torture and liberty. This work examined the same standards; however, the disparity is in their adequacy regarding the prohibitions against the use of excessive force by police officers in Tanzania. The researcher discussed eight rights mainly involved in using force and analyzed if its prohibition is sufficient.

Holmstrom examines the codification of international human rights standards for human rights protection. Since the middle of the Century, the international community has codified the human rights standards for human rights protection, and there are mechanisms established to protect, remedy and redress victims of human rights violations. Human rights law protects the right of an individual and of a group. Police officials, as human rights defenders, must secure, protect and respect human rights. It is believed that those who have power on behalf of people need to be aware of human rights standards. There is a need for police officers to understand human rights standards which are required to meet the standards in their field. The text identified essentials for police activity. And the book provides instruments for human rights protection. A compilation of international instruments which provide rules which guide police officials' work. Some are regional conventions, and others are non-treaty methods.⁷¹

Maslen further analyzed those laws and considered them as a set of binding rules governing the behaviour of human beings. Whenever there is a government, there are laws and agents to enforce the laws. Police officials are agents of the State and

⁷¹Holmstrom L., *et al.* 1, Essentials Texts on Human Rights for the Police: A Compilation of International Instruments; 2nd Revised Edition, 2008, pp. 1 – 38.

are entrusted to enforce laws as law enforcement officials. Police officials have powers, one of which is to arrest and detain criminal suspects to prevent crimes. Police in doing this work are allowed to use force when and where needed to achieve the aims.⁷² As force is sometimes used to ensure respect for the law.

The author states that frequently, the use of force has been brutal and in whatever context, legally or morally, the use of force has consequences. Mchome⁷³ Furthermore, it examines the Police Ordinance.⁷⁴ That allows the use of Force under Section 5(1). Under the provision, force shall be employed in and throughout the territory to preserve peace and maintain law and order. The author explains the rights of suspects and accused persons and states the obligation under international law prohibiting force and torture. The international rules on the prohibition of force State that the use of force shall be the last resort and other ill-treatments are not permitted.⁷⁵

The author further examines remedies for police misconduct; they can make complaints under the Criminal Procedure Act before magistrates or the police force. When succeeded through the magistrate, the victim can apply via private prosecution in which he can apply the case himself or via an advocate. When the victim complains to the police, it may pass via police investigation, and the problem here is that the chances of prosecution are hard to prosecute. In the third procedure, the victim will initiate disciplinary proceedings under the police force ordinance. This

⁷² Stuart M., *Police Use of Force under International Law*, Cambridge University Press, U.S.A., 2010, pp. 1 – 4.

⁷³ Mchome S.E., *Due Process of the Law: The Rights of Suspects and Accused Persons*, Dar es Salaam. University of Dar es Salaam Press, 2008, pp. 155-166.

⁷⁴ The Police Ordinance, 1962.

⁷⁵ The Universal Declaration of Human Rights of 1948, Art. 5.

procedure should be the procedure of the last resort and is likely to be biased.⁷⁶

The researcher analyzed the three authors above. Holmstrom stated about the codification of international human rights standards for human rights protection; Maslen noted the police official's powers and the use of Force; Mchome further examined the use of Force in Tanzania under the Police Ordinance and the rights of suspects and accused personnel. The researcher valued the contribution of these authors. However, none of them touched on the prohibition of excessive force by police officials in Tanzania under the framework of the proportionality principle.

Amanda observes that many developing countries had policing organizations and legislations adopting international human rights norms and standards. The Luanda guideline assessed the implementation of international human rights norms in Africa. As per the mandate availed under the ACHPR⁷⁷ States must formulate standards, principles and rules on which African governments can base their legislation. Thus, the forum prepares the code of conduct, which has 13 Articles, each with brief explanations of what it meant a particular article and the indicators which helped establish standards for policing in Africa. For instance, the indicator under Article 1 for human rights is; Police actions are based on law and human rights, police are trained in human rights, violations of human rights are addressed, and human rights and the dignity of police are respected.⁷⁸

⁷⁶Mchome S.E., *Due Process of the Law: The Rights of Suspects and Accused Persons*, Dar es Salaam. University of Dar es Salaam Press, 2008, pp. 155 – 166.

⁷⁷The African Charter on Human and Peoples Rights, 1981, Article 45(1).

⁷⁸Amanda D., et al. 1, *African Policing Civilian Oversight Forum, Policing and Human Rights: Assessing Southern Countries SARPCCO Code of Conduct for Police Officials*, South Africa, 2012, pp. 1 – 6.

The author further observes the structures of every enforcement agency and the criminal laws differ from country to country. To solve the problem, the Luanda guideline code addresses the issue by providing the principles that must be followed to comply with the African Charter to every organization. These principles are the rule of law, non-discrimination, proportionality and necessity, procedural guarantee and rights to detainees, accountability and transparency. The rule of law, as among the principle of the Luanda guideline code, has the following elements; the action must be authorized by law; for instance, if a person is detained, the place of detention must be formally recognized by law, and the powers of the police must be subject to the law as stipulated under section 1, 2, 3, 7, 25 of Luanda guideline Code.⁷⁹

Further, the author reveals that the standard for policing comprises international conventions and covenants, regional conventions and treaties, declarations, guidelines, basic principles and codes of conduct derived from the U.N. International Bill of Rights. Policing is governed by rules that protect and promote human rights and dignity, are fairly and equally applied to all without discrimination, arbitrariness or oppression and are subject to adequate oversight mechanisms to ensure that the rule of law is upheld.⁸⁰ The author states that the United Nations has also set the minimum standards that protect individuals from abuse of power by state actors. The framework includes UDHR.⁸¹, ICCPR⁸², and ICESCR.⁸³ The UDHR states that a

⁷⁹Amanda D., et al. 1, African Policing Civilian Oversight Forum, Policing and Human Rights: Assessing Southern Countries SARPCCO Code of Conduct for Police Officials, South Africa, 2012, pp. 1 – 6.

⁸⁰ Florence S., Common Standards for Policing in East Africa, Common Wealth Human Rights Initiative, Kenya, 2010, pp. 1 – 15.

⁸¹The Universal Declaration of Human Rights, 1948.

⁸²The International Covenant on Civil and Political Rights, 1966.

⁸³The International Covenant on Economic, Social and Cultural Rights, 1966.

member state must uphold and protect its rights. The writer says that the police institution is an agent of the State, the obligation to UDHR extended to the police institution to implement a rights-based framework for policing, and individual officers must abide by these rules. The UDHR guarantees the right to life, liberty and security of the persons, which are core rights in policing.

Furthermore, the ICCPR explains more about the civil and political rights shown under the UDHR. It provides the right to life, self-determination, liberty and security, freedom from arbitrary arrest, detention and torture, freedom of thoughts, religion, opinion, expression, peaceful assembly and association. To protect the rights and liberties of others, States may limit some of the rights; however, the derogation from their rights must be proportional and necessary for emergencies, and measures must be applied without discrimination. Regardless of the gravity of the emergency, certain rights can never be subjected to derogation. They include the right to life, freedom from torture, recognition as a person before the law and freedom of thought, conscience and religion.

Amanda examines the use of Force in Africa by having a descriptive analysis of the rules governing the use of force under the Luanda guidelines. In Africa, the Luanda guidelines were prepared to adopt regulations and policies on using force at the international level. The Guideline provided the principles: rule of law, non-discrimination, proportionality and necessity. The researcher cherished the author's contribution to policy and regulations in policing. However, the author should have examined to what extent the principles under the use of force are adhered to and whether they are adequate to prohibit excessive use of Force in Africa. Also, the

author did not examine the extent to which the principle of proportionality is sufficient to limit the excessive use of Force in Tanzania.

The second cluster of scholars analyzes the strategies to regulate the excessive use of force by police officers. Millen states that in any democratic country, police institutions are governed by different processes. Democratic policing is composed of constitutional and institutional legal frameworks.⁸⁴ Policing must balance the wishes of the public, politicians and uphold the laws. In their work performance, police officials must be accountable when they abuse power. Their accountability depends on good laws and a proper complaint system. Police are responsible for their duties as stipulated under the law. They are accountable for their core responsibility, maintaining order and preventing and detecting crime. Police officials must adopt lawful means to achieve objectives, especially protecting the human rights of all, including those who may have to use force. When they violate the objectives, police officials are answerable to court for due process of law.

Police officials are accountable on two levels: accountability of individual police officers for policing activities and that of the unit. The responsibility of respective police officers is regulated through a complaints system by internal and external mechanisms. Millen stated further that the police system has significantly changed, especially regarding police accountability. There are many factors which contributed to the reshaping of police governance. One of the factors is the establishment of laws and accountability. Millen stated about the accountability of police officials as an

⁸⁴ Millen F., *et al.*, Policing and Accountability: The Working of Police Authorities Policing and Society, 2011, pp.265-283.

individual and as a unit. Millen said about the accountability of police officials as an individual and as a unit. However, the author did not mention accountability for violating the proportionality principle of using force.

Kilatu examines several human rights reports in Tanzania, revealing an increasing trend for human rights abuse of fundamental rights. He avers that police officers, as agents of the State, are accountable for promoting and protecting rights.⁸⁵ The agents must abide by the international police official's principles and human rights standards. The standards covered include autonomy, impartiality, legality, accountability, proportionality, reasonable, and necessity. The State rules by law, and police are State agents who must observe the laws and standards. Police officials have to respect human rights under international, regional and national laws and policing rules that limit their powers. Law enforcement is the crucial part that protects fundamental human rights. These fundamental rights keep the law enforcement machinery within the ideal legal bounds.⁸⁶ In line with this is proportionality and reasonableness of police actions. The proportionality principle safeguards human rights under the adage that one should not use a sledgehammer to crack a nut.⁸⁷

Studies reveal that in Tanzania, there is dissatisfaction with procedures in channeling complaints against violating fundamental rights by police officers and a high violation of human rights such as torture, concocted cases, unlawful arrest and

⁸⁵Kilatu E., *Law as The Basic Regulatory Organ of The Society: The Case of Abuse of Fundamental Human Rights by The Police in Tanzania*, LL.M Thesis University of Mzumbe, Tanzania, 2016, pp. 24 – 27.

⁸⁶*Ibid.*

⁸⁷*Ibid*, p. 54.

detention.⁸⁸ These violations often need to be investigated.⁸⁹ Maina⁹⁰ Assesses police powers and accountability in the maintenance of peace and order. He analyses different powers that police have, including arrest, search and seizure, which are provided under regulations. The writer analyses the Criminal Procedure Act.⁹¹ In Tanzania, describing the rules under this Act, which govern the balancing of conflicting government functions of maintaining law and protecting human rights.

Kenneth⁹² States that police are armed forces for the protection of people's rights. There are three roles or tasks which guide their work. One is to make persons comply with the law, the second is the protection of civilians and their property, the force can be used only to promote the community's safety, and the third is participating in community activities. The author states a philosophical dilemma: some citizens may be injured in their protection duties. This leads the media to report giving an impression that police brutality is rampant and the police department is out of control. The police use of force and use of excessive force is an issue that must concern the public at large. The author states that reporters and members of the public need to research the use of force and ascertain the citizens' complaints in courts and know whether there are measures to punish the police for the use of force and whether there is Evidence as there are victims of the use of force who claim against police brutality.

⁸⁸ *Ibid*, p. 29.

⁸⁹ *Ibid*.

⁹⁰ Maina C. P., and Haris J., *Fundamental Rights and Freedoms in Tanzania*, Dar-es-Salaam, Mkuki&Nyota Publishers, 1998, pp. 143-154.

⁹¹ The Criminal Procedure Act, Cap. 20 R.E. 2019.

⁹² Kenneth A., *What we Know about Police Use of Force*, 1999, U.S.A., 1999 pp. 1-14.

Maina and Kilatu stated that police have to abide by the rules and standards: legality, accountability, proportionality, and necessity. These authors did not discuss the accountability for excessive use of force. However, Kenneth discussed police brutality and why police officials use force. He wanted society to find out whether there are measures to eliminate police brutality and if police officials are accountable for brutality. This study examines in detail the accountability of police officers for the use of Excessive Force in Tanzania under the framework of proportionality.

Lawrence⁹³ Analyses that if the police use force to defend and protect the public against violent criminals or other deviants, the use of force cannot be labelled as "brutality" or a public problem. The author states that for it to be termed as excessive force, it must be understood as something caused by a system, not merely by individuals.⁹⁴ The author affirms that police brutality is part of human rights violations and acknowledges the media's role in protecting human rights, like how media people view police brutality.⁹⁵

She further examines whether police brutality is a myth, and in so doing, she proceeds with a story that a guy was beaten by the police and died in police custody. Police were not prosecuted for the action. Police brutality, as the author noted, occurs everywhere, but the media has a habit of jumping on isolated instances of police misconduct and changing them into national stories. Another critical question posed was, how does the media report police use of force? She suggests that the

⁹³Lawrence G., *The Politics of Force Media and the Construction of Police Brutality*, University of California Press, United States of America, 2000, p. 33.

⁹⁴Lawrence G., *The Politics of Force Media and the Construction of Police Brutality*, University of California Press, United States of America, 2000, p. 33.

⁹⁵*Ibid.*

media typically presents most faithfully officials like other elites. The police use of atrocious measures is a public concern that must be addressed with public policies and not by the media because they report the good side of the police.

Lawrence states that the use of force in itself is not prohibited, but there are measures relating to when why and which degree of force can be used to make it lawful action. This applies to all types of force, not just firearms.⁹⁶ The use of force is strictly limited to arrest to prevent incidences of a severe crime that involves a threat to life, and the use of force shall be strictly regulated under national law in conformity with international standards.

On the other hand, Michelle views police-citizen violence as the key to every discussion that touches police. The author states that the vision of police in Tanzania is to maintain peace and tranquillity by reducing the incidence and fear of crime. For policing to be declared as good or bad, there are a number of factors which ought to be put into consideration. One includes the law and the police structure or how it is structured and works daily.⁹⁷ The mission of the police in Tanzania is to enforce law and order, preserve peace, detect crime, protect life and property, and apprehend and prosecute offenders. The author poses a question as to why there is a bad relationship between police and citizens. The answer is that it could be due to the number of killings or other reasons. The author confirms the reputation of police officers among citizens, which is caused by extra-judicial killings.

⁹⁶*Ibid.*

⁹⁷ Common Wealth Human Rights Initiative, the police, the People, the Politics, Police Accountability in Tanzania, 2006, Kenya, pp. 11 – 17.

Kaggwa examines the Luanda guidelines manual and encourages the proportionate use of force in police custody and pre-trial detention as one of the strategies to prohibit excessive use of force. The guidelines state that force shall be used where necessary, proportionate to an offence, and be reasonable. The guidelines require that to regulate excessive force by police, all police actions should be proportionate and necessary. Further, the author highlights provisions which provide how police use of force has an impact on the community and has an effect on the level of trust. How the community engages with the police has, in turn, affected the way the police themselves respond to the community.⁹⁸

Harriet⁹⁹ Points out that police are accountable for protecting the person's life, liberty and security, maintaining public safety, social peace and adherence to the rule of law as an essential element to human protection and promoting fundamental rights and freedoms. As to the strategies to regulate the excessive use of force, police need to fulfil their function by the rule of law. If a police officer arrests or detains a suspect, it must be by the law, and the accused person must be informed of their rights. There is a gap between how we want to be policed, how the police officials want to police us and how we are policed. What the public wants is a sound system of security and to find all their properties secured and police officials to be accountable.¹⁰⁰

Telephone¹⁰¹ Observes that members of one of the political parties in Tanzania were detained in Zanzibar and subjected to torture. They were beaten severely in police

⁹⁸ Kaggwa S.K., Guideline on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa: Luanda Guidelines Trainer Manual, Gambia, 2017, pp. 1-27.

⁹⁹ Harriet S., The Public and the Police, Institute for the Study of Civil Society, London, 2008, p.1-7.

¹⁰⁰ *Ibid.*

¹⁰¹ Telesphor M. R., Tanzania Public Order Institutions Accused of Violation of Human Rights in Tanzania Global Politicians, Tanzania, 2005, pp. 1-10.

and prison custody, and some asked for deportation due to severe torture melted on them while in custody. The author states that police violations in detention and prison sometimes lead to death. The author observes that the State justifies using reasonable and arbitrary power against civilians and prisoners under the pretext that such force is applied because civilians broke the law and for security.

Maslen & Connolly discusses the police use of force under international law. Among the critical issues in their discussions is the accountability of police on the use of force.¹⁰² The argument is that law enforcement officials protect society from violence and secure their rights. At times, they do so under dangerous circumstances, and in some situations, they cannot do so without the use of force, which can be abused against the members of society. To regulate the use of excessive force by law enforcement officials, it is, therefore, in the interests of every individual that such force be put under constant vigilance.¹⁰³ In the absence of effective accountability, the principles which govern the police use of force, such as necessity and proportionality, are watered down and rendered ineffective.¹⁰⁴

Under the human rights framework, it is critical that the right to life and humane treatment are upheld. This calls for the duty to investigate any alleged or suspected violations. Under international law, investigations should be adequate, thorough, independent, prompt, and transparent.¹⁰⁵ The investigation should also effectively show Evidence of due diligence and effort in identifying the causes of the loss of

¹⁰² Maslen S., & Connolly S., *Police Use of Force Under International Law*, Cambridge University Press, 2017, p. 374.

¹⁰³ *Ibid.*, p. 374.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

life, determining whether such loss of life was unlawful, and, if so, who is to be held responsible for it.¹⁰⁶

Lawrence believed that excessive force is something caused by a system and not merely by a person, Michele stated that police officials are accountable for their duties, Kaggwa talked about how police officials should use force in a manner that avoids violation of human rights, Telesphor stated on the effects of excessive use of force. None of these authors mentioned police accountability and to what extent the police are accountable for excessive use of force. Nevertheless, the researcher valued the contribution of these authors to the use of force and accountability. This helped the researcher further study police officials' responsibility for the excessive use of Force in Tanzania.

Further, another strategy to regulate excessive use of force by police officers is reparation; in respect of the reparation system for the victims of excessive use of Force, Florence states that there are institutions which avail remedy to the victims of human rights violations. The African Court is one of the mechanisms for human rights protection as it merged with the African Court of Justice, and the court adjudicated matters from the African Commission on Human and People's Rights. The court heard cases relating to the protocol and decided on them, and it also attempted to reach an amicable settlement between States.¹⁰⁷

The court encourages specific protection in the criminal justice system to safeguard and promote the rights of women, children, and marginalized communities. It

¹⁰⁶ *Ibid*, p. 379.

¹⁰⁷ Florence S., Common Standards for Policing in East Africa, Common Wealth Human Rights Initiative and the African Policing Oversight Forum, 2010, pp. 1 – 15.

develops a common standard for policing in the E.A.C. The court recommends enacting laws that establish internal and external oversight mechanisms for law enforcement agencies, prison services and the judiciary to ensure the impartial application of the rule of law and human rights.¹⁰⁸ The author recommends having internal and external oversight mechanisms for law enforcement officials. The aim is to protect human rights and the victims of excessive use of force.

Kilatu states that it is worth noting that several police perpetrators have not been prosecuted for their atrocities, and there is an excessive use of force by police in Tanzania. When human rights are violated, various institutions check abuse of power and violation of fundamental rights. These institutions are; the judiciary, the Commission for Human Rights and Good Governance, and civil society organizations. Some institutions belong to the State, and some are non-state organs. The judiciary is the main organ of the State that has a mandate to dispense justice. The increase in police use of excessive force reveals that institutions must be better organized to curb the problem.

The author's main motive is to discover the factors behind the abuse of fundamental rights and reparation for the victims of excessive use of force by police officials. The researcher observed that few books discussed particularly on the subject at hand. Many literatures and cases concerned excessive use of force by normal civilians. Florence and Edson wrote about the institutions for protecting human rights and the rights violated. These authors did not discuss reparation remedies for the victims of excessive use of force by police officials, and even not well written by many

¹⁰⁸*Ibid.*

scholars. The researcher examined whether there is a reparation system in Tanzania to help the victims of the excessive use of force by police officials and whether it amounts to one of the reasons why there are extreme uses of force by police officials in Tanzania.

An overview of the literature reveals how excessive force is prohibited under the law. Many scholars discuss states' use of force at the international level, which is purely concerned State's with the use of force under the inherent right to self-defence, not individuals. Other scholars write on the principle of proportionality in State actions relating to human rights actions; literature still needs to address the principle within the context of police use of force and whether the principle helps minimize the use of force. Other literature needs to do more regarding limitations on the use of force to protect human rights and the prohibition of excessive force, especially in the Tanzanian context. Many scholars concentrate on the effects of the use of Excessive Force.

Other scholars write about the proportionality principle on the use of force and to what extent the legislators adhere to the proportionality principle during legislation to limit the exercise of rights. The focus is any statute that affects human rights should follow the proportionality principle. They concentrate on the limitations of rights during legislation making to balance the interests of individuals and that of the State. On the other hand, another scholar points out the use of the proportionality principle on the limitation of the exercise of rights under the European Court of Human Rights in adjudication and shows different views about the proportionality principle; the principle of proportionality protects human rights and second, as a

threat/challenge to human rights protection.

Further, another scholar writes on police powers to use force and the rights which are affected by the use of force. He concentrates on the Basic Principles of the Use of Force, Firearms, and other human rights instruments and how they protect the rights. Different kinds of literature focus on human rights standards, and police officials need to be aware of the human rights standards to secure and protect them via training. Some literature points out the powers of police officials are allowed to use force, and the use of force turns out to be brutal and has consequences for human rights. One scholar analyses the Police Force Ordinance in Tanzania and how the law prohibits using force and torture. Another scholar analyses the use of Force in Africa, the Luanda guideline, establishing standards for policing in Africa. The Guideline provides rules that must follow during policing, rule of law, accountability, non-discrimination, proportionality and transparency.

On the part of strategies to regulate excessive use of force by police officials in the execution of their duties, many scholars suggest the way forward should be for police to follow principles stipulated under the laws and answerable to the court of law. Others state that there should be a suitable procedure for channelling complaints against excessive use of force, and reparations to victims of excessive use of force should be adequate. Therefore, most literature focuses on the effects of excessive use of force, the use of proportionality principle in legislation and adjudication, the use of force at the international level and the laws which regulate the use of excessive force at global, regional and national levels. However, this study focuses on the weaknesses of the law in Tanzania prohibiting excessive use of force by police

officers. It suggests strategies to regulate the excessive use of force to fill the gap.

1.5 Objective of the Study

1.5.1 General Objective

This research analyzes laws on the use of excessive force by police officers in Tanzania and its impact on citizens while suggesting strategies to regulate the excessive use of force under the framework of the proportionality principle.

1.5.2 Specific Objectives

The specific objectives of this study are the following:

- i) To examine the adequacy of the legal framework in Tanzania for prohibiting excessive use of force by police officers.
- ii) To examine the implementation of the international standards governing excessive use of force by police officers in Tanzania.
- iii) To examine whether legal accountability and reparations are adequate to regulate the excessive use of force by police officials in the course of their duties.

1.6 Research Questions

- i. Is the legal framework in Tanzania on the prohibition of excessive use of force adequate to protect civilians?
- ii. To what extent can general principles and rules prohibit excessive force be implemented internationally in Tanzania?
- iii. To what extent are legal accountability and reparations adequate to regulate the excessive use of force by police officials in their duties?

1.7 Significance of the Study

This research has a potential contribution to human rights protection in Tanzania. It might help to prevent miscarriages of justice in the future by shedding light on the legal discussion regarding the prohibition of excessive use of force by police officials in Tanzania under the framework of the proportionality principle. The study is helpful as a directive and reference to other legal scholars in assessing individuals' use of excessive force. It might also help the police institution be sensitive and change their "use of force" rules and protect human rights. The study contributes to the accountability of perpetrators of human rights violations and deters other individuals or professionals with the same behaviour. Last but not one, the study added knowledge to society in general regarding the rights of an accused person and civilians.

The study further highlights gaps or *lacunas* in the law, which will, in turn, assist law and policymakers in facilitating the amendment of the relevant laws and improving the policies, which could later have a positive impact towards ensuring the protection of individuals from excessive use of force by police officials.

1.8 Research Methodology

This study uses doctrinal and empirical research methods, which necessitated societal changes.¹⁰⁹

¹⁰⁹Salim I. et al., *Legal Research of Doctrinal and Non-Doctrinal*, International Journal of Trend in Research and Development, Vol. 4 (1), pp. 492 -495, see also Vijay M. G., *Doctrinal Legal Research and Guiding Principle in Reforming the Law and Legal System Towards Research Develop*, International Law Journal of Law, 2017, Vol. 3, No. 5, pp. 128-130.

1.8.1 Doctrinal Legal Research

The research uses doctrinal legal analysis to analyze laws, cases, and international instruments as primary sources. The researcher reviewed legal instruments and cases intending to examine the legal framework in Tanzania for the prohibition of excessive use of force by police officers and the international standards governing excessive use of force. The analysis of the international standards seeks to determine whether or not Tanzania meets obligations and the standards under various global and regional instruments. In examining multiple laws, the researcher employed a historical and analytical approach. Under the historical method, the researcher examines the history of laws prohibiting excessive use of force.

Under the analytical approach, the researcher analyzed whether the weaknesses under the law create problems under human rights protection and suggested strategies to regulate the excessive use of force by police officers while executing their duties. Regarding the secondary sources of doctrinal research, the researcher analyses books, articles, theses, dissertations and reports. The secondary source explains more about the effects of excessive use of force on society, which supplemented the primary data. Secondary data refers to gathered information such as books which assisted in adding value or elaborating or explaining what was already substantively contained in the preliminary data.

Various international instruments reviewed and analyzed include the United Nations Charter, the UDHR, the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Most importantly, crucial instruments which have a direct bearing on the proportionality principle and use of

excessive force have been referred to, namely: the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1965; the Basic Principles for the Use of Force and Firearms by Law Enforcement Officials of 1990 and the Code of Conduct for Law Enforcement Officials of 1979. Similarly, the study has referred to regional instruments such as the African Charter on Human and People's Rights and the Luanda Guideline on Rights-Based Approach to Arrest and Pre-Trial Detention in Africa.

The data collected were analyzed using canons of statutory interpretation and logic and legal reasoning principles, mainly inductive and deductive reasoning. Concerning the statutory interpretation, the research applied the literal meaning rule, mischief rule, golden rule and purposive rule. The literal rule was used in this study to give the actual meaning of the words of a statute without any additions. In some parts, the golden rule was used to remove the absurdity of the provisions of the law,¹¹⁰ In the sense that the researcher used another word with the same meaning as the word used under the respective law to avoid absurdity. In addition, the mischief rule was applied to fill the gap that the Parliament intended to cover under the statute. Moreover, the purposive approach was also applicable not in filling the gap but in fulfilling what the Parliament intended to achieve.

1.8.2 Empirical Legal Research

Empirical legal research becomes necessary when assessing the effect of the laws on the prohibition of excessive use of force in practice. Thus, empirical legal research

¹¹⁰Moni W., *Research Methods for Lawyers and Other Professionals*, Sports link Limited, Nairobi Kenya, 2016, pp. 99-106.

brings a holistic view of the problem. The researcher adopted empirical legal research because it deals with how the problem exists in a societal setting and how the institutions redress the problem of excessive use of force by police officers. The extent to which law is used can only be seen in society as law operates in the community and not in a vacuum. This being the case, empirical research methods are adopted so that the author can ascertain to what extent the laws prohibiting excessive use of force affect society.¹¹¹

The researcher used non-probability and probability sampling design¹¹² To decide on the sample size appropriate for this study. The sample size contained one hundred (100) respondents. A different kind of sampling was used to obtain each sample category for the sample size. A purposive sampling method was chosen based on the respondent's knowledge of the subject or the study. Purposive sampling was used for lawyers, police and human rights activists who possess knowledge of the subject matter. On the other hand, simple random sampling was used on civilians, giving each citizen an equal opportunity to respond to the questions relating to excessive use of force.

Convenient sampling was used in obtaining victims as respondents; the reason behind this method is the researcher relied on available individuals as samples. To police officials, snowball sampling was utilized. The researcher used a few respondents in the population to get others. The researcher used members from the

¹¹¹Salim I. et al. 1, *Legal Research of Doctrinal and Non-Doctrinal*, International Journal of Trend in Research and Development, Vol. 4 (1), pp. 492 -495, see also Vijay M. G., *Doctrinal Legal Research and Guiding Principle in Reforming the Law and Legal System Towards Research Develop*, International Law Journal of Law, 2017, Vol. 3, No. 5, pp. 128-130.

¹¹²Moni W., *Research Methods for Lawyers and Other Professionals*, Sportslink Limited, Nairobi Kenya, 2016, pp. 99-106.

police institution to choose their fellow professionals to obtain information. However, some were unwilling to participate due to fear of being put on record that they were giving information on a topic in which they were involved, and some needed more authority to speak on this aspect.

During fieldwork, the researcher contacted key persons who are dealing with human rights protection and police matters, police officers, human rights activists (journalists, people working under N.G.O.s that deal with human rights and human rights defenders, and individuals who work for the Commission of Human Rights and Good Governance) victims (affected with the use of excessive force) and lawyers in different categories, (magistrates and advocates) and academicians. The categories of academicians contained twenty respondents, while the remaining respondents were represented in the following threshold: 20 advocates, 20 police officers, 10 human rights activists, ten magistrates and 20 citizens who were victims of police violence and normal civilians. During the fieldwork, the researcher examined the law's weaknesses in prohibiting the excessive use of force and the strategies used by various institutions to regulate the excessive use of force.

The researcher used interview and questionnaire tools to obtain data from the field. The list of questionnaires was pre-designed and submitted to ten police officers, seven human rights activists, five normal civilians and five victims of excessive use of force, ten advocates and ten magistrates and five academician-lecturers. This makes a total of fifty-two questionnaires. The questionnaires were formulated to get information on specific themes. Questions in the questionnaires were open-ended and closed-ended. The questionnaire was helpful in this study since it enabled the

researcher to reach out to many respondents at once, making it easier to collect information from a wide variety of respondents. Some questionnaires were posted to specific respondents, like the group of human rights activists, and others were shared via the Internet and face-to-face delivery. The questionnaires which were distributed were all returned.

On the other hand, a structured interview that involved the use of a set of predetermined questions was applied to the readily available respondents, ten police officers, ten advocates, three magistrates, five normal civilians and five victims of excessive use of force, three journalists, and ten assistant lecturers. This makes a total of forty-six questions. Conversely, unstructured interviews that did not follow the predetermined questions were used for one civilian and one victim. Some of the interviews were administered face to face and by the use of electronic media, for instance, phone and Zoom applications, mainly to police officers and to some lawyers. However, meeting the respondents became a challenge due to time constraints and the respondents being far away or having a tight schedule.

Similarly, Secondary sources such as books, articles, reports, theses and dissertations were reviewed to complement the primary sources. This study assessed different scholarly perspectives on the adequacy of laws prohibiting excessive use of force and strategies used to regulate excessive use by police officers. As for the documentary review, the researcher used various libraries, such as the Open University of Tanzania and St. Augustine University Library. Websites were also used to access information from various electronic sources worldwide.

Generally, information collected through the empirical method was first categorized into themes. The information obtained was presented as a narrative in chronological order on the corresponding theme. The researcher used deductive, inductive and analogy reasoning techniques to analyze, present and reach reasoned conclusions. The researcher looked at every theme the major premise surrounding it, and narrowed it down to a minor premise and, lastly, to have a conclusion to every theme while presented.

1.9 Limitations of the Study

The study faced many limitations, for instance, the need for adequate information, particularly on excessive use of force by police officers under the proportionality principal framework. Most writers talk about the use of force by the State, but they have yet to write about the use of force by an individual as an agent of the State concerning the proportionality principle. The reasons behind this are that there is secrecy and confidentiality because it touches the sensitive state machinery. However, this challenge was addressed using literature from other jurisdictions relevant to the topic under discussion. This helped bring new relevant content that facilitated the connection of ideas, especially in the literature review, the conceptual and theoretical framework.

On the other hand, the researcher faced difficulties when writing the historical background of the proportionality principle. The researcher found different documents containing different versions of the history of the proportionality principle, making it hard to extract the general history. The libraries visited needed to have current books related to the theme of the study. The researcher used online

texts, which are expensive, and some websites limited the reader's access to the book unless bought by the reader. However, this challenge was mitigated through a keen analysis of the available literature, and the researcher connected several ideas, which formed a uniform historical outline relevant to the researcher.

Further, the lack of cooperation in some places where the researcher needed to collect data, for instance, to access cases related to the research theme, proved very difficult. The centre's libraries, for example, the Commission for Human Rights and Good Governance in Mwanza, needed books related to the theme or reports that the researcher could access and use in the study. Additionally, some respondents were afraid to give information related to the use of excessive force and the proportionality principle, and some needed an idea concerning the subject matter. This created hardship in data collection. Despite the difficulty, the researcher found other respondents willing to provide additional information to the research.

1.10 Scope of the Study

The study examines the laws regulating police use of excessive force in light of the proportionality principle. It strictly focuses on how the police officers within Tanzania exercise their powers towards citizens in circumstances such as arrest and detention and the use of firearms. It focuses on whether or not police officers act following the laws that govern them. Furthermore, various regional, sub-regional and international instruments are assessed to draw a complete picture of how the international norms regulate the use of excessive force by police officers. This looks at whether or not the domestic legislation has conformed to the standards of such international instruments. Tanzania is chosen as an area because several incidents

connote excessive use of force by police officers, and the State has legally addressed them despite being a signatory to numerous international instruments prohibiting the use of excessive force and calling for proportionality.

1.11 Ethical Considerations

The researcher complied with ethical considerations as follows>

(i) Anonymity and Confidentiality

Generally, research information should be confidential, and all participants are to remain anonymous. This is an exception where the respondent has given their permission for disclosure of the identity. Anonymity relates to separating the participant's identity from the information presented, while confidentiality relates to how much information is stored.¹¹³ Some respondents wanted to remain anonymous as they belonged to the police force department with classified information. Confidentiality was further an issue taken into consideration. All information recorded during the interviews and responses provided in the questionnaires were stored where only the researcher could access them.

(ii) Seeking Informed Consent

Informed consent is essential in the conduct of research. For an individual to be said to have fully participated in the study, they must have done so with permission. They should be able to choose whether they want to participate.¹¹⁴ Informed consent is essential as there should be an honest interaction or correspondence between the researcher and the respondent. To achieve this, the researcher, before collecting the

¹¹³Nickel O., Critical Factors in Police Use-of-Force Decisions, Walden University, 2015, p. 92.

¹¹⁴Saleh A., Examination of Economic Diplomacy in Promoting Investments: The Case of Tanzania, Oman and United Arab Emirates, PhD Thesis, The Open University of Tanzania, 2015, p. 72.

respondents' views, first informed them on the subject under research and its significance. This aimed to make the respondents agree to give information willingly by calculating the risks (if any). It was only after consent was obtained that the researcher proceeded to collect the data from the respondents.

(iii)Researcher Bias

The researcher's role allowed close contact with the materials that were collected. All materials that were collected were impartially reviewed. It is understood that the validity of the literature could be affected by the personal judgment of the researcher. Thus, the research contained materials with diverse opinions about the topic under research and shed light on different perspectives of the research, even those which are against the problem asserted to exist by the researcher.

1.12 Structure of the Thesis

Chapter one includes the reviewed literature, which pinpointed and supported the existence of the problem under research. It points out that proportionality is a human right principle without which certain rights of individuals, including freedom from torture and the right to life, could be curtailed. Chapter two is the conceptual and theoretical framework. Several concepts under the study are discussed, including human rights, the proportionality principle, excessive use, and the relation thereof. A brief history of some of the concepts is also provided to show how they evolved to the way they are in the contemporary era. This part also discusses several theories on why police officers behave as they do.

Chapter three is dedicated to the international perspectives and regional instruments which govern the principle of proportionality concerning police officers' use of

excessive force. Relevant international instruments which correlate with the topic under research.

Chapter four provides for the police officers' accountability from the Tanzanian perspective. It is dedicated to police force mandate and accountability. Here, an explanation of the police authority structure in Tanzania and their roles as stipulated by the domestic laws governing the execution of their duties in Tanzania are discussed, namely: the Constitution of the United Republic of Tanzania, 1977; the Criminal Procedure Act; the Penal Code; the Tanzania Evidence Act; and the Police Force and Auxiliary Services Act. Chapter five analyzes the research findings. It has data analysis and presentation of research findings collected from several sources by the researcher. These sources include documents such as books, reports, government decisions, and legal materials. The methods of gathering facts include literature reading, questionnaires, interviews and legal text tools. It further answers the research questions posed by the researcher in light of the problem statement.

Finally, Chapter Six contains the conclusion and recommendations of the study. It reached a general conclusion that excessive force is contributed by: various weaknesses in the laws, including a lack of reparations mechanisms for victims. The Chapter recommends measures to ensure police officers act within the law and protect citizens' rights against excessive use of force.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

This chapter contains the conceptual and theoretical framework. The first part is a conceptual framework that analyzes different concepts included in the study. The second part is the theoretical framework discussing theories underlying the study, their appropriateness, application and the aid they bring to the study. The conceptual framework explains the relationship between the main concepts of a study and makes the findings more meaningful. It provides the reasons why this research is worth conducting, and it bases on concepts which are the main variable in the study. On the other hand, a theoretical framework guides the researcher to make their scholarly contribution. The theoretical framework limits the scope of the investigation and focuses on specific variables.

2.2 Concepts Related to Excess Use of Force

2.2.1 Policing Process

Police officers or law enforcement officers are members of the force or above the rank of constable. ¹¹⁵Law enforcement officers include all officers of the law, whether appointed or elected, who exercise police powers, especially the ability to arrest and detain. ¹¹⁶ Policing is one of the means states use to respect for and protect human rights of the people in the jurisdiction. Policing is, therefore, what police do to ensure compliance with the law. ¹¹⁷The act of policing comprises the deprivation of liberty of individuals, restoring order and giving aid and assistance in emergencies

¹¹⁵ The Police Force and Auxiliary Service Act, Cap 322 [R.E 2010], Section 2.

¹¹⁶ The United Nations Code of Conduct for Law Enforcement Officials, 1979, Article 1.

¹¹⁷ Ralph C., Human Rights and Policing, 2nd Revised Edition, 2007, pp.17– 39.

and many other police officials' works. ¹¹⁸The objective of policing is the preservation of peace, maintenance of law and order, prevention and detection of crime, guarding offenders and protection of property.

Likewise, police officials during policing are allowed to use force and firearms to achieve the objective. The power to use force and firearms by police officials emerge from State's duty to maintain public order, protect society, protect human rights and ensure the rule of law. Thus, force may be used to ensure compliance with the order, arrest the dangerous suspect and control the crowd.¹¹⁹ Using force in policing follows states' obligations under international law, especially the conditions under international human rights law. In this context, Police officers may use force during policing against any person in custody, charged or convicted of an offence when that person escapes. While force may be lawful and necessary, it may damage property, cause injury, and loss of life, leading to a violation of human rights.

The fact that the law allows police to use force while complying with the requirement of the law, such permission can be abused.¹²⁰ Generally, Police officers are expected to be straight, professional and ethical. However, this is not always the case. Some could have adulterous affairs, while others could commit criminal acts.

¹²¹For example, there could exist some police officers who are "violence-prone" and are responsible for much brutality and excessive use of force that is inflicted upon

¹¹⁸ *Ibid*, pg. 17

¹¹⁹ The United Nations, Use of Force and Firearms in Law Enforcement Officials, Criminal Justice Handbook Series, United Nation Office at Vienna, New York, 2017, pp.1-40.

¹²⁰ Waddington P., Policing Citizens, UCL Press, London, 1999, p. 38.

¹²¹ *Ibid*.

individuals.¹²² There could exist legal prohibition on the use of force. However, it is believed that policing cannot always be "done according to the book".¹²³

Much is to be attributed to the aspect of police discretion in the act of policing as it is unavoidable. The full enforcement of laws is considered impossible as police work under different circumstances, and requiring them to abide by the lawfully would render their work difficult.¹²⁴ Thus, the rules, no matter how good they are, should be applied depending on every circumstance. However, if the law becomes a servant of Discretion, it promotes cynicism and breach of the law. Thus, police officers and their relationship to the law is mitigated by commonsense or reasonability.¹²⁵

Generally, there are six objectives of Policing. First, to ensure the "bad guys"¹²⁶ get their just desserts and the rest of the public remains safe. This entails protecting society and the public in general from lawlessness. To achieve this objective, officers prevent crimes by being present and possibly stumble across an offence which is in progress or using their intuition, training and investigation skills to recognize that something is amiss with a person or situation.¹²⁷ This, however, has to be understood as involving not only the police officers but also non-police organizations and individuals who facilitate the achievement of this goal.¹²⁸

The second objective is to respond to the crime that has been committed. This is known as reactive policing. However, it has been debated whether reactive policing

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.* p.133.

¹²⁶ Meaning people who committed misstates to be punished.

¹²⁷ Waddington P., *Policing Citizens*, UCL Press, London, 1999. P.4.

¹²⁸ *Ibid.* p.10.

is significant in detecting the commission of offences and, thirdly, conducting forensic science in connection with other relevant departments. This is the most crucial function related to the investigation and obtaining of information so that police can act proactively rather than reactively towards a crime.¹²⁹ The fourth objective is peacekeeping. Police officer, as a peacekeeper, seeks to maintain order by using several resources. Peacekeeping involves the maintenance of order, for instance, in a dispute that erupts between individuals or among community members. The work of the police here is passively to guide them to reach an amicable agreement.¹³⁰

Fifth aspect of policing involves helping and assisting individuals. Police officers can also apprehend individuals, although not criminals but have the elements of disturbing the peace. To achieve this objective, police officers have various options to deal with such a problem. This could even include the apprehension of mentally ill individuals for their safety. That of others.¹³¹ This still shows that the police role is so diverse that they could be considered social service providers. This is because the police are continually called upon to perform a lot of services for members of the public that have nothing to do with maintaining order and preventing crimes. Police officers are loaded with duties which are extraneous to their primary functions.¹³² For instance, to provide help to personal acts, help older people and children who are missing and return them home safely.

¹²⁹ *Ibid.* p. 6-7.

¹³⁰ *Ibid.* pp.12-13.

¹³¹ *Ibid.* p.14.

¹³² *Ibid.* p.15.

Last but not least, policing involves the exercise of authority. This entails the ability of police officers to intervene in some incident or a place where a lot of activities are going on, and the area could have authority and be disciplined. They do so as part of their duty to police patrol.¹³³ However, it is clear that in conducting this duty, once the police officers have left, all forms of illegalities resume. This, when looked at closely, does not have a relation towards crime-fighting nor maintaining order, but it has the purpose of asserting command of the area by the police authority. The police assert authority by structuring conversations around their concerns, they display certainty and do not equivocate, and they find it challenging to apologize since that could amount to demeaning themselves and their power.¹³⁴

Generally, police officers, in conducting their duties, are vested with some discretionary powers.¹³⁵ This draws attention to the fact that police do more than just enforce the law and what they are directed to do. Still, they have some room to decide how best they do it depending on the overall prevailing circumstances.¹³⁶ Police acting in strict accordance with the law is questionable as there are apparent difficulties that the law cannot cure in the conditions that they operate in. However, at times, this Discretion acts as a cloak in which prejudice and abuse of power hide, although Discretion is not in itself offensive.¹³⁷

Conclusively, policing is one of the ways states use to protect human rights. Police powers in preserving peace, maintaining law and order, and preventing crime are

¹³³ *Ibid.* p.20.

¹³⁴ *Ibid.* p. 20.

¹³⁵ Discretion refers to the authority of an individual or administration, whether in terms of substance, procedure, or both, which it is free to exercise as it thinks fit. It is the power to exercise a discretion which the courts, at times, cannot interfere with. Discretionary authority can be derived from the law, or it could be based upon convention.

¹³⁶ Waddington P., *Policing Citizens*, UCL Press, London, 1999, p. 38.

¹³⁷ *Ibid.*, p. 38.

part of human rights protection. Police officers, as agents of the State trusted by this power, must act professionally and ethically. During policing, the use of force and firearms is allowed. Nevertheless, its use should follow legal standards. Thus, the concept of policing explains more about the rules and regulations which guide police officers during policing. This task has been thoroughly analyzed in the third chapter of this thesis.

2.3 Use of Force and Excessive Force

The term "use of force" is difficult to define. It has no uniform definition for the lack of the levels of force used by the police. This gets even more difficult when one seeks to define reasonableness. While it is easy to define deadly force as the application of force likely to cause death or serious bodily harm, it is not easy to define the former. In less than-lethal categories, the use of fists, feet, or a nightstick may be easy to recognise and classify, but whether the use was defensive or offensive, reasonable or excessive, will depend on the circumstances.¹³⁸ A specific action or the use of a tactic may be reasonable or necessary to apprehend a suspect or to protect the public, while the very same action or tactic may be unreasonable and excessive without suspect resistance.¹³⁹

Terms such as "improper", "illegitimate", and "unnecessary" are used to describe situations in which an officer's actions are judged to be unreasonable. Since force and excessive force can be defined or measured in several ways, it is impossible to determine where the police force has been excessively or justifiably used.

¹³⁸ Alpert g, & Dunhamr, police use of force, Cambridge university press, united states of America, 2004, p.20.

¹³⁹ *Ibid*. p.20.

Nevertheless, attempts to define the use of force have been made. The level of force that police are required to use in controlling and apprehending a suspect has been said to be objectively reasonable in the view of all the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to arrest.¹⁴⁰

Notwithstanding, the phrase "police use of force" refers to behaviour by an individual that intentionally threatens and attempts to inflict physical harm on others. Although there is no similar meaning of force in the police literature, most literature failed to provide a conceptualisation of force, and few scholars have attempted to define what excessive force is.¹⁴¹ Lack of a comprehensive definition for excessive use of force creates problems to police and public.¹⁴²

It should be noted that the use of force is usually resorted when police officers position their bodies in a confrontation mode through lethal force. It is the ultimate expression of police authority, and it can be abused so that the police can become a proverbial judge, jury and executioner in such circumstances.¹⁴³ On the other hand, literature defined the use of force as the use of physical means that may harm a person or cause damage to property.¹⁴⁴ Physical strength includes the use of hand and body by law enforcement officials, it consists of the use of any instrument weapons or equipment, i.e. batons, chemical irritants, pepper spray, handcuffs and

¹⁴⁰ Graham vs Connor, U.S.A Supreme Court 490, (1989)

¹⁴¹ Geoffrey A., How Reasonable is the Reasonable Man? Police and Excessive Force, University of South Carolina Scholar Commons, Journal of Criminal Law and Criminology, Vol.85, Issue 2, 1994, pp.481-510.

¹⁴² *Ibid.*

¹⁴³ Waddington P., Policing Citizens: Authority and Rights, UCL Press, London, 1999, p. 149.

¹⁴⁴ Adams K., What We Know about Police Use of Force, The National Institute of Justice, 1999, p.4.

dogs.¹⁴⁵

Police possess tremendous powers while they perform duties under precarious conditions. Their general responsibility is to preserve peace and enforce the law.¹⁴⁶ Police are responsible for the protection and are allowed to use force to protect the community and have the monopoly to employ non-negotiable force in situations where force is unavoidable.¹⁴⁷ The force which is allowed is a reasonable force.¹⁴⁸ Accordingly, the use of force should only have resorted to the extent that the force is necessary to achieve a legitimate aim and applied according to domesticated laws, regulations and training.¹⁴⁹ Further, the amount of force used should also be proportional to the threat and legitimate to police action.¹⁵⁰ Thus, police officers are duty bound to use power where appropriate. Where force is misused, it becomes *ipso facto* an assault. However, the problem lies at the heart of what exactly amounts to the force being excessive.¹⁵¹

Nevertheless, the authority to use force by police needs to be better understood, and it is hard to determine the legal use standards. For this matter, police use of force must be assessed, and the best way could be evaluated by separating the concepts of "reasonable force" and "necessary force." Reasonable force analyses whether the force used was proportionate to the threat. In contrast, necessary force analyses

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Castner K., Police Use of Excessive Force: An Examination of Violent Police Citizen Relationship, Temple University, 2014, pp.1-6.

¹⁴⁸ Kenneth A., What We Know about Police Use of Force, National Institute of Justice Report, 1999, pp.1-15.

¹⁴⁹ Charles F., Understanding Police Use of Force: Rethinking the Link between Conception and Measures, Department of Criminal Justice, Wayne State University, Detroit Michigan USA, pp. 558-571. Also see the Basic Principle on the Use of Force and Firearms by Law Enforcement Officials, 1990, Principle 1 and 4.

¹⁵⁰ *Ibid.*

¹⁵¹ Waddington P., Policing Citizens: Authority and Rights, UCL Press, London, 1999, p. 150.

whether or not the police use of force was required. However, the words 'reasonable' and 'necessary' are very broad to the extent that the police are unable to understand during their application.¹⁵²

Generally, these above terms must be defined and understood clearly, and they should be clearly defined than being academically and judicially interpreted. It needs to be clarified as to what amounts to being reasonable and what amounts to being necessary.¹⁵³ Another problem is determining the appropriate level of reasonableness to justify whether or not the force used was excessive. Whether force is excessive or not can be determined by the sheer amount of force used, as in some situations, even the most extreme use of force can be justified. Further, what is appropriate can be differently perceived from several angles and viewpoints, including the most important one, which is that of the person who is using the force.¹⁵⁴

Thus, a "detached reflection cannot be demanded in the presence of an uplifted knife", meaning that individuals, including police officers, might perceive a threat where there is none and use a significant measure of force in countering the same, and in doing so, could act entirely lawfully.¹⁵⁵ The argument that the use of force is only to be exercised where necessary creates an imprecise guide, the same measure of force could be deemed appropriate in some circumstances but could be a criminal assault in others. The police could thus use force in the course of their work, but the question as to whether it was lawful or not is not decided until after the force has

¹⁵² Castner K., *Police Use of Excessive Force: An Examination of Violent Police Citizen Relationship*, Temple University, 2014, pp.1-6.

¹⁵³ Geoffrey A., *How Reasonable is the Reasonable Man? Police and Excessive Force*, University of South Carolina Scholar Commons, *Journal of Criminal Law and Criminology*, Vol. 85, Issue 2, 1994, pp. 481-510.

¹⁵⁴ Waddington P., *Policing Citizens: Authority and Rights*, UCL Press, London, 1999, p. 150.

¹⁵⁵ *Ibid.*

already been used, and the event has occurred.¹⁵⁶

On the other hand, the problem of what amounts to an appropriate force is perpetuated by what constitutes the term "appropriate force". This term differs widely; for instance, brutality applies to the public as a wide spectrum of behaviour, from the merest incivility to a brutal beating. Officers sometimes need to realise that they have used force in certain situations. Even the term "force" itself is sometimes defined broadly; hence it is difficult to imagine an arrest that does not involve the use of force. However slight, such force may be. Therefore, when officers are accused of brutality, use of excessive force or any other allied offence, it is clear that, at times, it is something they have control over or they could not have control over the same.¹⁵⁷

Thus, judicial evaluation of the standard on the reasonableness of police action is needed. Identifying reasonableness is a challenge, and a move must be made beyond the limits of the present analysis method. To solve this problem, the most influential policy on the use of force model policy was developed by the International Association of Chiefs of Police. It states that "Police officers shall use only force that is reasonably necessary to effectively bring an incident under control while protecting the lives of the officers or another."¹⁵⁸ Further, it states that police officers are authorised to use department-approved non-deadly force techniques and issues equipment for resolution of incidence. This includes protecting themselves or others from physical harm or restraining/subduing a resistant individual/to keep an

¹⁵⁶ *Ibid*, p. 149.

¹⁵⁷ Waddington P., *Policing Citizens: Authority and Rights*, UCL Press, London, 1999, p. 150.

¹⁵⁸ *Ibid*.

unlawful situation safely and effectively under control.¹⁵⁹ Officers should be updated and use advanced technology to avoid excessive force. Moreover, the problem emerged that laws and policies do not allow police officers to use unrestricted force, and the law does not limit reasonable force. Law and policies do little to remove the ambiguity, and the question remains, what is excessive force and how to distinguish it from reasonable force.¹⁶⁰

Other writers defined the terms used under the use of force to determine what amounts to excessive force. Adams, K. argues that coercive force includes acts of physical violence-threats and the use of weapons.¹⁶¹ So, if the force applied is excessive and arbitrary, it is by definition also unlawful. Impliedly, illegal use of force means force that violates the principle of legality or force that does not conform to objectivity. Conversely, excessive force applies to situations where force is legal and legitimate, but the type of force is unnecessary or disproportionate. The legitimacy of the use of force is determined by domestic law that is compatible with international human rights obligations.¹⁶²

Generally, the use of force is arbitrary when resorting to force, or the specific type and level of force is not legitimate in light of the particular circumstances. Arbitrary use of force is unlawful and excessive.¹⁶³ Thus, the term excessive force needs to be better researched, and measures are hardly found because there is a lack of data on

¹⁵⁹Geoffrey A., How Reasonable is the Reasonable Man? Police and Excessive Force, University of South Carolina Scholar Commons, Journal of Criminal Law and Criminology, Vol. 85, Issue 2, 1994, pp. 481-510.

¹⁶⁰ Ibid.

¹⁶¹ Adams K., What We Know about Police Use of Force, The National Institute of Justice, 1999, p.4

¹⁶² Ibid.

¹⁶³ Charles F., Understanding Police Use of Force: Rethinking the Link Between Conception and Measures, Department of Criminal Justice, Wayne State University, Detroit Michigan USA, pp. 558-571.

police use of excessive force. Police agencies are reluctant to disclose information, especially data involving excessive force.¹⁶⁴ This makes this study more meaningful. In a nutshell, the term use of force is hard to define and has several meanings. Different terminologies are used to define the use of force and excessive force. Despite the difficulty of explaining these terms, police officers are allowed to use force reasonably as to international standards. In that case, there are many incidences of police brutality, and the use of force is poorly understood, and it is difficult to determine the legal standards of using force. This leads to the use of force by police officers being assessed.

For this reason, the use of force is problematic, and the same measure of force could be appropriate in one circumstance and be criminal assault in others. Where again, to define the use of force is lawful or not is not decided until after the force has been used. Officers only sometimes realise that they have used force in all situations, and judicial was the current standard for the reasonableness of police action. Ultimately, laws and policies need to do more to remove this ambiguity. However, the question remains about excessive force and how to distinguish it from reasonable force.

2.3.1 Reasonableness and Excessive Force

There is a disparity between the concepts of reasonableness and excessive force. Typically, the actions considered reasonable and necessary are those used to apprehend suspects who actively and physically resist the officers. The main concern, however, is whether the circumstances in which police employ force that

¹⁶⁴ Geoffrey A., How Reasonable is the Reasonable Man?: Police and Excessive Force, University of South Carolina Scholar Commons, Journal of Criminal Law and Criminology, Vol 85, Issue 2, 1994, pp.481-510.

are determined to be excessive are unwarranted.¹⁶⁵ Police may use reasonable and prudent force in situations which necessitate the protection of themselves or citizens and also to effect arrests. Thus, the force used should be proportional to the threat and limited to the minimum required for legitimate police action. Any force employed beyond this is to be considered excessive.¹⁶⁶ When judging the appropriateness of the use of force and whether it is reasonable or unreasonable, a crucial factor is to be considered, whether the police officer perceived the threat concerning the suspect or situation.

A reasonably well-trained officer is expected to evaluate a threat based on the realistic danger to them and the tactical situation, and officers should not place themselves in cases where force becomes unavoidable. There is, therefore, a fine line between what is and is not excessive force, and that line is often a subjective one.¹⁶⁷ Due to the difficulties in determining what is and is not excessive force, this study adopts the term excessive use of force, as a level of force that exceeds the suspects level of resistance reasonably.¹⁶⁸ And excessive force is a situation in which more force is used that is allowable when judged in terms of administrative or professional guidelines of legal standards.¹⁶⁹ And reasonable force means that force which is objectively reasonable under the circumstances and the minimum amount of force necessary to affect an arrest or protect the officer or the other person.¹⁷⁰

¹⁶⁵ Alpert G., & Dunham R., (2004), *Police Use of Force*, Cambridge University Press, United States of America, p. 19.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ <https://www.researchgate.net> (accessed 18/8/2023).

¹⁶⁹ National Institute of Justice, *Use of Force by Police*, Bureau of Justice Statistics, United States, 1999, p.4.

¹⁷⁰ <https://www.lawinsider.com> (accessed 18/8/2023).

In summary, differentiating reasonableness and excessive use of force depends on the situation, and the difference is subjective. Police may use reasonable force in cases that need protection, and how he perceives the situation may change to excessive force. The reasonable force may be excessive use of force depending on the situation.

2.4 Concept of Order Maintenance

Maintenance of order is the primary function of the police force and courts. The police aim at bringing the behaviour of those they police in the society to comply with the law and the directive of legal authorities such as police officers and judges.¹⁷¹ In contrast to the concept of order and its maintenance, policing lies on procedural justice and police legitimacy. The latter is used where individuals evaluate whether or not they were fairly treated. It means the difference between satisfied and disaffected individuals.¹⁷² The police are considered the key to order maintenance in public¹⁷³; thus, maintaining order is the police exercising its powers in the regulation of the behaviour which disturbs or threatens to disturb the public peace or which involves a face-to-face conflict among individuals.¹⁷⁴

To sum up, maintenance of order is what police do in their daily activities. It involves control of people's behaviour to comply with the law and instructions from a legal authority. In policing, maintaining order requires evaluating police action

¹⁷¹ Fagan J., & Tyler T., *Policing, Order Maintenance and Legitimacy*, p.1 available at <https://www.ojp.gov/pdffiles1/nij/Mesko/207975.pdf>, (2004), (last visited on 2nd December 2021).

¹⁷² Gau J., & Brunson R., "Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy", *Justice Quarterly*, Vol. 27, Issue 2, p. 256, available at <https://www.ojp.gov/pdffiles1/nij/Mesko/207975.pdf>, (last accessed on 3rd December 2021).

¹⁷³ D'Souza A., "An Examination of Order Maintenance Policing by Business Improvement Districts", *Journal of Contemporary Criminal Justice*, (2020), Vol. 36(1), p. 72,

¹⁷⁴ Thacher D., (2007), *Order Maintenance Policing*, pp. 122-123

during the maintenance of order, procedure, justice and legitimacy.

2.5 Use of Force Continuum

Trained law enforcement officials are expected to resolve conflicts without force, even when resorting to force is inevitable. They should be able to decide through a range of types of force they can use, *albeit* ones which use the minimum force necessary to achieve the required objectives and ensure that such are proportionate to the threat faced. They can scale up when the need arises or down where the situation allows.¹⁷⁵ Thus, the term 'Scale of force' or 'the continuum of force' has the notion that the progressively increasing categorisation of suspect resistance should match a progressively growing officer categorisation response.

It is the specification of the highest level of appropriate response that is to be given in a certain level of suspect resistance.¹⁷⁶ It thus refers to the graphic description of the escalation and de-escalation of force used by police personnel in response to actions taken by a suspect or offender and serves the legal duty of an officer to use only reasonable force in response to the threat reasonably perceived by the officer.¹⁷⁷ It engulfs five components which ought to be taken into consideration by a police officer seeking to resort to the use of force, these include; threat assessment, level of resistance by the accused, the method of force to be utilised, the control techniques, considerations of force escalation and de-escalation and the justification

¹⁷⁵ The United Nations Office on Drugs and Crime & The United Nations Human Rights Office of the High Commissioner, (2017), Resource Book on the Use of Force and Firearms in Law Enforcement, United Nations, p.65, available at https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf, (last visited on 3rd December 2021).

¹⁷⁶ Garner J., & Maxwell C., (2002), Understanding the Use of Force By and Against the Police in Six Jurisdictions, Final Report, National Institute of Justice Office of Justice Programs, p. 6.

¹⁷⁷ Police General Orders No. 274 of 2021.

for the same.¹⁷⁸

Thus, a continuum concerning the use of force specifies in detail the appropriate use of force practices in conformity with the legal and policy requirements. Impliedly, it means that officers should use only what is reasonably necessary to obtain compliance. Garnel J and Maxwell C.¹⁷⁹ provide that there are three measures of force used by police officers, namely: physical force, the continuum of force and the maximum force.¹⁸⁰ Therefore, this concept should be understood as a scale in which the law enforcement officials should be able to decide between different instruments and types of force which allow them to escalate and de-escalate depending on the situation. It needs them to be appropriately equipped and trained with several instruments and techniques on the use of force so that they are aware of the different instruments and can make an informed decision as to when to choose what instrument.¹⁸¹

As previously stated, law enforcement officials need to be able to solve conflicts without using force, even when the force is inevitable. Nevertheless, when the use of force is unavoidable, the level of force should match the situation. The use of force continuum helps police choose the appropriate force level. The scale needs them to be adequately equipped and trained with several instruments to make a wise decision.

¹⁷⁸ *Ibid.*

¹⁷⁹ Garner J., & Maxwell C., (2002), Understanding the Use of Force By and Against the Police in Six Jurisdictions, Final Report, National Institute of Justice Office of Justice Programs, p. 6.

¹⁸⁰ *Ibid.*

¹⁸¹ The United Nations Office on Drugs and Crime & The United Nations Human Rights Office of the High Commissioner, (2017), Resource Book on the Use of Force and Firearms in Law Enforcement, United Nations, p.65, available at https://www.unodc.org/documents/justice-and-prison-reform/17-03483_ebook.pdf, (last visited on 3rd December 2021).

2.6 Human Rights

Human rights cannot be disconnected from excessive use of force and proportionality. The powers of police officers, in another way, are the rights to law enforcers provided by law and what they protect is human rights. Therefore, the term right is an interest recognised and protected by law, respect for which is a duty and disregard for which is wrong.¹⁸² A right is an authorisation to do something, permission to do a specific service or treatment from others, commonly known as positive rights. On the other hand, a bunch of rights which prohibit or restrict someone from doing something, are include negative rights and group rights, which belong to a group of people as opposed to an individual.¹⁸³ The system of rights can be different from one society to another, but the fundamental meanings are alike.

Generally, Rights denote something lawful and permissible, which is recognised by different international, regional and national laws. Rights have the effect of giving privilege, claims, power and immunities to the holders. People with legal rights need protection and the capacity to defend them. If such rights are violated, he has the right to be remedied.¹⁸⁴ There are several rights recognised in our society but not covered by the law. Thus, they do not amount to legal rights, for instance, the right to sexual orientation. One of the reasons is that they are immoral and against human dignity. Rights recognised and protected by the law can be considered legal rights. The perception is limited; while some rights are recognised and protected by law, some are not covered. The important thing is that they are inherent in man.¹⁸⁵

¹⁸²Woodley M., Osborn Concise Law Dictionary, Tenth Ed, 2005, p.356.

¹⁸³ Campbell T., Rights: A Critical Introduction, Routledge, London, 2006, pp.3-10.

¹⁸⁴*Ibid.*

¹⁸⁵*Ibid.*

Historically, human rights principles and ideas originate from Greek philosophy and various religions. Man has come to be seen as an autonomous individual endowed by nature with certain inalienable fundamental rights that could be invoked against the government and should be safeguarded by it. Human rights are the pre-conditions for the existence of human dignity.¹⁸⁶ Several approaches exist in defining human rights; the purpose is to find a loop way to violate human rights. For instance, human rights are regarded as rules or guidelines to unify the world and all governments. This approach goes against the characteristics of human rights that are innate to every human. If accepted, it would mean that human rights are not inherent to all human beings.¹⁸⁷ This approach would allow the government to decide whether human rights are relevant to their people. It would create chaos in society as human rights are essential, and humans cannot survive without them. Human rights are those entitlements which individuals have by being human. This denotes that every human being is equal and has rights in an equivalent amount irrespective of age, sex, race, social class and religion.

Human rights are also defined based on several books and schools of thought. The positivist school of thought defines human rights as entitlements in the legal system which result from the will of the State as the command of the sovereign.¹⁸⁸ Positivists have an idea that human rights are the product of humans, as the law is a product of human beings. In this case, if states are allowed to be a source of human rights, then states will claim impunity, and all the perpetrators of human rights violations would be left free. Some rights could not be categorised as human rights

¹⁸⁶ Payne A., Human Rights Reference Book, University of Peace, South Africa, 2010, p.16.

¹⁸⁷ *Ibid.* p. 20.

¹⁸⁸ *Ibid.*

because they are against government activities. In this way, the State may violate human rights without being questioned. While natural law thinkers view the term in correlation with nature, they concluded it as sometimes being inherent in humanity.¹⁸⁹

States are responsible for protecting human rights; this obligation is for all conditions. This is why in the year 2005, the heads of State who gathered at the World Summit in the Framework of the General Assembly approved principles forming the responsibility to protect human rights under paragraph 138 of the 2005 world summit.¹⁹⁰ It, among other things states that "each State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crime against humanity." Under international law, States stand as duty bearers of human rights obligations.

The international human rights treaties and customary international law impose three duties on States: the duty to protect, respect and fulfil human rights. The duty to respect means that states are obliged to refrain from interfering with the enjoyment of rights by individuals and groups.¹⁹¹ It means that the State has to protect individuals from abuse of the same by non-State actors; duty to enact legislation protecting human rights and to protect individuals. This entails that when a state is aware that the rights are violated, it has to ensure access to impartial legal remedies. These collars' duties apply to all types of rights, civil, political, economic, social and

¹⁸⁹ *Ibid.*

¹⁹⁰ Doc.A/RES/60/1.

¹⁹¹ *Ibid.*

cultural rights.¹⁹²

To sum up, states are responsible for protecting human rights and fundamental freedoms. One of their responsibilities is to respect and fulfil human rights and fundamental freedoms. When legal rights are violated, the victims need protection, including using force and firearms. In that case, the human rights concept cannot be separated from the rules under the proportionality principle and the use of force principles. Police officers have the powers to use force; however, the use of force beyond the required limits may lead to human rights violations.

2.6.1 Human Rights Protection and the Use of Force by Police Officers

Human rights protection means putting the rights into practice and seeing them enjoyed by individuals. It is every individual or government's duty and responsibility to guard human rights for the well-being of all humans. The obligation and *onus* to uphold and defend human rights and fundamental freedoms lies explicitly with the State.¹⁹³ This is inclusive of all arms of the State by adopting or enacting appropriate legislation or ratifying and acceding human rights conventions, taking judicial and administrative measures. For every human right under the legal instruments, there exist three obligations, to avoid depriving, to protect from denying and not to aid the deprived.¹⁹³ The fundamental rule that drives human rights protection under the use of force is that all human beings are entitled to respect for their human rights and fundamental freedoms, including the right to life and security of the person, to be free from torture and other cruel, inhuman or degrading treatment or punishment.¹⁹⁴

¹⁹² *Ibid.*

¹⁹³ Payne A., Human Rights Reference Book, University of Peace, South Africa, 2010, p. 20.

¹⁹⁴ Payne A., Human Rights Reference Book, University of Peace, South Africa, 2010, p. 20.

International human rights law contains rules that regulate the relationship between the State and individuals within its jurisdiction.¹⁹⁵ International regulations require State actors to respect and protect human rights. These obligations are derived from treaties. However, specific international laws provide rules on using force and firearms internationally. For instance, the United Nations Code of Conduct on the Use of Force by Law Enforcement Officials¹⁹⁶(Code) and the Basic Principles on the Use of Force and Firearms for Law Enforcement Officials.¹⁹⁷ The Code of Conduct on the Use of Force by Law Enforcement Official under Article 3 states that, law enforcement officials may use force only when it is strictly necessary to the extent required for the performance of their duties. The document aims at providing standards on the use of force and protects the right to life and physical integrity of the person.¹⁹⁸

The Code and the BPUFF stipulate the standards on the use of force, for instance, when law enforcement officials are allowed to use force and for what purposes, when force is vital to achieving the lawful objective, the type and level of force used to achieve a legal objective, what law enforcement officials ought to consider before use of firearms of force, that they shall as far as possible apply non-violent means before resorting to the use of force and firearms, the proportionality principle should be reflected, and those who commit violations should have access to effective remedies that include access to justice and reparation. These basics are also subject

¹⁹⁵ The United Nations, Use of Force and Firearms in Law Enforcement Officials, Criminal Justice Handbook Series, United Nation Office at Vienna, New York, 2017, pp.1-40.

¹⁹⁶ the United Nations Code of Conduct on the Use of Force by Law Enforcement Officials.....

¹⁹⁷ the Basic Principles on the Use of Force and Firearms for Law Enforcement Officials.....

¹⁹⁸ The United Nations, Use of Force and Firearms in Law Enforcement Officials, Criminal Justice Handbook Series, United Nation Office at Vienna, New York, 2017, pp.1-40.

to the interpretation and elaboration by courts.¹⁹⁹

Therefore, States may develop policies that further develop this framework on using force and firearms for the policing situation. The BPUFF provides for the basic standards that must be adhered to by police officials when carrying out their duties. These are human rights obligations and rules applicable to the use of force by law enforcement officials.²⁰⁰ To meet these standards on the use of force and firearms by law enforcement officials, states need not only an adequate legal and operational framework but also the political will, the resources and good institutional structure.²⁰¹ The regulations or policies which police institutions and States develop should cover the most critical aspects that need to be controlled by the law, for instance, the principles governing the use of force and firearms, instruments to the use of force, rules on accountability and control mechanisms. Human rights protection needs a state to have adequate rules and procedures governing policing.²⁰²

To conclude, the reason behind human rights protection under the use of force is that all human beings are entitled to respect for their rights and fundamental freedoms. One of the institutions that protect human rights is the police force. For human rights to be covered needs adequate rules and a particular way which governs policing, political will, resources and international structure. These acceptable rules, which emerged from a global, regional and national level, are human rights obligations. Therefore, governments may develop policies which further the use of force and

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

firearms.

2.6.2 Human Rights and Policing

Human rights are linked to policing. There are powers in policing that go together with human rights principles, for instance, non-arbitrariness, accountability, proportionality and fair trial. Human rights and policing are two dimensions with different approaches, but they are related. Human rights and policing is a recent research field which explains the relationship between the two. The idea behind human rights and policing is that police officials often consider human rights a hindrance rather than a foundation of their work.

Secondly, police officials are human rights protectors and are simultaneously reported as violators. Police officials protect human rights when preventing crimes and facilitate a peaceful life. As violators of human rights, in places where violation of human rights occurs, police officials are almost involved in one way or another.²⁰³

Police officials are authorised by the State to enforce the law. The State gives them the power to use force when necessary, but the force should be reasonable. Thus, human rights are linked to policing as it aims to restrict police powers, especially using force. At the same time, it introduces the principles which bind them, such as legality, proportionality, accountability and necessity.

This is why human rights became the objective of policing.²⁰⁴ Human rights also go hand in hand with policing, meaning that all police powers shall go together with

²⁰³ Anneke O., *Understanding Policing*, Drukkeerij Giethoorn Ten Brink, Netherlands, 2007, pp. 1-10.

²⁰⁴ Crawshaw R., *Police and Human Rights; A Manual for Teachers and Resource Persons and Participants in Human Rights Programmes*, 2nd Edition, Boston, Martius Nijhoff Publishers, pp. 19-24.

human rights principles and all regulations, including laws, agreements or treaties. Policing has a connection with human rights because policing is a composition of international and regional treaties, conventions, covenants, declarations, guidelines, basic principles and codes of conduct, which are derived from the International Bill of Rights. These standards are binding upon State actors, including police officials. Policing is governed by rules that protect and promote human rights and dignity and are fairly and equally applied to all without discrimination, arbitrariness, or oppression and are subject to adequate oversight mechanisms to ensure that the rule of law is upheld.²⁰⁵ Human rights protection depends on good policing; the use of good laws and principles without which there is a human rights violation. The realisation of human rights depends on suitable enforcement mechanisms.²⁰⁶

Generally, the concepts of human rights and policing depend on each other. They are interconnected, affect each other, and one cannot stand without the other. Human rights are essential to human beings and are protected using different mechanisms. Policing is there to safeguard human rights and prohibit violation of human rights. However, some factors can lead to human rights violations, which include the lack of consideration of the proportionality principle by the police when applying force. Lack of knowledge about human rights is also a factor contributing to the violation of human rights, both to the society and police officials.²⁰⁷ This is because it reduces individual readiness to adhere to the rules established within different conventions and legislation. The level of education among officers can also lead to human rights

²⁰⁵ Florence S., Common Standards for Policing in East Africa, Common Wealth Human Rights Initiative, South Africa, 2010, pp. 1 – 15.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

violations. The command and organisational structure, training curriculum, as well as general policy within the police, are closely related to the protection of human rights.²⁰⁸

In conclusion, human rights and policing are linked. Police officers are human rights protectors, and the rules in policing go together with human rights principles. Therefore, human rights are a foundation of police work.

2.7 Proportionality Principle and Its Theoretical Foundation

Proportionality is a legal norm which sets maximum standards on the force that might be used to achieve a specific legitimate objective.²⁰⁹ The principle provides that harm which is caused to civilians and property must be proportional and not extreme in comparison to the advantaged output.²¹⁰ The principle is generally widely applicable in international law, including international human rights law. It is a fundamental concept of justice which is as old as an organised society, and it can be found in different historical documents and the history of law in various legal instruments.²¹¹ It is believed to have originated from the Catholic and moral, political philosophy and incorporated to legal context. An act is termed unlawful if, in the end, it is not proportional to the objective.²¹²

Proportionality is a legal rule which has different interpretations. One of the interpretations is "action must have a rational means to a permissible end, which

²⁰⁸ *Ibid.*

²⁰⁹ The Academy, Use of Force in Law Enforcement and the Right to Life: The Role of Human Rights Council, Geneva Academy of International Humanitarian Law and Human Rights, 2016, p.1-9.

²¹⁰ Protocol I to the Geneva Convention, 1907, Article 52.

²¹¹ This principle is one of the core essential principles under the European Convention of Human Rights 1950, Article 8 and other legal documents.

²¹² Grant H., & Bradley *et al.*, Proportionality and Rule of Law: Rights, Justification and Reasoning, Cambridge University Press, p.25.

does not unduly invade fundamental human rights." Another principle clarification is, "You must not use a hammer to crack a nut if a nutcracker would do so."²¹³ The principle has been developed since the Aristotle era, which argued that "just is a ratio between two parties mediated by an abstract principle." Aristotle called the proportionality principle distributive justice. That is, what is in what is proportional and what is unjust is what violates the proportion.²¹⁴

Aristotle's view on proportionality was termed vague and too general. However, it appeared to be the first idea of historical sources of the general principle of proportionality for today's proportionality principle.²¹⁵ As time went by, proportionality became a real and defined proposition. Many philosophers explained proportionality in different aspects. Cicero described proportionality as the law of the correct ratio, the proper proposition;²¹⁶ While Aquinas explained proportionality in the law of self-defence.²¹⁷ Aquinas explained that for the defence of self-defence to be accepted in Court, some conditions must exist for the use of force to be just.²¹⁸ He argued that power must be necessary and when used must not be excessive, it must be a proportional force and must also be exercised by the sovereign according to rules.²¹⁹

Aquinas' theory of proportionality in self-defence became the general principle of law. The principle not only applied to States in their mutual relations but even to

²¹³Basic Bulletin, The Principle of Proportionality and the Concept of Margin of Appreciation in Human Rights Law, Issue 15, December 2013, pp. 1-3.

²¹⁴Peyton H., *Equity: In Theory and Practice*, Princeton University Press, UK, 1995, pp.20-30.

²¹⁵ Peyton H., *Equity: In Theory and Practice*, Princeton University Press, UK, 1995, pp.20-30.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

individual relations.²²⁰[40] Later on, Aquinas²²¹ introduced the "double effect principle", which reflected the proportionality principle. It states that on the use of force in self-defence, the killing of a person is justified provided that one does not intend to kill him but as a side effect of promoting some good end. He believed that in certain situations, it is allowed to cause harm as a side effect of bringing about a good result, even though the action is not permissible to cause such harm. This is because he believed that the means used justified the end.²²²

On the other hand, Gracius led the transition of the proportionality principle to modernity, connecting the idea of justice as a proportion to the concept of interest balancing. The proportionality principle during Gracius time developed and became a universal principle found in the ordinary and civil law legal systems and applicable before national and international courts alike.²²³ The ancient concept of justice as *the ratio*, the mediaeval concept of proportionality self-defence has been expanded to be used in self-defence cases not only among states but also among individual persons.

Consequently, the principle of proportionality became famous and used in public international law related to self-defence. As stated, the principle is used in self-defence cases between states and individuals in national police affairs and administrative law. The right to self-defence is justified only when force is exercised in proportion to the threat. Any person who acts against the right of self-defence

²²⁰ *Ibid.*

²²¹ He is a Doctor of the church, a Roman Catholic priest and a classical proponent of natural theology (1225-1274).

²²² Aristotle, *The Philosophy of Law: Theory, Practice and Justice*, LessbethHuppes-Cluysenaer Press, New York, 2013, pp. 1-28.

²²³ *Ibid.*

would receive punishment proportional to the crime.²²⁴

Generally, the above concept of law is recognised in different countries. The Canadian Constitution of 1867 allowed the government to limit constitutional rights and freedom to reasonable extents. The Canadian courts use the proportionality principle in emergencies when determining whether or not a limitation of rights is necessary. In 1963, the principle started to be officially used in all cases where fundamental freedoms were infringed; hence it was regarded as the principle of constitutional law. Similarly, France applies the proportionality principle in striking a balance between costs and benefits when the Court adjudicates on matters concerning constitutional rights.²²⁵ The principle has also been used as a standard of constitutional review and as a key factor driving global convergence in constitutional norms.²²⁶

On the other hand, proportionality principle in Germany originated in the 19th Century in what was known as Prussian administrative law.²²⁷ It was the first principle to be developed by German administrative courts and taken to be significant principle of judicial governance by several States and by various international regimes.²²⁸ The principle-imposed constraints on police powers which infringed individual liberty or rights to property.²²⁹ This happened in the late 18th Century when the police institutions acted on proportionality principle as additional

²²⁴ Engle E., The History of the General Principle of Proportionality: An Overview, Humboldt University Berlin, Faculty of Law, pp. 1-11.

²²⁵ Hanri M., *et al.*, The Constitutional Protection and Regulation of Property and Its Influence on The Reform of Private Law and Land Ownership in South Africa and German, New York, pp.127-128.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

rule to police actions. Through the principle, the means adopted by the police had to be suitable to reach the purpose of the law; failure of which made the police actions unlawful.²³⁰ Later, the proportionality principle was adopted in 1949 by the Constitutional Court and applied to the law limiting fundamental rights.²³¹ Since then the proportionality principle became applicable whenever the Constitutional Court had to review the law limiting fundamental rights or their administration.

Generally, the Federal Constitutional Court of Germany developed the proportionality principle with three elements. The first was suitability, in which the measure should be suitable for achieving the desired objective.²³² The second was a necessity, in which a less restrictive means should be used if it is equally effective. Thirdly, proportionality, whereby the measures should be proportionate to the objective.²³³ Since then, Germany became recognised as a model for applying the proportionality principle. Later on, the proportionality principle was expanded to European law²³⁴ through a system of judicial review in the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ).

Currently, the proportionality principle is believed to have been a source of fairness, justice and hope for a better defence of human rights in a democratic society.²³⁵ For

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² Hanri M., *et al.*, *The Constitutional Protection and Regulation of Property and Its Influence on The Reform of Private Law and Land Ownership in South Africa and German*, New York, pp.127-128.

²³³ Basic Bulletin, *The Principle of Proportionality and the Concept of Margin of Appreciation in Human Rights Law*, Issue 15, December 2013, pp. 1-3.

²³⁴ Jesper R., *The Ethics of Proportionate Punishment, A Critically Investigation*, Kluwer Academic Publisher, USA, 2000, pp. 11-13.

²³⁵ The use of proportionality in Court is also understood as being the key element in the protection of human rights which different Conventions provide. Having the proportionality principle to legislation enables the Court to implement the same. When courts apply the Convention and legislation, they protect international, regional and national rights. The proportionality principle protects the rights of accused persons and the victims. When a person committed a crime still, he was subject to human rights. The principle also found its way under punishment theories which provide that punishment of certain crimes, for instance, in self-defence cases, punishment must be proportionate to the threatening/ aggressive force,

example, the principle is contained in the Charter of the Fundamental Rights of the European Union where article 52(1) states that "actions shall be subject to the principle of proportionality limitations on the exercise of the rights." Thus, the principle has become one of the most decisive elements of human rights protection in the European Union.²³⁶ The principle is presently well established under binding instruments in the European Union law. For example, Article 5(4) of the Treaty of the European Union entrenches the principle of proportionality.²³⁷ The principle is further applied to administrative law and is similarly understood as the core principle of criminal law, which shapes the correlation between punishment and crime.

Similarly, the principle is essential and applicable to African countries on the protection of constitutional rights²³⁸, particularly when determining the legality of limitations on human rights.²³⁹ Likewise, Tanzania contains the principle under the provisions of the Criminal Procedure Act²⁴⁰ which states that a police officer or any other person shall not, in the course of arresting a person, use more force or subject the person to greater indignity than is necessary to make the arrest or to prevent the escape of the person after he has been arrested. Similarly, South Africa embodies the principle in its 1993 interim Constitution and the subsequent 1996 Constitution. The Court later tested it in the case of *Coetzee v Government of Republic of South Africa*.²⁴¹

refer Grant H., & Bradley *et al.*, Proportionality and Rule of Law: Rights, Justification and Reasoning, Cambridge University Press, p.25.

²³⁶ Ranchordas S., and Boudewijn W., (Ed), The Judge and Proportionate Use of Discretion: A Comparative Administrative Law Study, 2016, pp. 1-11.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ Section 21.

²⁴¹ 1995 (4) SA 631,656.

2.7.1 Legal Basis of the Proportionality Principle

The proportionality principle got its legal basis from the ancient codes, including the Code of Hammurabi, the Hammurabi codex, old testimony (an eye for an eye), and Babylonian laws code, which dates from about 1722 BC.²⁴² The Code of Hammurabi²⁴³ is one of several sets of laws in the ancient near East which was used as an example in the fundamental law regulating the government like a primitive constitution. The Hammurabi Code covered different areas like trade, the duties of workers, slavery, and theft. The Code, under Rules 196 and 200 stated that if a man put out the eye of another man, his eye shall be put out; if he breaks another man's bone, his bone shall be broken; if a man knocks out the teeth of his equal, his teeth shall be knocked out. The Code stated that punishment should be proportional to the offence committed. This shows proportionality found its legal basis since then, and the Code became the legal basis of the proportionality principle.²⁴⁴

However, the modern proportionality principle protects the rights of individual persons. It is not based on 'an eye for an eye' as with the former proportionality principle.²⁴⁵ The Magna Carta²⁴⁶ is considered one of British history's most influential legal documents. Lord Denning²⁴⁷ called the document 'the greatest

²⁴²Yataka A., *The Margin of Appreciation Doctrine and the Principle of Proportionality In the Jurisprudence of the ECHR*, Hart Publishing, UK, 2002 p.189, there are three factors underlying rationales in the development of the proportionality principle in the Ancient Roman and Greek tradition, there was a need to restrict the private need for revenge but to ensure public order by allowing moderate and proportional offence, the notion of justice in Roman and Greek need proportionality principle, and Greeks philosophers viewed proportionality as an essential tool for achieving efficiency.

²⁴³ 1705-1750.

²⁴⁴ The Code of Hammurabi, 1705-1750.

²⁴⁵ The Code of Hammurabi, 1705-1750.

²⁴⁶ 1215, also the proportionality principle found its roots in the image of balancing in Egyptian tombs in painting symbols. If the deceased had committed a heavy wrong, his access to the realm of the dead was derived. This symbol of balancing proportion has its roots back to ancient Greeks and Egyptians and stands as a symbol of justice and is proportional.

²⁴⁷ 1899-1999.

constitutional document of all time and the foundation of the freedom of the individual against the arbitrary authority'.²⁴⁸ The Magna Carta embodies a proportionality principle mandating that the punishment should fit the crime. The Supreme Court in England claimed the authority of the Magna Carta when infusing the prohibition against cruel and unusual punishments with a proportionality principle.²⁴⁹

Specifically, the Magna Carta embodied the proportionality principle under three chapters²⁵⁰, which provided that a penalty shall not exceed the degree of the offence. Clause 20 states that for a trivial offence, a free man should be fined in proportion to the degree of his offence and for a serious offence, the exact proportionality shall apply. Similarly, Clause 21 that they should fine offenders equal to or proportional to the gravity of their offence, while Clause 39 provides that no one shall be punished or penalised except by the law. In that case, the proportionality principle finds its starting point in the Magna Carta document.²⁵¹

Similarly, the proportionality principle finds its legal basis under the English Bill of Rights of 1689. As an Act of the Parliament of England that deals with constitutional matters, the English Bill of Rights lays out basic civil rights. It lays down limits to the monarch's power and sets out the rights of parliament. Furthermore, the Bill sets out certain rights of the person and limitations, including the prohibition of cruel and unusual punishment. It specifically contained phrases that point out the

²⁴⁸Yataka A., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Hart Publishing, UK, 2002 p.189.

²⁴⁹Yataka A., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Hart Publishing, UK, 2002 p.189.

²⁵⁰ 20 -22.

²⁵¹Magna Carta, 1215.

proportionality principle. For example, the phrase which prohibits "cruel and unsound punishment" and the one prohibiting sentence considered disproportional to the gravity of the crime committed.²⁵²

The principle of proportionality in England is rooted in the English Bill of Rights. This is through the language adopted in the 8th Amendment, which stated that a right to be free from disproportionate punishments is embodied through the cruel and unusual punishment provision of the English Declaration of Rights of 1689. Later on, the English Bill of Rights influenced North America, and the Constitution of the United States, which enshrined provisions such as no excessive fine should be imposed; no cruel and unusual punishment should be inflicted on people, and the right to be free from disproportionate punishment.

Apart from the above statutes, precedents articulate the principle. Precedents are used when there are lacunae in the law.²⁵³ For instance, in *Kreutzer's case*,²⁵⁴ which is to be considered a starting point of this principle, and the police invoked a provision which empowered them to adopt such measures as necessary for the maintenance of public order. The Prussian Court held that to meet the principle of necessity, the measure must not exceed an intensity of what was required by the perused

²⁵² The English Bill of Rights 1689, Article 10.

²⁵³ Joseph M., *Legal Methods*, Gunewe Publishers Mwanza, Tanzania, pp.50-77.

²⁵⁴ 1882 also see Robert, T, *Legitimate Expectation and Proportionality in Administrative Law*, Hart Publishing, 2000, p. 5 that the principle known as a general principle of law and limits government power can also be traced to the international *handelsgesellschaft* case. The case concerned a challenge to community provision on the common organisation of the agricultural market as it infringes the proportionality principle derived from Article 40 (3) of the European Economic Treaty of 1957. The European Court of Justice counterbalances the effects of market regulation measures which restrict economic freedom and holds that a public authority must not impose obligations on citizens except to the extent to which they are strictly necessary for the public interests to attain the measure's purpose. In this case, the court treaty proportionality is the general principle of law, similar to the principle which respects fundamental rights. Since then, it has been believed that this is the case the proportionality principle found its origin.

objective.²⁵⁵ It is from this case law that the Federal Constitutional Court of Germany developed the proportionality principle with three elements, namely: suitability measure, measure on necessity and the objectivity measure.²⁵⁶

European Court also maintained the above position on Human Rights in its jurisprudence. For example,²⁵⁷ in the case of *Meadow v. Minister for Justice Equality and Law Reform*²⁵⁸ the Court considered whether a proportionality analysis generally applies to administrative decisions that have an input on one's constitutional and fundamental rights. In this case, the Supreme Court has introduced a general requirement for using the proportionality principle in all administrative action. So, where individual rights implication is a potentially monumental one that might have a wide-ranging implication for administrative decision-making in this jurisdiction for quite some time to come, the principle should be applied.²⁵⁹

Chief Justice Murray, in this case, had the following to say: "...in examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense, I see no reason why the Court should not have recourse to the principle of proportionality in determining those issues... the principle of proportionality is a means of examining whether the decision meets the test of reasonableness. Suppose the decision has potential

²⁵⁵ Robert, T, *Legitimate Expectation and Proportionality in Administrative Law*, Hart Publishing, 2000, p. 5

²⁵⁶ *Ibid.*

²⁵⁷ Robert T., *Legitimate Expectation and Proportionality in Administrative Law*, Hart Publishing, 2000, p.5.

²⁵⁸ 2010.

²⁵⁹ The case concerned an applicant for asylum in Ireland who claimed that she suffered a real risk of persecution if returned to Nigeria because she would be forced into a marriage arranged by the father and subjected to female genital mutilation. The applicant had been refused asylum on the basis that she was determined not to have made out a well-founded fear of persecution on refugee connection ground and was subsequently unsuccessful before the refugee appeals tribunal, which was satisfied that she had established a credible connection between her circumstances and forced marriage and FGM. On applying for leave to remain in the State, the applicant claimed that forgoing her return to Nigeria would violate her rights in both national and international law, given the severity of the danger that it was alleged awaited her there.

implications for individual rights. It is inherent in the principle of proportionality that where there are severe limitations for the rights, particularly the fundamental rights of individuals as a consequence of an administrative decision, the more substantial must be the countervailing considerations that justify it.²⁶⁰

Similarly, Denham J. held that "Where fundamental rights and freedoms are factors in a review, proportionality principle is relevant in analysing the reasonableness of a decision. This is inherent in the test of whether a decision is reasonable."²⁶¹ Thus, in determining the reasonableness of a decision, the Court must consider whether or not proportionality analysis was engaged. This led to the question of how a proportionality determination could be established and to the question of whether or not the decision maker is obliged to reveal the basis of the decision and, in particular, the extent to which proportionality was taken into account to the person concerning whom the decision was made.

2.7.2 The Rationale behind the Proportionality Principle

This part concerns the fundamental reasons for the use of the proportionality principle. The principle is applicable in almost every international and national legal system and underlies the international legal order. One of its functions is protecting human rights in conflicts and incidents where public and individual interests or rights conflict. The principle of Proportionality is applicable in many situations for human rights protection. Here are some incidences of the proportionality principle and its justification for human rights protection.

²⁶⁰ *Meadow v Minister of Justice, Equality and Law Reform* [2012] 2 IR 701.

²⁶¹ *Ibid.*

(a) Concerning War

As a matter of principle, when a party commits a lawful attack against a military objective, the principle of Proportionality will come into play whenever there is collateral damage, that is, civilian casualties or damage to a non-military objective. As formulated in the first Additional Protocol to the Geneva Convention of 1977, attacks are prohibited if they cause incidental loss of civilian life, injury to civilians, or excessive damage to civilian objects concerning the anticipated concrete and direct military advantage of the attack. An example can be drawn from the U.S. attack on the Amiriyah bunker in Baghdad on 13th February 1991, where an aerial bomb attack killed at least 408 civilians.²⁶² The shelter was used in the Iraq-Iran war as the Persian Gulf war by hundreds of civilians.

According to the U.S. military, the shelter at Amiriyah had been targeted because it fits the profile of a military target or objective. If it was a military objective in which civilians were sheltering, an attack on the bunker would be lawful, subject to the principle of Proportionality. According to Aaron, F., The proportionality principle creates a permanent obligation for military commanders to consider the results of the attack compared to the advantage anticipated.²⁶³ Similarly, the principle is also applicable in attacks to prohibit war crimes.²⁶⁴ This is contained in Protocol II and Amended Protocol II to the Convention on Certain Conventional Weapons,²⁶⁵ and under the Statute of the International Criminal Court which provides *among other*

²⁶² Aaron F., Interpreting Proportionality Doctrine Through The Lens of International Custom, Arizona State University College of Law, *Yale Journal of International Law*, 1993, pp. 1-10.

²⁶³ Aaron F., Interpreting Proportionality Doctrine Through The Lens of International Custom, Arizona State University College of Law, *Yale Journal of International Law*, 1993, pp. 1-10.

²⁶⁴ The Rome Statute of the International Criminal Court, 1998, Article 8(2).

²⁶⁵ Protocol II to the Convention on Certain Conventional Weapons, Article 3(3); Amended Protocol II to the Convention on Certain Conventional Weapons, Article 3(8).

things that, "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be excessive concerning the concrete and direct overall military advantage anticipated constitutes a war crime in international armed conflicts." ²⁶⁶

Consequently, numerous States have adopted legislation which makes it an offence to carry out an attack which violates the principle of Proportionality and links the principle with the concept of humanity. The concept of humanity also confirms the basic immunity of civilian populations and civilians from being objects of attack during armed conflicts. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties that may occur during attacks against legitimate targets, provided that casualties are not excessive concerning the concrete and direct military advantage anticipated.²⁶⁷ In that sense, the proportionality principle is used to establish a link between the concepts of military necessity and humanity. In the end, this implies that the collateral civilian damage arising from military operations must not be excessive concerning the direct and concrete military advantage anticipated from such operations. ²⁶⁸

(b) In the Courts of Law

The principle is also used in delivering justice in courts of law. The courts use the proportionality principle to reach a rational judgment. One of the tests used by courts is the suitability test which refers to the relationship between the means and the end.

The aim is to check whether the chosen measure is suitable or appropriate to achieve

²⁶⁶ ICC Statute, Article 8(2)(b)(iv); see also UNTAET Regulation 2000/15, Section 6(1)(b)(iv).

²⁶⁷ Aaron F., *Interpreting Proportionality Doctrine Through The Lens of International Custom*, Arizona State University College of Law, *Yale Journal of International Law*, 1993, pp. 1-10.

²⁶⁸ *Ibid.*

the proposed purpose. The necessity test supports the suitability test. Necessity is one of the elements of Proportionality used by the court to assess whether the chosen measure is necessary to achieve the proposed goal. The standard chosen should be least restrictive on the given norm, suitable and essential and should not impose a burden on the individual. Courts use these grounds to decide on a given case.²⁶⁹

The proportionality test is used around the world to adjudicate human rights disputes. The European Court of Human Rights even recognises it as protecting individual rights. The intention is to find a fair balance between the community's general interest demands and the requirements for protecting the individual's fundamental rights. Such an appropriate balance is struck by applying the principle of Proportionality, and the European Convention on Human Rights ensures that the limitations placed upon an individual's protected right are imposed only if they follow the law.

The principle also applies in labour matters at the courts since different distributions of contractual powers characterise employment relationships. Therefore, one of the essential functions of labour law is precisely to re-balance this unequal power distribution in the contract and to avoid the abusive exercise of power on the employer's side.²⁷⁰ What courts establish is that the measure that interferes with the right has to attain the legitimate aim. The measures should impair as little as possible the affected rights. The measure has to represent a net gain when the reduction in enjoyment of the request is weighed against the level of realisation of the aim of the

²⁶⁹Dolzhikor A., The European Court of Human Rights on the Application of Proportionality Principle in "Russia" Cases, Atlay State University, Law Department, 1950, Cases pp.1-10.

²⁷⁰Piera L., The Reasonableness and Proportionality Principle in Labour Law, Law Department, University of Calgary, Italy, 2008, pp. 1-19.

measure.²⁷¹

When determining the lawfulness of legislative and administrative measures, national courts apply the proportionality principle as a general principle. The proportionality principle is widely preferred for managing disputes involving rights provisions and State or public interest conflicts. The principle is connected with the wish to secure legitimacy for a decision and the justification of the decision. The fact that law is not a science or objective science makes it difficult to determine the exact meaning of the law. Thus, the justification of decision-making by reference to the principle of Proportionality can imply more efficient decision-making.²⁷²

The use of proportionality safeguards against unlimited legislative and administrative powers, according to which administrative authority may only act precisely to the extent needed to achieve its objective. The public authority need not infringe on fundamental human rights but protect the same. The principle further guides that all statutes that affect human rights should be proportionate and reasonable.²⁷³

(c) In Governments and States

One major purpose of the principle of Proportionality is to limit state powers. States must not act disproportionately to achieve a legitimate aim. The principle of Proportionality, as a legal principle, safeguards against the unlimited use of legislative and administrative powers and is considered to be a part of the "rule of

²⁷¹Mathias K., and Moritz M., Proportionality A Benefit to Human Rights? Oxford University Press and New York University School of Law, 2012, pp. 23-34.

²⁷² *Ibid.*

²⁷³ *Ibid.*

common sense," according to which an administrative authority may only act to exactly the extent that is needed to achieve its objectives.²⁷⁴

Case law has clarified that a sliding scale applies to the use of proportionality 'the more substantial the interference, the more that is required to justify it'; in particular, the State must 'not use a sledgehammer to crack a nut'. In this situation, the burden lies on the State to justify whether interference is proportionate. Before a State interferes with the right, questions to be asked are, does the policy or measure in question pursue a sufficiently important objective? Is the rule or decision under review rationally connected to that objective? Are the means adopted most necessary to achieve that objective? Does the measure achieve a fair balance between the interests of the individual(s) affected and the wider community, that is, whether an action constitutes a proportionate means of achieving a legitimate aim?

The principle of Proportionality requires each decision and measure to be based on a fair assessment and balancing of interests and a reasonable choice of means. In other words, any action undertaken by State must be proportionate to its objective. The principle of Proportionality helps States to guide measures by a public authority that affects basic human rights. That measure chosen must be appropriate to achieve the objective intended, necessary to achieve the objective designed; that is, there are no less severe and reasonable means of achieving the aim that the person concerned can

²⁷⁴Tor-Inge H., The Function of the Proportionality Principle in European Union Law, *European Law Journal* Vol. 6 No. 2, 2010, pp.1-5 Also proportionality principle originating in continental administrative law, it has more recently been described as intrinsically connected to the new wave of constitutionalism. It has been defused around the world since the world war. It is widely perceived as a preferred procedure for managing disputes involving an alleged conflict between rights claims between a right provision and a state / public interest or between a private good and a state or public interest. The essence of the proportionality principle is that it makes it possible to combine a liberal right-based constitutional rationale with a strong commitment to a welfare state.

reasonably be expected to accept the measure in question. The *International Handelsgesellschaft* case of 1970 states that "a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the measure's purpose. Since then, the proportionality principle has become one of the essential fundamental principles for human protection.

(d) As a Constitutional Principle

Proportionality is a legal construction and methodological tool. The principle has four components, proper purpose, rational connection, necessity means and proportionality *strict sensu*. The components used as core principles to limit clauses to legal instruments.²⁷⁵ These are the constitutional mandate requirement. Any law limiting a constitutionally protected right must meet the test of Proportionality, especially proportionality *stricto sensu*. The proportionality principle is the best tool to determine a proper relation between the aim and the means, meaning the benefits gained and the harm caused to the use achieved by fulfilling the purpose and the harm caused to the constitutional right. An advantage gained by the public and harm caused to the constitutional right through the means selected by the law can be analysed.

The proportionality principle is used as a criterion for constitutional review, where a constitutional court evaluates whether the State interferes with specific human rights. Constitutional courts must determine, using the proportionality principle, how far

²⁷⁵Emilion N., *The Principle of Proportionality in European Law: A Comparative Study*, London and Kluwer Law International, London and Maxwell, 1996, pp. 26-37.

certain rights or interests can be protected. The proportionality principle is a rule under constitutional law and has been considered the ground for review. As a potential weapon in court.²⁷⁶ The court can also interpret the principle to facilitate arguments of a particular principle or policy that protects individual rights. Principles of law have internal and external functions which are respectively employed to secure efficient decision-making and to assure the same kind of predictability.²⁷⁷ Thus, it is based on the reasons mentioned above that this principle is contained in numerous decisions concerning the question of the relationship between individual rights and constitutionally protected interests.²⁷⁸

(e) In Other Fields

The proportionality principle can apply to many situations to protect individuals from arbitrary decisions. The principle is not only used in law but also in other fields. For instance, the Mental Capacity Act²⁷⁹ predictably addresses the issue of physical restraint. It advocates that restraint may only be used where it is 'necessary to protect the person from harm and is proportionate to the risk of harm. As stated in the Act, a proportionate response' means 'using the least intrusive type and minimum amount of restraint to achieve a specific outcome in the best interests of the person who lacks capacity.' In circumstances where the use of force may be necessary, the Act states that careers and healthcare and or social care staff should use 'the minimum amount of force for the shortest possible time.'²⁸⁰

²⁷⁶ *Ibid.*

²⁷⁷ Tor-Inge H., The Function of the Proportionality Principle in European Union Law, *European Law Journal* Vol. 6 No. 2, 2010, pp.1-5.

²⁷⁸ Dragical., The Principle of Proportionality as a Criterion for The Constitutional Review, pp.1-5.

²⁷⁹ 2005.

²⁸⁰ Mental Capacity Act, 2005 Code of Practice, TSO (The Stationery Office), 2007.

For instance, to hold a person's arm while crossing the road when they do not understand how safe it is. It would not be a proportionate response to negate the risk by stopping the person from going outdoors completely, but having a secure lock on a door that faces a busy road may be appropriate. The Mental Capacity Act advocates those careers and healthcare or social care staff should 'consider less restrictive options before using restraint' and, where possible, seek the views of others who are involved in the person's care as to what action they think may be necessary to protect them from harm.²⁸¹

2.8 Proportionality Principle and Human Rights

The freedom of human beings cannot be absolute. The rights protected under international legal instruments and the national constitutions have limitations. The principle of Proportionality seeks to provide an accurate answer between human rights conflict and public interest.²⁸² Proportionality assesses the right in two ways; substantive evaluation and moral argumentation before concluding. Any action which interferes with the rights has to pass the proportionality requirement; that the action has proper purpose meaning the constitutional right cannot be limited for any reason, the limitation of the right must be legitimate and takes into account on democratic values of the society, adequacy meaning the intervention a right must be suitable and appropriate to achieve a goal, necessity and Proportionality *strict sense*.²⁸³

²⁸¹*Ibid.*

²⁸²Dolzhikor A., The European Court of Human Rights on the Application of Proportionality Principle in "Russia" Cases, Atlay State University, Law Department, 1950, Cases pp.1-10.

²⁸³*Ibid.*

There are doubts about how and when the proportionality principle became one of the human rights principles. International custom justifies its application to international legal instruments and human rights documents. The unwritten character of the proportionality principle has caused many arguments for its application. Its justification is within international customary law. The international customary law and evidence of general practice recognised by States as legally binding rules form its justification.

Custom is the regular source for international law so that international tribunals can use it.²⁸⁴ The doctrine belongs to customary law principles. Customary International law is the only source of legal accountability for the proportionality principle in military activity undertaken by nations, state agents and individuals. The non-signatories of the treaties are bound by principle as customary international law principle²⁸⁵ and hence, still making them accountable for any violation of human rights.²⁸⁶

Internationally, it functions at two levels as a state liability and individual criminal liability for military commanders and nationally as personal accountability for human rights violations.²⁸⁷ The proportionality principle has the legal status in the field of human rights protection in a sense that individuals and States should respect human rights. Respecting human rights, however, does not mean human rights should remain unlimited. The rights need to be exercised following some rules and

²⁸⁴ *Ibid.*

²⁸⁵ Estreicher S., Privileging Asymmetric Warfare? Defenders Duties under International Humanitarian Law, *Journal of International Law*, 2011, pp. 425-428.

²⁸⁶ *Ibid.*

²⁸⁷ Fletcher P., & David J., Reclaiming Fundamental Principle of Criminal Law in The Darfur Case, *Journal of International Criminal Law*, pp.539-342.

limits. Human rights may be restricted to ensure the very existence of the State, to perpetuate the existence of democracy, and to public health and to provide public education and morals.

The relationship between the State and the individual is two folds: the State safeguards the rights of individuals and individuals have to exercise their rights to protect the peaceful existence and stability of the country.²⁸⁸ The proportionality principle and human rights can never be separated. The Proportionality principle protects individual rights and public interests and guides police officials when policing. Proportionality and human rights are associated with each other for human rights protection. The principle of Proportionality has a connection with human rights and is found in human rights documents. It shows the limits to restitution on requests that can be permitted to an extent necessary to ensure legitimate public purpose.²⁸⁹

2.9 Proportionality Principle and Use of Excessive Force

There is a connection between the proportionality principle and the use of force. There is a consensus on its methodology that the use of the proportionality doctrine guarantees substantive rights and limits the use of force. To protect the rights, the State has to enact laws and measures to avoid depriving the right. Proportionality sets out four questions for any legislation in evaluating whether the limitation of a right is justifiable.²⁹⁰ These questions are: Does the legislation establishing the

²⁸⁸Dolzhiokor A., The European Court of Human Rights on the Application of Proportionality Principle in "Russia" Cases, Atlay State University, Law Department, 1950, Cases pp.1-10.

²⁸⁹Yataka A., The Margin of Appreciation Doctrine and the Principle of Proportionality in Jurisprudence of The ECHR, Hart Publishing, USA 2001, pp.186 -190.

²⁹⁰The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, 2002, p.189.

limitation of rights provide a legitimate objective? Are the means suitable to the objective? Are the means in the sense of the aim necessary? Does the benefit have effects on the limitation on the right? The questions imply that there must exist Proportionality between the purpose to be comprehended and the measures of any legislation that protects human rights.²⁹¹

Proportionality limits misuse of power by the government and other public officials to the necessary level depending on the circumstances. Policing involves police officials and civil societies, comprising police officials' powers to arrest, detain and use force. In this way, the government has to choose procedures or measures that harm the least to the rights and freedom to achieve its objectives. The standards accepted by the government must be sensibly connected to the justifiable objectives it aims to achieve. There must be Proportionality in *strict sensu* between harm instigated and measures beneficial to attaining the objectives to protect the rights.²⁹² The principle assesses if there is prohibited interruption of the State with specific human rights in an individual case given. The proportionality principle further examines the relationship between individual rights and State protected interests.²⁹³ It analyses the means. It ends up preserving the right of the subject and the rights of a person. In this way, the proportionality principle guides the use of force.

Police officers do discipline the victims to put them under control. Proportionality is further applied in punishment through punishment theories. The sentence should not

²⁹¹The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR, 2002, p.189.

²⁹²Dragica W., The Principle of Proportionality as A Criterion of Constitutional Review, Volume Lxviii, 2008, pp. 261-284.

²⁹³Dragica W., The Principle of Proportionality as A Criterion of Constitutional Review, Volume Lxviii, 2008, pp. 261-284.

be excessive compared to the gravity of the offence. Bentham once explained that the moral theory of punishment includes some notion of proportionality ideas, that a penalty should be proportional to what justifies it. The principle ensures that a sentence is comparable to the gravity of wrongdoing, that is, to the seriousness of criminal conduct and not excessive.²⁹⁴ Proportionality insists on fairness in punishments even if a person committed a wrong. Penalties should be proportional to the gravity of the defendant's conduct. This means that the endorsement should be proportionate to the offence committed because the principle adheres to the rule of justice and promotes respect for the law, and protects human rights.²⁹⁵

The proportionality principle limits the police use of force. The principle assesses the means and ends *via* its elements; reasonableness, necessity and *stricto sensu* to any situation to protect the rights. Reasonableness and Proportionality have been treated as coordinate principles, as the requirement of justice.²⁹⁶ On the other hand, Proportionality and reasonableness somewhat represent different ideas because Proportionality generally focuses on the relationship between two variables: means and ends in achieving administrative objectives. Police are allowed to use force in line with the proportionality principle. They are required to act reasonably and proportionally to the danger they are facing. The proportionality principle, therefore, limits police use of force by ensuring a fair balance between an individual's rights and the community's general interests. Proportionality is also a measuring point to

²⁹⁴Jesper R., *The Ethics of Proportionate Punishment, A Critically Investigation*, Kluwer Academic Publisher, USA, 2010, pp. 11-13.

²⁹⁵Andrew H., *Proportionality in the Philosophy of Punishment*, *Crime Justice Journal*, University of Chicago Press, USA, 1992, Vol.16, USA, pp. 55-98.

²⁹⁶Thomas S., and Richard F., *Proportionality Principle in American Law, Controlling Government Action*, Oxford University Press, New York, 2001, pp. 31-34.

assess if the State interferes with the rights or goes beyond its authority. Police are required to balance between means and the objective sought.

To conclude, the proportionality principle is a legal rule which sets the maximum standard for the force that might be used. The regulation applies to international law, including international human rights law. The proportionality principle limits the exercise of rights. It imposes constraints on police officers' powers, infringing individual liberty and property rights. And it is also applied to administrative law to limit the ability of administrative personnel and, under criminal law, to make justice to criminals, that there should be a correction between punishment and crime. The principle rationale is to solve human rights conflicts and incidents where public and individual interests conflict.

2.10 Theories on the Use of Force and Proportionality Principle

This section presents details of the underlying theories of the subject. The study considered different theories and their appropriateness for application to the study. All theories discussed hereunder form the basis and guided arguments of this study. These theories covered all the aspects under the study, human rights, the proportionality principle, the use of force and the reasons behind excessive force (theories of police behaviours), accountability and reparation to victims of excessive use of force.

2.10.1 Human Rights Theory

Human rights and the proportionality principle are inseparable. Human rights are believed to be the natural rights of every individual. The founder of this theory was

Aristotle, whose propositions were later explained by St. Thomas Aquinas. The theory argues that humans are creatures of nature and should follow the rules laid down by God.²⁹⁷ This theory reveals that human rights are natural rights to every individual. Human rights are part of natural law, and natural law is part of the law of God. It confers certain indisputable rights upon the individual.²⁹⁸ Later, John Locke, one of the founders of the philosophy of individual rights and limited government, connected the idea with natural rights.²⁹⁹ He used natural law to ground his philosophy. According to Locke, in the existence of human beings in a state of nature, men and women have absolute freedom, equality and independence to determine their situations, and no one should control the other.³⁰⁰

Due to that freedom and desire to have well-organised and good relations, individuals enter into a social contract of civil society and set up a political authority to protect their respective rights. They enter a social agreement with the State. The government is obliged to protect the rights of its subjects, failure of which will forfeit its validity and authority.³⁰¹ According to this theory, the government derives validation for its existence and continuous existence of political power from the contractual duty to protect the right of its subjects. This theory was the basis for the principle that law should protect the basic human rights of individuals against abuse by governments. People give some of their authority/power to the government and retain their rights and freedom under the government. The rights originated and are

²⁹⁷Thomas A., *Summa Theologia*, Longmans and Company, London, 1475, Vol II, pp.235-237.

²⁹⁸Thomas A., *Summa Theologia*, Longmans and Company, London, 1475, Vol II, pp.235-237.

²⁹⁹Thomas A., *Summa Theologia*, Longmans and Company, London, 1475, Vol II, pp.235-237.

³⁰⁰Micheline I., *The History of Human Rights: From Ancient Times to the Globalization Era*. Berkeley, Calif: University of California Press, 2008, pp. 34-40.

³⁰¹ *Ibid.*

retained by the people and not granted by the government. These rights are known as human rights.³⁰²

Hence, the theory is appropriate to the study revealing that human rights are natural. These rights need protection from the State under the social contract theory. The police are part of the State agents and are mandated to protect basic rights. Violating these rights requires accountability from a person and the State itself. The theory has a bearing towards Proportionality as these rights are to be protected, and Proportionality measures such protection. The Human Rights theory asserts a connection between the enjoyment of Human Rights and Proportionality in the sense that without acts of the State adhering to Proportionality, there cannot be an enjoyment of Human Rights.

2.10.2 Theory of Justice

Aristotle's theory of justice states things which are produce and protect happiness. He clarified justice in two kinds. There is complete and partial justice. Partial justice requires sharing benefits and bearing burdens.³⁰³ Benefits sharing, for instance, honouring material goods and security, is regarded as partial justice.³⁰⁴ Justice can be seen in many ways and different things. Aristotle', explained that partial justice is what we consider "justice".³⁰⁵ Complete justice is rightness which leads individuals to do the right things, which involves being fair or possessing good judgment. Thus, receipt of an unfair share or benefits or burden is considered an injustice.³⁰⁶

³⁰²Nirmal B., Natural Law: Human Rights and Justice, Some Reflection on Finnis's Natural Law Theory, *Banaras Law Journal*, Banaras Hindu University, pp.4-11.

³⁰³Maurya S., Aristotle's Theory of Justice: Revisited, University of Allahabad, pp. 14-17.

³⁰⁴Ibid.

³⁰⁵Maurya S., Aristotle's Theory of Justice: Revisited, University of Allahabad, pp. 14-17.

³⁰⁶Johnston D., A Brief History of Justice, First Edition, John Wiley and Sons Ltd, 2011, pp. 26-88.

Aristotle further developed his idea of justice as "fairness". Additionally, he classified the same into two forms: distributive and corrective justice.³⁰⁷ Distributive justice is comparable to partial justice and is a distribution of honours, property or anything else divided among the community members.³⁰⁸ Aristotle's idea of justice as distributive justice is equal share to all community members. Likewise, distributive justice is divided into two types: fair and unfair. If a person receives an unequal share is not proportionate and is unjust. Later, distributive justice was reversed by the contribution principle.³⁰⁹ The contribution principle states that justice is what people receive in portion, equal to what they contribute.³¹⁰

Aristotle's theory helps society understand what justice is. It is a fact that justice is proportional and fair. The researcher accepted the idea of justice, especially in corrective justice. The theory has importance to this study as it explains about proportionality principle as one of the justice principles; it expounds on how Proportionality protects human rights *via* its elements. The principle is used as one of the ways to control the use of force, which is the subject of the study. However, a part of the theory is separate from this study. Distributive justice is well explained; however, it is not correlated with the study.

2.10.3 Retributive Theory

The retributive theory states that criminals deserve to suffer. State actors always provide punishment as corporate and have the capacity to consider individual revenge. The right to impose criminal punishment is the right of the sovereign as

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

supreme power to inflict pain on individuals because they committed a crime. One of the philosophers in retributive theory is Immanuel Kant. He believed that if a person committed murder, he must also die because there is no substitute for what he did as a requirement of justice.³¹¹ He believed there is no similarity between death and remaining alive. The death of an accused person will help remove all maltreatment and abomination of humanity.³¹²

The theory of retribution, according to Immanuel Kant, an eye for an eye (*lex talionis*) principle is accepted in the retributive theory as a Mosaic legal tradition to do justice for victim and offender.³¹³ *Lex talionis* became the justification of the cruelest and most proportional punishments. However, the theory failed because there are no equivalent reactions to theft, blasphemy, slander and many fraudulent crimes. Similarly, the *lex talionis* theory was rejected because it is not punishment, but some form of revenge.³¹⁴ Punishment is to prevent another fresh harm to a fellow citizen and deter another citizen. Punishment and the method of inflicting the same should be proportionate.

Retribution justifies punishment that is a response to a crime for present and past crimes and not future crimes.³¹⁵ Later, the penal philosophy of retribution passed through some changes owing to the doctrine of Proportionality. The proportionality principle added the element of fairness in punishment and reduced the severity. In

³¹¹An MHRD Project under its National Mission on Education through ICT, Penology and Sentencing, "Retributive and Deterrence Theories of Punishment" pp. 9 – 10.

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴An MHRD Project under its National Mission on Education through ICT, Penology and Sentencing, "Retributive and Deterrence Theories of Punishment" pp. 9 – 10.

³¹⁵ *Ibid.*

Lehna v. State of Haryana (2000), the court stated that the principle of Proportionality between crime and punishment is a principle of just desert and serves as the foundation of every criminal sentence that is justifiable.³¹⁶

The retribution theory explains punishment and its justification. The theory has contributed to the study that an accused person deserves punishment. Punishment is a right for victims and offenders. This study analyses the reparation system for victims of excessive use of force and accountability to police officers when they use excessive force. Thus, the theory explains more about accountability for violating human rights and reparations to the victims of excessive use of force. Although the accused person shall be punished, the punishment should be fair, just and proportional. However, Kant's theory of punishment is not accepted by the study. The researcher adopted the retributive theory, which is proportionate to the punishment.

2.10.4 Remedial Liability Theory

The remedial theory explains that the one who commits a wrong is liable for the wrongful Act. If the evil is a civil one, a person who commits a wrong has to provide remedy/redress, while in criminal cases, he is under the duty to pay the penalty, that is, the responsibility of wrongdoing.³¹⁷ The liability is punishment or obligation to a person. Punishment is for the protection of society and is sometimes perceived as an end in itself. A person is responsible only for those wrongful acts committed wilfully

³¹⁶ An MHRD Project under its National Mission on Education through ICT, Penology and Sentencing, "Retributive and Deterrence Theories of Punishment" pp. 9 – 10.

³¹⁷ JFitzgeraldP., and SalmondJ., Jurisprudence, London, Sweet & Maxwell, 12 Edition, 1966, pp. 349-352.

or recklessly. The duty must be fulfilled whenever the law creates.³¹⁸ Police officers who commit a wrong or violate human rights are responsible for the wrongful Act and deserve punishment.

Additionally, the victims of human rights violations are entitled to a remedy. The remedial liability theory explains the one who commits a wrong is liable for the wrongful Act. The remedial theory aims to protect the rights of individuals, society and the State from criminals by punishing the accused and not forgetting the victims. A person has the right to have justice, first for their rights to be violated, the invasion of their dignity, and the loss or injury incurred. The preceding shows how this theory fits the study; hence the researcher has adopted the same guiding framework for this research.

2.10.5 The Balancing Theory

Balancing is the metaphor which seeks to ascertain the right method of decision-making; it entails rational individuals placing on one side of the scale considerations which favour action, and on the other side, they put the weight on different concerns and a decision is made based on the weight and outcome of the balancing.³¹⁹ It is in the basic manner of reasoning and daily life that every choice made leads to an implication, having to always be in a conflicting interest with something else. As everything is in constant conflict, a resolution must be reached.³²⁰ For instance, a society's demand for free speech can be weighed against national security interests. It is akin to protected constitutional rights; these rights are individual and constantly

³¹⁸Fitzgerald P., and Salmond J., *Jurisprudence*, London, Sweet & Maxwell, 12 Edition, 1966, pp. 349-352.

³¹⁹Tsakarakis S., *The Balancing Method on the Balance: Human Rights Limitations in the ECHR*, 2004, p.2.

³²⁰*Ibid.*

challenge the government's claims. It is always conditional on several circumstances which determine the outcome of the balancing.³²¹ It is on this account that this theory propounds that the interests accorded to individuals always conflict with those of the government and its organs. In the end, many tend to outweigh the interests of minorities and individuals.³²²

Alexy further propounds this theory by stating that rights and collective interests are subjects of principles that must be optimised. The interests are to be protected and realised to the greatest extent in the legal and factual aspects. Where there are two or more conflicting interests, the satisfaction of one interest comes at the cost of another, and it becomes necessary to balance the same; it is a matter of which interest has more weight depending on the facts at hand.³²³ In this sense, the concept of Proportionality lies on the narrow sense, that it demands a balancing enquiry which is observed as a comparison between the degree or intensity of the interference with a right and the importance of the satisfaction of the competing consideration. The greater the degree of non-satisfaction, or detriment to one principle, the greater should be the importance of satisfying the other and the more intensive the restriction, the weightier the reasons for restricting it must be.³²⁴

The balancing theory has some key elements. The first is that it operates at the level of first-order reasons. This means that one determines what ought to be done on the balance of reasons and the consequences that will be attracted. On the other hand,

³²¹*Ibid*, p.3.

³²²*Ibid*.p.4.

³²³Meyerson D., "Why Courts Should Not Balance Rights Against the Public Interests", *Melbourne University Law Review*, Vol 31, 2007, p. 879.

³²⁴*Ibid*.

there are second-order reasons for refraining from acting on one's view of what ought to be done on the balance of reasons.³²⁵ Another feature of the balancing model is focusing on the consequences. It perceives that the way to choose between the rights and the public interests is to weigh the consequences of protecting the rights against those of restricting it, of promoting the best balance of good over bad effects.³²⁶ The final and essential feature of the balancing model is that it treats the rights and the public interests as commensurable with each other. It means there is a single scale on which the value of protecting the rights and public interests can be measured, compared and balanced. Rights and governmental powers in this area compete on the same plane and are weighed on the same set of scales. The interests lying in the common denominator or the mediating term, which allows the balance to be struck between them.³²⁷

In light of the previous, the balancing theory shows a constant rocking between the rights of individuals and the interests of the State. The researcher adopts this theory as it shows that the police force can use its powers to subdue individuals who are allegedly acting against the interests of the State, such as security. In so doing, Proportionality must be observed in the force to balance the force used depending on the kind of action and magnitude of the individuals.

2.11 Theories on Police Behaviours

The sociological theory explains in detail police behaviours according to different sociologists. The behaviour of police is subjected to social dynamics which police

³²⁵*Ibid*, p.880.

³²⁶*Ibid*, p.881.

³²⁷*Ibid*, p.882.

and citizen come across. According to Donald Black's, the Sociological theory of law comments that the behaviour of police depends on influence by social attributes, that is victims, suspects, plaintiffs and defendants. How police behave depends on the impact of the society. According to this theory, police are mostly taking action against lower-status persons than higher-class persons whose accused are wealthy and sometimes powerful. Also, the disrespect of suspects contributes to the use of force by police officials.³²⁸ The theories below are very helpful to the research findings. The researcher examined the reasons behind the behaviours of police and the use of force.

The psychological theory explains that behavioural deference among police depends on many factors like race, gender, educational background, personal outlook and personality. A perspective on human nature can govern³²⁹ Behaviours of the person and even a moral attitude towards coercive authority. For instance, tough police officers are most likely to misuse force, are distrustful and believe the role of the police is crime control, are focused on serious crimes, and believe that the community is hostile towards the police and sees them as an opposing force. There is another kind of police known as problem solvers. They believe that the role of the police is to offer assistance in solving problems, they take themselves as a positive force, and they are against the use of force as a police measure. This kind of officer use of force is least to him.³³⁰

The theory argues that using force depends on an officer's outlook, differentiating him from other officers. Officers most likely to use force could be expected to

³²⁸Robert W., *The Causes of Police Brutality: The Evidence on Police Use of Force*, Institute of Public Police, USA, 1995, pp. 24-34.

³²⁹*Ibid.*

³³⁰*Ibid.*

conceive the police role in slight terms, limited to crime fighting and law enforcement. Officers believe their part is practical. When officers use force at their discretion, citizens are hostile and abusive. These are the reasons to opt for the use of force. The organisation's content, social forces and attitudes also affect the behaviour. The organisation theory explains that destructive behaviours are sometimes influenced by the organisation in which officers work. Organisational possessions influence police behaviours. A system of motivations, discouragements, content and application of rules and regulations may affect a person's behaviour. It is the nature of the police work which shapes the behaviour of the police officers.³³¹

There are different organisation styles of policing, including the legalistic, watchman and service styles. These organisation styles affect police behaviours. The study of police behaviours shows that the use of force is more likely to be resorted to by officers in watchman-style departments. The best way is to use the law (legalistic) rather than use physical force. The theory argues that police use deadly force as a learning behaviour. New officers learn police behaviours not during their training but from senior officers, especially in the field. Thus, there is a difference between police training and the reality on the street. Police need to learn what they know on the street since this determines police culture and organisation culture.³³²

2.11.1 Conflict Theory

Durkheim propounded the conflict theory. It emphasises the role of coercion and power in producing the social order. This theory provides that the State has a

³³¹Robert W., *The Causes of Police Brutality: The Evidence on Police Use of Force*, Institute of Public Police, USA, 1995, pp. 24-34.

³³²*Ibid.*

coercive role in maintaining social order as a significant mandate for public safety initiatives to thrive. Police agencies in this context deliver coercive power, which is legally sanctioned, and order initiatives used by the government to maintain that social order.³³³ All these control initiatives have caused police agencies to develop a corporate culture characterised by aggression and assertiveness. Thus, it has resulted in a paramilitary organisational structure which expresses command and control features and has assumed a physically coercive approach.³³⁴

Despite the coercive approach, there should be effectiveness in the police force in preserving order and preventing crime. It is equally good that all police powers should be controlled and confined so as not to interfere arbitrarily with personal freedoms, especially during citizen encounters where the appropriateness of their behaviour may come into question relative to public safety and the justifiability of physical force is brought into question. Thus, as per the theory, the police use force where there arises a conflict between them and the subjects of their power, and at times, it leads to excessive force to subdue that conflict.

2.11.2 Deference Exchange Theory

Sykes and Clark propounded this theory. Here, the police-citizen interactions form a normative and interpersonal construct. It explains that when the police encounter a citizen as a suspect, there is an expectation by the officers and the general public of deference. If the suspects show deference, they re-establish themselves as individuals willing to be part of the moral and legal community. By refusing to show deference, suspects present actions that openly reject the principles of the moral and

³³³Nickel O., Critical Factors in Police Use-of-Force Decisions, Walden University, 2015, pp. 8-9.

³³⁴*Ibid.*

legal community. Because the normative relationship is asymmetrical, deference should be expressed differently downwards than upwards, with the higher-status actor not expected to show the same level of response as the low-status actor. The obligation on the part of the citizen to show deference is also proportionate to the level of the offence. When a citizen becomes a suspect, the asymmetry will be more significant than if the citizen is not a suspect. If the suspect decides to disregard the orders of the officer deliberately, fails to show deference, and actively resists the officer, then the officer's response will likely be aggressive.³³⁵

Conversely, this can be interpreted as the police's superiority. Suppose a suspect perceives the same. In that case, the refusal to express deference may be interpreted as a rejection of the moral and social fabric and of the officer's symbolic status as the enforcer of the law and protector of society. As the individual is not responding as expected in the encounter, the defiance between them then escalates, discrediting each other leads to the exchange of threats, gestures, or any other difficult-to-measure behaviour which leads to normative responses.³³⁶ As per this theory, police use force out of trying to show their authority and execution of their work, where individuals seem not to recognise such authority, the police could resort to the use of excessive force.

2.11.3 Demeanour Theory

Demeanour has been widely considered a theory of why police use force. In 1964, Piliavin and Briar theorised that there is a close link between the demeanour of a

³³⁵ Alpert G., & Dunham R., *Understanding Police Use of Force; Officers, Suspects, and Reciprocity*, Cambridge University Press, United States of America, 2004, p. 40.

³³⁶ *Ibid*, p. 41.

suspect and that of the use of force by police officials. Police use force more often when citizens become antagonistic and defiant than when suspects cooperate. Demeanour is constantly linked with arrests; disrespectful suspect demeanour forms an essential theoretical construct in explaining why the use of force occurs. Higher levels of irrationality among suspects are associated with lower compliance with police directives. Thus, several police officers use aggressiveness in such circumstances, and this is where the use of force usually arises to subdue the suspect(s); it could even go so far as to employ excessive force for some police officers. This is considered one of the most powerful variables related to police-citizen violence.³³⁷

2.11.4 The Individual Theory

In the individual theory, there exists the 'rotten apple' theory. It states that the attitudes and personal characteristics of some officers make them prone to use more violence than others; it depends on the presumption that many police officers are not violence-prone but do work within the ambit of the law.³³⁸ Uldricks & Van Masgrigt extended another strand within the theory known as the 'fascist pigs theory' which suggests that only specific individuals with certain dispositions such as authoritarian personalities are attracted to police work due to its nature so that many of the police officers are violence-prone.³³⁹

Police officers were categorised into three types depending on their masculinities. Huggins conducted a study of police violence and use of excessive force in Brazil

³³⁷*Ibid*, pp 41 – 42.

³³⁸Bleur J., *Police Use of Deadly Force: Analysing Police' Encounters' in Mumbai*, London School of Economics and Political Science, PhD Thesis, 2007, p. 37.

³³⁹*Ibid*.

and came up with three types of masculinities, personalistic, bureaucratic and blended. With their personalistic masculinities, they see themselves as passionate true believers who aim to improve society by preventing crimes and criminals. They, therefore, commit the civilians and the community, but their self-image balances their feminine, caring side as macho policemen who dislike physical and mental weakness.³⁴⁰

On the bureaucratic masculinity, the police officers operated as institutional functionaries who sought to separate categories of valued violence only for its instrumentality in achieving the most appropriate and efficient social control needs. They think that good police act professionally and know how to employ torture and use of force within the proper bounds. For the police officers who possessed blended masculinity, they showed signs of personalistic cops. Still, they did not identify positively with the communities that they policed, nor with the organisation that they worked in. As per Huggins, this category of police officers act independently of the police institution and take the law into their own hands to do 'good'.³⁴¹

2.11.5 Situational Theories

The situational theory, as propounded by Sherman, an examination of the characteristics of the situation in which police use force with special emphasis on the age, race, gender, and class of the suspect and the officer that is involved.³⁴² In some situations, the demeanour, status and behaviour of the suspect, the seriousness of the offence, the experience level, attitudes and disposition of the officer, visibility of the

³⁴⁰ *Ibid*, p.38.

³⁴¹ *Ibid*, p.39.

³⁴² *Ibid*.

encounters, numbers of officers present at the scene, characteristics of the neighbourhood where the interaction takes place, and many other factors which play a crucial part in analysing the outcome of instances where police have used force. Thus, Bittner provides that the use of force is usually executed following the dictates of an intuitive grasp of situational exigencies. This theory deals with who is more likely to be at the receiving end of police violence, such as minorities, and people of lower class and status, under which conditions, violence is more likely to be used.³⁴³

It has been further theorised that in situational aspects, some other factors, such as who the citizen is and the police officer's background characteristics, do influence police behaviour, an officer with higher education. More experience is less likely to employ violence.³⁴⁴ Regarding who the citizen is, such a person is usually the victim. Green and Ward provide four paradoxes to the use of coercive power by the police. One is that the harder it is for the police to threaten a person with some physical harm, the greater the likelihood that they will resort to physical force.

Where police are confronted with a 'dispossessed individual who has nothing to lose, the 'detached' who does not care about what they have to lose, and the 'irrational' who does not understand the threat they face, the police do not have to invoke violence but they usually do.³⁴⁵ Thus, police at times believe that individuals are described as 'their property', that some are both socially marginal and outlaws, and violence is the only language they understand. With irrationality, it means police are more likely to use force against those who resist their authority due to mental illness,

³⁴³ *Ibid.*

³⁴⁴ *Ibid*, p.40.

³⁴⁵ *Ibid*, p.42.

alcohol or drugs, but also excessive use of force or fatal shootings can be attributed to a temporary loss of control.³⁴⁶

2.11.6 Organisational and Subcultural Theories

The organisational theories tend to explain police use of force and excessive force through their culture. This police 'subculture' is theorised to create a violent officer on one part and protect the officer's actions from external censure.³⁴⁷ Police officers display specific characteristics, including action, cynicism, isolation, loyalty, etc. They are the core elements of the police culture attributed to the structural features of police work, such as danger, authority, and pressure of results which give rise to a specific category of working personality.

The theory provides that the organisation's nature and the emphasis on factors such as loyalty and secrecy protect violence-prone officers. Police organisations use a 'blue wall of silence' technique to protect their officers from being scrutinised, prosecuted, or punished by outside investigating agencies. They also have an overt policy or have specialist units which support the use of force by police officers in certain situations, which would ordinarily be disallowed.³⁴⁸ This theory, therefore, shows that police use of excessive force is perpetuated by the organisational culture which police officers have. Usually, officers have a culture of ignoring their fellow police officers who use excessive force because it is part of their work, and they do not want them to be accountable.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid*, p.42.

³⁴⁸ *Ibid.*

2.12 Conclusion

This chapter consists of a conceptual and theoretical framework. This part is crucial to this study as it has broken down the concepts applied in this thesis and how they relate to each other, this chapter is a map that guides the direction of the researcher and is a foundation upon which the research is constructed. It also laid out the theoretical framework for using the force and proportionality principle, on which this study is premised. The study has talked about theories governing police behaviour, remedial liability theory, retributive theory, theory of justice, the balance theory, the conflict theory and human rights theories. The study is governed by all theories above articulated as each theory is the foundation of one of the research questions.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORKS ON POLICE FORCE MANDATE, ACCOUNTABILITY AND PROPORTIONALITY IN TANZANIA

3.1 Introduction

This chapter analyses laws and regulations governing police force operations, mandates and accountability in Tanzania. One of the objectives of the study is to scrutinise the police force mandates and legal accountability of police officers for violation of the principle of proportionality in the use of force in a situation short of armed conflict. The discussion confined itself to excessive force in the proportionality principle framework provided by international instruments. The chapter revolves around the debate on the police force and its mandate in the use of force. It further presents various accountability mechanisms applicable in Tanzania as part of the international standards. In addition, the chapter provides for the legislation which governs police accountability and the right to reparation in Tanzania.

3.2 Laws and Regulations Governing Police Force Operations in Tanzania

Tanzania's legal framework consists of laws and institutions which promote and protect human rights. The framework covers principles and regulations which spell out the mandate to promote and protect human rights in the country. The international human rights instruments provide for standards that shall be adhered to by all States. States have to adopt and enact legislations which give a backup to these human rights standards, to implement and oversee the promotion and protection of

human rights. Thus, there are fundamental human rights standards for using force to arrest, police custody, pre-trial detention and the use of force at the local level. Mention these essential rights: the right to life, the right to freedom from torture and other forms of ill-treatment, the right to liberty and security of the person, the right to a fair trial, the right to freedom of peaceful assembly, association and freedom of expression and the right to an effective remedy. Hereunder are regulatory mechanisms in Tanzania as part of the broad internal human rights system.

3.2.1 Human Rights Protection under the Constitution of the United Republic of Tanzania

The Constitution of the United Republic of Tanzania protects human rights, and it is the mother law in Tanzania. All the laws which are contrary to this law are void. The Constitution affirmed the principles of freedom, justice, fraternity and harmony. These principles are adhered to by any democratic society and should be attached to by the executive. The Constitution under the Bill of Rights protects all the essential human rights standards by police officers when they use force; Article 12(2)³⁴⁹ States that every person is entitled to recognition and respect for his dignity. Article 13(6)(d)(b)³⁵⁰ The Constitution provides for the presumption of innocence. A person charged with a criminal offence shall not be treated as guilty until proven so by a competent court of law. Article 13(6)(d)³⁵¹ Requires human dignity to be protected in all criminal investigation and process activities. Article 13(6)(e)³⁵² No person shall be subjected to torture or inhumane or degrading treatment. The Constitution also

³⁴⁹ The Constitution of The United Republic of Tanzania, Cap. 2, R.E 2008.

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² The Constitution of The United Republic of Tanzania, Cap. 2, R.E 2008.

provides for the institutions which are essential for human rights promotion and protection., Article 62³⁵³ to 65³⁵⁴

The Parliament consists of the national assembly and President, the President as one part of the Parliament, has the authority to oversee and advise the Government and all its organs in the discharge of their responsibility following the Constitution; the Parliament enacts laws where implementation requires legislation, ratify all treaties and agreements to which the united republic is a party and the provision which requires ratification. Accountability and interpretation Article 107A³⁵⁵, 107B³⁵⁶ and 108³⁵⁷ The Constitution gives the High Court power to dispense justice and remedies for human rights violations in the country. The Judiciary should be independent in dispensing justice without favours to preserve and protect all human rights. The Constitution similarly establishes the armed forces for maintaining peace and security.³⁵⁸ and the Commission for Human Rights and Good Governance under Article 129³⁵⁹ to 131³⁶⁰ Which has the purpose of human rights protection and promotion.

Further, Article 30³⁶¹ It provides for limitations upon the enforcement and preservation of human rights and fundamental freedoms as it states that the exercise of rights shall not in any way cause interference with individual freedoms and public

³⁵³ *Ibid*, Article 66 (2) (3).

Article 63(1) (2) (3) (a) (b); (c) (d).

(e).

³⁵⁴ *Ibid*.

³⁵⁵ *Ibid*, Article 107A(2) (a) (b) (c) (d) (e).

³⁵⁶ *Ibid*.

³⁵⁷ *Ibid*.

³⁵⁸ *Ibid*, Article 147.

³⁵⁹ *Ibid*.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid*.

interest. The Constitution incorporates one of the proportionality requirements (*proportionality stricto sensu*); it analyses the proportionality between the limitation purposes of the law and the protection of the constitutional right. As referred to Article 30(2)(a)³⁶² The rights and principles provided under the Constitution do not render unlawful any existing law or enactment of the law to ensure the rights and freedom of other people and interests are not prejudiced.

The Constitution provides the Bill of Rights that mention all the rights and the institutions to protect the rights, which are also stipulated under international and regional instruments on the use of force; however, the provisions need enforcement mechanisms to make human rights in practice.

3.2.2 Accountability on Excessive Use of Force under the Penal Code

The Parliament of the United Republic of Tanzania enacted the Penal Code. The law spells out behaviours that are offences and their punishments. It is one of the mechanisms for legal accountability. Police officers are also subjected to this Act. Section 18A³⁶³ Allows the use of force proportionately, as stated. Subject to the provision of this Code, a person has the right to defend himself or any other person against any unlawful act of assault or violence to the body, to defend his property and any property if it is lawfully possessed, under his custody or his care or the property of any other person against any unlawful act of seizure or destruction or violence. Section 18B³⁶⁴ Avails to an individual the right of self-defence or defence of property and that a person shall be entitled to only use such reasonable force as

³⁶² *Ibid.*

³⁶³ The Penal Code, Cap. 16, R.E. 2019.

³⁶⁴ *Ibid.*

necessary.³⁶⁵

The Penal Code³⁶⁶ States that every person shall be criminally liable for any defence resulting from excessive force used in self-defence or defence of another or property protection. Any person who causes the death of another as the result of excessive force used in the defence shall be guilty of manslaughter.³⁶⁷ However, there are elements that helps a person to stand on the right of self-defence or defence of properly, the defence shall stand to a person who in exercise of that right causes death or grievous harm to another and the person so acting acts in good faith and with an honest belief based on reasonable grounds that his Act is necessary for the prevention of his own life or the life or limb of another in the circumstance where; the unlawful Act is of such nature as may be reasonable cause the apprehension, that his own death or the death of another person could be the consequences of that Act, or the unlawful Act is of such a nature as may reasonably cause the apprehension that grievous harm to his own body or the body of another could be the consequences of that unlawful Act, the unlawful Act is with the intention of committing rape or defilement or an unnatural offenses or the illegal Act is with the purpose of kidnapping or abducting or the lawful Act is burglary or robbery or any crime which endangers life property.³⁶⁸

Furthermore, where a person is charged with a criminal offence of use of force; out of arrest or attempt to arrest, the Court may consider whether the means used were

³⁶⁵*Ibid*, Section 18B.

³⁶⁶*Ibid*.

³⁶⁷*Ibid*, Section 19.

³⁶⁸ The Penal Code, Cap. 16, R.E. 2019, Section 18.

necessary or the degree of force used was reasonable for the apprehension of such person, have regard to the gravity of the offence which had been or was being communicated by such person and the circumstances in which such offence had been or was being committed by such person.³⁶⁹

As to the right to assembly, the Penal Code³⁷⁰ provides for the dispersion of rioters that after the expiration of reasonable time, twelve or more persons continue riotously assembled, a police officer may do all things necessary for dispersing persons so continuing assembled, and they make resistance to the order, if Police may use all such force as is reasonably required for overcoming such resistance and shall not be liable in any criminal or civil proceeding for having by the use of such force caused harm or death to any person. Further, Section 231 of the Penal Code provides for criminal responsibility in the use of excessive force. Any individual authorised by law to use power shall be criminally responsible for any excess according to the nature and quality of the Act, which constitutes the excess use of force.

In summary, the penal Code provides legal accountability for individuals committing crimes. The law criminalises excessive use of force and punishes it for that. However, the law does not punish torture, cruelty and human and degrading treatment and punishment.

3.2.3 Proportionality Principle under the Criminal Procedure Act

The Parliament of the United Republic of Tanzania enacted the Criminal Procedure

³⁶⁹ *Ibid*, Section 19.

³⁷⁰ Section 78

Act (CPA). The law provides guidelines and procedures to investigate crimes and conduct criminal trials. The Police officers are to exercise the power granted to them in performing their duties imposed upon them by the law and comply with the provisions of part II of the Criminal Procedure Act.³⁷¹ A police officer must obey superiors' orders and respect the independence of the Judiciary and court judgment. On top of that, the police officer is deemed to be on duty at all times and is required to communicate to his superiors' officer intelligence matters affecting public peace, to take preventive measures to prevent the Commission of a crime, nuisance, detect crime and bring the offenders to justice. They may do this with or without a warrant for the purposes mentioned under the provisions of the Act. The police officer has the power to arrest a person with a warrant and is allowed to touch and confine the body, and if the person resists, they may use all necessary means to affect the arrest.³⁷²

The law provides for police powers and procedures that every police officer shall exercise these power conferred on him in performing the duties imposed on him as a police officer.³⁷³ A police officer shall accompany a person who is under restraint for investigation.³⁷⁴ Police have the power to investigate and have a duty to examine a suspect, to inform him that they are bound to answer honestly all questions relating to the case.³⁷⁵ Without a warrant, a police officer can enter any premises during the day or night to any place licensed under the intoxicating liquors Act or any site

³⁷¹ The Criminal Procedure Act, Cap. 20. 1984, Section 6.

³⁷² The Criminal Procedure Act, Cap. 20. R.E 2019, Section 11.

³⁷³ The Criminal Procedure Act, Cap.20, R.E 2019, Section 6.

³⁷⁴ *Ibid*, Section 5.

³⁷⁵ *Ibid*, Section 10(4).

believed to have illegal drinks for detecting offences.³⁷⁶ Suppose a police officer suspects a person committed a serious offence, and all information the Police have received implicates the same crime. In that case, this justifies the police officer to arrest the person without a warrant.³⁷⁷ The rules against arrest are applicable in that a policeman is not allowed to ask him questions unless he is informed that he may refuse to answer any question.³⁷⁸

A police officer can use arms on anyone in lawful custody charged with or convicted of an offence. If a person is escaping or attempting to escape, the police officer believes he cannot prevent the person from escaping. He may also use arms where another person is in danger of grievous bodily harm, and he cannot affect the arrest or prevent such rescue.³⁷⁹ The police officer may use force in making an arrest.

However, the force used shall be reasonable not to subject a person to unnecessary indignity. The police officers shall not, in the cause of arresting a person, do an act likely to cause the death of that person unless the police officer believes on reasonable ground that doing that Act is necessary to protect life or prevent serious injury to some other persons.³⁸⁰ He must first give a warning sign that he is about to use such an arm. The officer also needs to study the environment to see if the community understands the use of arms and if the use of force is in a normal

³⁷⁶*Ibid*, Section 27 (1-3) and Section 16.

³⁷⁷*Ibid*, Section 14 and 28. A police officer has the power to arrest a person without a warrant when a person breaches peace before his presence, abstract Police while he is on duty etc.

³⁷⁸ The Criminal Procedure Act, Cap. 20 R.E 2019, Section 10(4) and The Police Force and Auxiliary Service Act, Cap 322, Section 32. The Police have a duty before examining a person to inform that he is bound to answer honestly all questions relating to the case. Section 10(5), Police or any other person in authority shall not make any inducement, threat or promise to any person charged with an offence to induce him to make a statement concerning a charge against him. Section 23 requires a person to be informed of the grounds of arrest. The substance of the offence must be communicated.

³⁷⁹*Ibid*, Section 29.

³⁸⁰ The Criminal Procedure Act, Cap 20. R.E 2019, Section 21.

environment. The police officers, likewise, must be taught how to use arms to administer police duty.

Police also have the power to grant bail; the Police may give bail to a person who is brought under police custody in a situation when a police officer believes that a person committed no offence and they have no reasonable reasons to continue holding that person in custody or thought that they arrested a wrong person.³⁸¹ There are conditions available for police bail if a person can appear before a specified court at the specified time and if he will follow the requirements specified in his conduct while released on bail since he has the right to have police bail.³⁸² The police officer can also refuse to grant bail, and, in such a case, he shall record the reasons for his refusal.³⁸³ When the Police arrest a person, they should be informed of their rights to bail, and if the bail is denied, the police officer should write the reasons for this refusal.³⁸⁴ Furthermore, where a person is arrested, and that person is not of the age of majority, that is, 15 years, such a person may be released after his parent or guardian enters into recognisance on his behalf.

A police officer or person in authority shall not offer any inducement, threat, or promise to any person charged with an offence to induce him to make any declaration regarding the charge against him.³⁸⁵ Police officers have the power to arrest with and without a warrant, and if a person resists, reasonable force can be used.³⁸⁶ The use of force is allowed but should not subject a person to more indignity

³⁸¹*Ibid*, Section 64.

³⁸²*Ibid*, Section 65 and 66.

³⁸³*Ibid*, Section 67.

³⁸⁴*Ibid*, Section 56.

³⁸⁵*Ibid*, Section 10(5).

³⁸⁶*Ibid*, Section 11, 14 and 28.

than is necessary, and an officer during arrest shall not do an act likely to cause that person's death unless believed on reasonable grounds that doing that is required to protect life or prevent serious injury.³⁸⁷ A police officer or person making an arrest shall touch or confine the body of the person being arrested if the person resists, they may use all means necessary to effect the arrest.³⁸⁸ After that, it is followed by an interrogation within four hours.³⁸⁹ However, the law permits the extension of the interrogation for up to 8 hours.³⁹⁰

The law requires the persons under restraint to be informed of their rights, and police officers are not allowed to ask any questions for a purpose connected with investigating an offence. The provision prohibits any police officer from asking any questions to a suspect under interrogation until he has told him their rank and the suspect to be informed is charged in a language that he knows well or is fluent in.³⁹¹ The provision requires a suspect awaiting interrogation to be treated with humanity and respect for his dignity; suspects should not be subjected to cruel, inhumane or degrading treatment by police officers.³⁹² Regarding examination by police officers, a police officer shall examine and interview an accused orally and should put them into writing and he is bound to inform the person to answer honestly all the questions relating to the case at hand.³⁹³ Police have special duties; for instance, when a suspect conflicts with the law, the Police need to inform a parent or guardian that the child is under restraint and the offence committed.³⁹⁴

³⁸⁷Section 21(1)(2).

³⁸⁸*Ibid*, Section 11.

³⁸⁹The Criminal Procedure Act, Cap. 20, R.E 2019, Section 50 (1).

³⁹⁰*Ibid*, Article 51.

³⁹¹The Criminal Procedure Act, Cap .20, R.E 2019, Section 53.

³⁹²*Ibid*, Section 55.

³⁹³*Ibid*, Section 10.

³⁹⁴*Ibid*, Section 56.

Furthermore, the Police have the power to grant bail, that is, police bail, to suspects, and there are conditions of police bail; if the suspect can appear before a specific court, he will follow the requirements of the bail, circumstances, nature and seriousness of the offence.³⁹⁵ A police officer may refuse to grant bail and should record the reasons for refusing.³⁹⁶

To sum up, the Criminal Procedure Act requires police officers to follow the rules and orders under the Act. The law provides for police officers' powers and procedures in criminal justice. The law stipulates the guidelines on how and why to use force and the grounds for the use of force when necessary and reasonable not to cause death and indignity. It prohibits torture, cruel, inhuman and degrading treatment and punishment and protects the rights of detained persons.

3.2.4 Use of Force under the Evidence Act

The Parliament of the United Republic of Tanzania enacted the Evidence Act (TEA). The law guides for admission of evidence under the Court of Law. This Act applies to all judicial proceedings in Tanzania before the High Court and all magistrate courts except the primary courts. TEA guides the admission of evidence in criminal cases. The law states a confession as evidence can be made in police custody.³⁹⁷ Voluntarily and the onus to prove that confession made by an accused person lies on the prosecution. An admission will be termed involuntary if the Court believes it was taken by inducement, promise or any other prejudice.³⁹⁸ However, no confession

³⁹⁵ *Ibid*, Sections 64,65 and 66.

³⁹⁶ *Ibid*, Section 67.

³⁹⁷ The Evidence Act, Cap 6, R.E. 2019, Section 28.

³⁹⁸ *Ibid*, Section 27(3).

shall be rejected on the ground that a threat or a threat has been used unless the Court believes the inducement was likely to cause untrue admission of guilt to be made.³⁹⁹

In a nutshell, the Tanzania Evidence Act covers the admission of evidence in the criminal justice system. It explains confessions in police custody and how it is conducted; however, the law indirectly allows confessions which are obtained by inducement.

3.2.5 Regulation of Use of Force under the Police Force and Auxiliary Service Act

The Parliament of the United Republic of Tanzania also enacted the Police Force and Auxiliary Service Act (PFASA). The PFASA establishes a police force by GN No 73 of 1965.⁴⁰⁰ This Act applies to the mainland as well as Zanzibar. It provides police mandates, the organisation and discipline powers of the Police. Police institutional mandate refers to an official or authoritative command or police powers. Police have different mandates, as explained here under. The members of the Police Force shall work in and outside the United Republic as stipulated under part XIII of this Act.⁴⁰¹

The PFASA provides for the Constitution of the police force that, includes; the Inspector, Commissioner, Deputy Commissioner, Assistant Commissioner, Senior Superintended and so on.

The law provides for the duties of the police force; to maintain peace and law, prevention and detection of crime, apprehension and guardian of offenders and

³⁹⁹ *Ibid*, Section 29, also see the case of Thadei Mlomo and others vs Republic [1995] TLR 187, the Court of Appeal of Tanzania held that involuntary confession is not admissible in a court of law if the accused person is subject to torture, meaning the evidence of involuntary confession will be admissible if there are threats. Also, in the case of Dotto Ngassa vs Republic Criminal Appeal No. 6 of 2002, the Court of Appeals was not conquered with the provision of section 29 of the Tanzania Evidence Act. "The court should be very cautious in admitting it as evidence because the suspect is not a free agent by then".

⁴⁰⁰ The Police Force and Auxiliary Service Act, Cap. 322, Section 3.

⁴⁰¹ The Police Force and Auxiliary Service Act, Cap. 322 R.E 2010, Section 5.

protection of property.⁴⁰² In the preservation of peace and maintenance of law and order, police officers perform work and duties as conferred to them and have an obligation to obey lawful orders as received from superior officers to execute their office.⁴⁰³ The PFASA further provides for the general powers of the Inspector⁴⁰⁴ he is in charge of the administration of force throughout the United Republic.⁴⁰⁵ Also, the general powers and duties of police officers are that police officers shall promptly obey and exercise all orders and warrants lawfully issued to them.⁴⁰⁶ Police officers likewise shall be deemed to be Prison officers in certain circumstances; where a police officer is carrying out the duties of a Prison Officer, such Police officer, whilst engaged in any such duty, shall be deemed to be Prison Officer and shall have powers and protection and privileges attached to such officer.⁴⁰⁷

The PFASA states police officer may use arms against any person in lawful custody charged with or convicted of any offence when such person is escaping or attempting to escape, where such police officer has reasonable grounds to believe that he cannot otherwise prevent the escape. After warning such a person that he is about to use such arms against him, such a warning is unheeded.⁴⁰⁸ Also, force may similarly be used to rescue any other person from unlawful custody by force, preventing or attempting to prevent the lawful arrest of any other person.⁴⁰⁹ Where such Police have reasonable grounds to believe that any other person is in danger of grieves

⁴⁰² *Ibid*, Section 4.

⁴⁰³ The Police Force and Auxiliary Service Act, Cap.322, Section 27 and The Criminal Procedure Act, Cap 20, Section 47 state that the Police prevent breaches of the peace and may intervene in any situation to prevent infringement of peace and Commission of any arrestable offences.

⁴⁰⁴ *Ibid*, Section 7.

⁴⁰⁵ *Ibid*, Section 8.

⁴⁰⁶ *Ibid* Section 27.

⁴⁰⁷ *Ibid*, Section 28.

⁴⁰⁸ The Police Force and Auxiliary Service Act, Cap. 322.

⁴⁰⁹ *Ibid*, Section 29.

bodily harm and that he cannot otherwise affect such arrests or prevail such rescue.⁴¹⁰

Additionally, police officers have the power to obtain information or compliance.⁴¹¹

Regarding the power to record information, a police officer who interviews someone can record the same. If the person, during the interview, confesses, the police officer may record in writing the details in relation to an offence. After the completion of the interview, he should register; the questions and answers to any statement made by the person orally, the statement which the person writes during the interview, the caution made to the person before he made confession and his response to the caution, the time of commencement and completion. After the interview, the interviewee can read the record, make any alterations or add anything, and sign the certificate at the end of the record.⁴¹² Power to search for evidence⁴¹³ of anything concerning an offence that has been committed, anything that may be used to commit any crime.

Police officers have the power to examine fingerprint photographs; they may take pictures of the fingers, toes and palms of suspects or accused persons for printing.⁴¹⁴

Police officials can inspect and search motor vehicles to keep order on public roads.⁴¹⁵ They can also regulate music and the conduct of assemblies by directing the conduct of all such assemblies and processions in public places and specifying the route by which they may pass.⁴¹⁶ All these powers should be exercised with the

⁴¹⁰*Ibid.*

⁴¹¹ The Police Force and Auxiliary Service Act, Cap 322, Section 30.

⁴¹²*Ibid.*, Section 33.

⁴¹³*Ibid.*, Section 35.

⁴¹⁴*Ibid.*, Section 36.

⁴¹⁵*Ibid.*, Section 39.

⁴¹⁶*Ibid.*, Section 42(h).

protection of human dignity.

The PFASA provides for the Miranda rule, which states that the Police, before interrogating a criminal suspect, should inform him of the right to remain silent during interrogation. Police can interrogate suspects or any other connected persons, and such interrogations should be within the law, and the record shall be kept. All the rights of witnesses and accused persons shall be protected. For instance, a police officer is responsible for preserving a detained accused person. A person's right is primary and shall be respected unless a party is against the law.⁴¹⁷ Where a police officer suspects a person has committed a serious offence and believes that the information given by Police will incriminate such a person, a police officer shall not ask him any questions.⁴¹⁸

Additionally, the law requires a police officer who interrogates a suspect to ascertain if the suspect committed the offence to record the interrogations. The recording helps reference the interrogation procedure and the police officers presiding over the interrogation to set out questions asked to the suspect and the answer provided by the suspect.⁴¹⁹ Last but not least, the police officer has the power to disperse assemblies and processions whenever held if such assembly breaches the peace or prejudices the public safety or for the maintenance of peace and order.⁴²⁰

In conclusion, the Police Force and Auxiliary Service Act explains the mandates of police officers. It highlights the duties of police officers; to maintain peace and law,

⁴¹⁷*Ibid*, Section 27.

⁴¹⁸*Ibid*, Section 32 (1).

⁴¹⁹ The Police Force and Auxiliary Service Act, Cap 322, Section 33.

⁴²⁰*Ibid*, Section 44.

prevent and detain crime, guardian of offenders and protection of property. The Act allows police officers to use force and stipulates the circumstances in which force is permitted. It protects the rights of the accused who are in detained places. However, the Act explains more about the duties of police officers, and the principle and rules governing the use the force needs to be better articulated.

3.2.6 Accountability on Use of Force under the Prevention of Terrorism Act

The Prevention of Terrorism Act provides for comprehensive measures to deal with terrorism. The Act prevents and cooperates with States in suppressing terrorism and other related matters. Under section 29(1),⁴²¹ The Criminal Procedure Act provides that a police officer not below the rank of assistance superintended may enter the place without a warrant or in charge of a police station and may, notwithstanding any other Act and with the assistance of other police officers, enter and investigate the place in cases of urgency. During the incidence, Section 29 (6)⁴²² Provides a police officer who uses such force as may be necessary for any purpose in accordance with this Act shall not be liable in any criminal or civil proceeding or having, by the use of force, caused injury or death to any person or damaged to loss of any property.

Section 33(1)⁴²³ avails power to police officers to seize property which has been used in the Commission of Terrorism acts, and the Inspector General of Police or Commissioner of Police has reasonable ground for suspecting that the same property has been, is used to commit an offence under this Act may seize the

⁴²¹ *Ibid.*

⁴²² *Ibid.*

⁴²³ *Ibid.*

property, further section 33(8)⁴²⁴ States that no civil or criminal proceedings shall lie against the police officer for the seizure of property made in good faith according to the provisions of subsection 1.

To conclude, the Terrorism Act cooperates with other states to end terrorism acts. The law allows police officers to use force when conducting their duties. However, a police officer when exercises the power to use force as necessary and cause death, injury or loss of property, the law restricts criminal and civil liability upon the officer. The Act openly limits legal accountability.

3.2.7 Accountability on Use of Force under the Emergency Powers Act

The Parliament of the united republic of Tanzania enacted the law. The Act provides provisions for and gives specific emergency power to the President, intending to ensure public safety and maintain public order during emergencies. The Constitution of the United Republic of Tanzania under Article 32⁴²⁵ Assign the President of Tanzania power to proclaim a state of emergency in the United Republic of Tanzania for the reasons of threat to the country's security, peace and good order. Following the provision of Article 32 of the CURT, the Emergency Powers Act provides special powers to the President to declare a state of emergency.

This Act repealed the Emergency Power Order in the Council of 1939 to 1961, which confers powers upon the President to ensure public safety and maintain public order during an emergency. The Emergency Powers Act confers powers to the

⁴²⁴ *Ibid.*

⁴²⁵ The United Republic of Tanzania Constitution, Cap 2, R.E 2008.

President, to mention a few, to arrest and detain suspended persons,⁴²⁶ special power to announce emergencies,⁴²⁷ ability to control institutional and organisation,⁴²⁸ ability to control publications,⁴²⁹ and power to restrict entry into the United Republic.⁴³⁰ Section 26⁴³¹ States that no proceedings or order taken or made under this Act shall be called into question by any court, and no civil or criminal proceeding shall be instituted against any person for anything done under this Act or against any person for any loss or damage caused to in respect of any property whose possession can be proved to have been taken under this Act.

As previously stated, the Emergence Power Act gives powers to the President during emergencies. President, when exercising these powers during this moment, the law says no court shall question, and no criminal or civil proceedings shall be instituted for any loss or damage. The Act limits legal accountability and the right to remedy and reparations for any power abuse that leads to human rights violations.

3.2.8 Prohibition against Use Force under the Law of the Child Act

The Child Act No. 21 of 2009 was enacted by the Parliament of the United Republic of Tanzania and provides for reform and consolidation of laws relating to children. It stipulates the child's rights, promotes, protects and maintains the child's welfare with a view of giving effect to the international and regional conventions on the child's rights. It provides for affiliation, foster care, adoption and custody of the child. Moreover, it regulates employment and apprenticeship to make provisions

⁴²⁶ The Emergency Powers Act, No. 1, 1986, Section 7.

⁴²⁷ *Ibid*, Section 5.

⁴²⁸ *Ibid*, Section 9.

⁴²⁹ *Ibid*, Section 10.

⁴³⁰ *Ibid*, Section 11.

⁴³¹ *Ibid*, Section 26.

concerning a child in conflict with the law and to provide for related matters.

Part IX⁴³² Provides for a child in conflict with the law, a child as an accused person or victim. The police officers have the duty under the law to protect children's rights though they conflict with the law. Where a child is apprehended with or without a warrant and cannot be brought before a juvenile court, the officer in charge of a police station to which he is got, unless it is related to homicide, shall release such a child and take the responsibility by himself or have parents or guardians, relatives and release without sureties.⁴³³ The police officer shall make arrangements for preventing, so far as practicable, a child while in custody from associating with adults charged with an offence unless he is a relative.⁴³⁴ The police officers shall not bring a child to the Court unless an investigation has been completed or the offence requires committal proceedings.⁴³⁵ Under Section 13⁴³⁶ A child is protected from torture and degrading treatment; the law states that a child shall not be subjected to inhuman punishment or degrading treatment which dehumanises or humiliates a child's physical or mental well-being.

To sum up, the Law of the Child Act protects and promotes the child's welfare to international standards. The Act meets the obligations under international law to protect the rights of vulnerable groups. The Act protects the child in custody from being associated with adults; a child is protected from torture and degrading treatments and is not to be subjected to inhuman or degrading treatment.

⁴³² The Law of the Child Act, No. 21, 2009.

⁴³³ *Ibid*, Section 101.

⁴³⁴ *Ibid*, Section 102.

⁴³⁵ *Ibid*, Section 103.

⁴³⁶ The Law of the Child Act, No. 21, 2009.

3.2.9 Accountability on Use of Force under the Commission for Human Rights and Goods Governance Act

The Commission for Human Rights and Goods Governance Act (CHRAGG) was enacted by the Parliament of the United Republic of Tanzania in pursuance of Article 131 of the Constitution of the United Republic of Tanzania. The Commission is among the governmental institutions which protect and promote human rights and is one of the oversight mechanisms for human rights protection. This institution has the powers and duties which the Act recognises. The Act provides the composition, foundations, power, privilege and other matters in relation to the Commission for Human Rights and Good Governance established by Article 129 of the Constitution.⁴³⁷ Shall be regulated by the provision of this Act.⁴³⁸

The functions of the Commission are to promote within the country the protection and preservation of human rights according to the Constitution and laws of the land, receive allegations and complaints for violation of human rights, and conduct inquiries to matters concerned with or involving the violation of human rights. Also, it is mandated to conduct further research into human rights, administrative justice and good governance issues to investigate the conduct of any person to whom or any institution to which the provision of this section applies in the ordinary cause of the exercise of the function of this office or discharge of function above authority.⁴³⁹

Furthermore, it is mandated to investigate or inquire into complaints concerning parties or actions by a person holding office in the service of the public authorities or

⁴³⁷ *Ibid.*

⁴³⁸ The Commission for Human Rights and Good Governance, No. 7, 2001, Section 5.

⁴³⁹ *Ibid*, Sections 22 – 28.

other public bodies, including private institutions and private individuals, where those complaints relate to abuse of power, injustice, unfair treatment of any person, where the accused exercise official duties.⁴⁴⁰ It also provides a mandate to visit prisons and places of detain, inspect the condition of those persons held in such places and make recommendations relating to any existing or proposed legislation, regulations or administrative provision to ensure compliance with human rights norms and standards with the principle of good governance.

The Commission promotes adopting or accessing treaties or Conventions on human rights, harmonising national legislation, and monitoring and access compliance within the United Republic of Tanzania. Furthermore, the law provides for the composition of the Commission; the chairman should be the Judge of the High Court or Court of Appeal, and if a chairman is from one part of the United Republic vice chairman shall be a person from the other part of the union.⁴⁴¹

In summary, the Act was enacted to establish the CHRAGG to promote and protect human rights and fundamental freedoms as one of the oversight mechanisms for human rights protection. The Commission receives allegations and complaints for human rights violations and investigates human rights violations for abuse of power, injustice and unfair treatment of any person. The Commission has mandates to visit the prisons and places of detain and make recommendations or proposed legislation, regulation and promotes the adoption of treaties or conventions.

⁴⁴⁰ The Commission for Human Rights and Good Governance, No. 7, 2001.

⁴⁴¹ *Ibid*, Sections 22 to 28.

3.2.10 Accountability on Use of Force under the Basic Rights and Duties

Enforcement Act

The Parliament of the united republic of Tanzania enacted the Basic Rights and Duties Enforcement Act (BRADEA). The Act is the basis of enforcing the provision of the fundamental rights and duties set out under Part Three of the Constitution of the United Republic of Tanzania. This Act is applicable in Tanzania and Zanzibar to suit the provisions of Articles 12 to 29 of the Constitution. Section 3 of the Act⁴⁴² It enforces fundamental rights and duties under part three of the Constitution. If any person alleges that the conditions of articles 12 to 29 of the Constitution⁴⁴³ Has been, is being or is likely to be contravened, he may apply to the High Court without prejudice to any other Act and concerning the same matter that is lawfully avoidable.⁴⁴⁴

The law permits anyone whose fundamental rights have been deprived to seek redress at the High Court.⁴⁴⁵ An application to the High Court in pursuance of Section 4 shall be by petition to be filled in the appropriate registry of the High Court by original summons.⁴⁴⁶ A petition made under this Act shall set out the name and address of the petitioner, the terms and address of each person against whom redress is sought, the grounds upon which redress is desired, the specific section under part three of chapter one of the Constitution which is the basic of the petitioner, particulars of the fact, but not the evidence to prove such facts relied on,

⁴⁴² The Commission for Human Rights and Good Governance, No. 7, 2001.

⁴⁴³ The Constitution of the United Republic of Tanzania, Cap 2. R.E 2008.

⁴⁴⁴ The Basic Rights and Duties Enforcement Act, Cap 3, R.E 2019, Section 4.

⁴⁴⁵ *Ibid*, Section 4.

⁴⁴⁶ *Ibid*, Section 5.

and the nature of the redress sought section 6 (a-f).⁴⁴⁷

The High Court may exercise original jurisdiction to determine the situation or application made and to determine any question arising in the cause of the trial, which is referred to it in pursuance of Section 6.⁴⁴⁸ The High Court shall not exercise its power under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to a person concerned under any other law or that the application is merely frivolous or vexation.⁴⁴⁹

When a matter arises to subordinate courts and deals with the provision of articles 12 to 29 of the Constitution⁴⁵⁰ The suit shall be brought to the High Court.⁴⁵¹ High Court shall preside with three judges of the High Court to determine whether the application is frivolous or vexation, or otherwise fit for hearing. Suppose the Court finds out that the fundamental rights have been unlawfully denied or that ground exists for protection by order. In that case, the Court shall have the power to make an order as necessary or appropriate to secure the applicant's enjoyment of the fundamental rights, freedoms and duties.⁴⁵² This is one of the human rights remedies and justice for the applicant.

In addition, if the High Court finds out any law or any action taken by the Government or other authorities contravenes articles 12 to 29 of the Constitution,⁴⁵³ The High Court has the power to order the legislative authorities to correct any

⁴⁴⁷*Ibid*, Section 6 (a-f).

⁴⁴⁸ The Basic Rights and Duties Enforcement Act, Cap 3, R.E 2019.

⁴⁴⁹*Ibid*, Section 8.

⁴⁵⁰ The Constitution of the United Republic of Tanzania, Cap 2. R.E 2008.

⁴⁵¹ The Basic Rights and Duties Enforcement Act Cap 3, R.E 2019, Section 9.

⁴⁵²*Ibid*, Section 13.

⁴⁵³ The Constitution of the United Republic of Tanzania, Cap 2. R.E 2008.

defect or give any other conditions to the limit set by the High Court.⁴⁵⁴ The law provides the chance for any person aggrieved by any decision of the High Court on an application brought under Sections 4, 5 and 6455 may appeal to the Court of Appeal⁴⁵⁶ to get a remedy.

In conclusion, this Act was enacted to enforce the provisions of the fundamental rights and duties set out under part three of the Constitution. The law allows any persons whose rights have been violated or are likely to be broken to seek redress at the High Court. The Act promotes legal accountability and the right to remedy and reparations to victims of human rights violations.

3.2.11 Regulation on Use of Force under Police General Orders

The Police General Orders set for the order of the police force; are issued pursuant to Section 7(2) of the Police Force and Auxiliary Services Act Cap 322 R.E 2010. These directives assist and guide the police force personnel in the execution of their daily duties and responsibilities. Each of the members of the police force is expected to abide by such orders and directives. However, there is admittance within the Orders that they cannot regulate each and every situation, and this judgment and discretion must be prudently applied.⁴⁵⁷ Further, there is a requirement for the use of discretion, common sense and reasonableness which will guide members' use of such discretion. Police force members are to be faithful to the applicable laws, the oath of office, the Code of ethics, and the police force's mission, goals and objectives in exercising their discretionary judgment.

⁴⁵⁴ The Basic Rights and Duties Enforcement Act Cap 3, R.E 2019, Section 13(2).

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid*, Section 14.

⁴⁵⁷ Purpose of the General Orders p. (i).

P.G.O No. 1 lists the basic principles which guide the police force. Expressly, in the use of firearms, it is provided that firearms tend to conflict with the essence of the police force and the protection of life. For that purpose, every member of the police force is called upon to attain the highest degree of proficiency in firearms and the orders regulating such firearms.⁴⁵⁸ Commanding and senior officers are obliged to ensure that members under their charge are appropriately instructed to use arms correctly in the execution of their duties.⁴⁵⁹

P.G.O No. 274 is also relevant when in the use of excessive force. Order 4 requires each officer issued with arms and ammunition to ensure that such are properly handled and used in accordance with the procedures, as each officer is to be personally accountable and responsible for any improper use of weapons in their care and control. An officer is not allowed to open fire with the direct intention of causing death, and in no circumstances is a police officer authorised to use more than the minimum force necessary to carry out his duties.⁴⁶⁰

The P.G.O makes resorts to section 29 of the Police Force and Auxiliary Services Act Cap 322 R.E 2010, which requires that where other reasonable options fail, to use arms against any person in lawful custody charged with or convicted of a felony when such person is escaping or attempting to, believes that they cannot otherwise prevent the escape and has given a warning to such person that he is about to use such arms against him and such warning is unheeded. This can also be done whereby force another person to rescue or attempt to prevent the lawful arrest of any person

⁴⁵⁸Order 33.

⁴⁵⁹Order 34.

⁴⁶⁰Order 5(a)(b).

or by force avoiding or trying to stop the lawful detention of any person.⁴⁶¹

The P.G.O. further sets out conditions in which police officers are entitled to use arms. Police are allowed to use components where it is essential for the effecting of an arrest of a person who is armed with a lethal weapon, where it is necessary for the defence of another person who may be seriously injured or killed by an assailant who is armed, or where it is essential for self-defence.⁴⁶² The P.G.O. further clarifies that where firearms are used; they should not be used to kill or inflict a severe injury and should be directed, when feasible, at the legs only.⁴⁶³ An appendix is made to the order, which provides for the mode of use of force.⁴⁶⁴

The Appendix termed "Appendix A" to P.G.O No. 274 states that the appropriate level of force that a police officer may use in controlling a person depends on the situation in which the officer finds himself when the force is used. Several factors are to be considered in determining the level of force that may be applied in controlling a situation; this includes the age, size, fitness, experience, skill level, relative strength, and number of the officer(s) and suspects(s) involved in an incident.⁴⁶⁵ The lowest level of force is required the lowest appropriate level. This is because the mere presence of uniformed police personnel could be enough to control a suspect's actions; when such an individual becomes aggressive, or resistance escalates, the officer should respond with the appropriate level of force to handle the situation. If a suspect's aggression or resistance de-escalates, the officer must also

⁴⁶¹ Order 6(a)(b).

⁴⁶² Order 7.

⁴⁶³ Order 8.

⁴⁶⁴ Order 9.

⁴⁶⁵ Paragraph 4 of Appendix A of P.G.O No. 274.

decrease the force used to control the situation. Ideally, an officer is to use the lower, most appropriate level of force, which is reasonably likely to allow the officer to maintain secure control over the situation.⁴⁶⁶ It is advised that police officers must always act in this manner as it will amount to using only the necessary force to control a situation.

The P.G.O. goes further to categorise the Force Continuum. It is organised into Threat Assessment, Level of Resistance, Method of Force, Control Techniques, Consideration of Force Escalation/De-escalation and Justification. Of most relevance is the Level of Force.⁴⁶⁷ The level of force is to first be through the presence of the officer, then verbal commands; failing that, physical contact should be made and, where necessary, physical control. If the previous fails, then severe physical control should be used by employing a weapon such as a baton to overcome the force of resistance and facilitate the arrest. Lastly, the officer is allowed to use deadly force, which includes the use of force readily capable of causing death or serious physical injury under the circumstances in which it is used.⁴⁶⁸

3.3 The Application of the Proportionality Principle in Tanzania

The application of international law principles in Tanzania generally follows a dualist approach. International law principles become part of domestic law through treaty ratification. International treaties are transformed by first enacting domestic legislation which gives effect to the treaty, or the provision of the treaty may be embodied in the text of an Act of Parliament, or the treaty may be included as a

⁴⁶⁶ *Ibid*, paragraph 4(a).

⁴⁶⁷ See paragraphs 5 and 8 of Appendix A to P.G.O No. 274

⁴⁶⁸ *Ibid*, paragraph 8.

schedule to a statute.⁴⁶⁹ The legislation which will be enacted will cover the substance or the content of the treaty. In Tanzania, courts apply these international treaties only when the State has signed them, even without ratification and no implementation Act. This action has a legal basis under Article 63(3) (e)⁴⁷⁰ To perform its function, the national assembly may deliberate upon and ratify all treaties and agreements to which the United Republic is a party and all positions which require ratification. This has authorised the application of the proportionality principle in Tanzania as a principle under human rights treaties.

The proportionality principle has its application and justification under customary law principles. The principle can be viewed in Tanzania *via* several legislation. For instance, the Criminal Procedure Act⁴⁷¹ States that a police officer or any other person shall not, in the course of arresting a person, use more force or subject the person to greater indignity than is necessary to make the arrest or to prevent the escape of the person after he has been arrested. A police officer shall not, in the cause of arresting a person, do an act likely to cause the death of that person unless the police officer believes on reasonable grounds that doing that Act is necessary to protect life or prevent serious injury to another person.⁴⁷²

The Prisons Act⁴⁷³ Stipulates that any prison officer may use such force against a prisoner as is reasonably necessary to make him obey lawful orders which he refuses to attend or maintain discipline in prison. Any prison officer may use any weapon,

⁴⁶⁹ Joseph, M, Legal Methods, Gunewe Publishers Mwanza, Tanzania, pp. 50-77.

⁴⁷⁰The United Republic of Tanzania Constitution 1977, Cap. 2, R.E 2008.

⁴⁷¹Section 21.

⁴⁷²*Ibid.*

⁴⁷³Section 13.

including firearms which may have been issued to him against a prisoner in escaping or attempting to escape and refuses, when called upon, to return or engage with other prisoners in breaking out or trying to break out any part of prison and continuance to breakout or to attempt to break out when called upon and resists, is endangering the life of, or is likely to inflict grave injury to the prison officer, or any other prisoner.

The use of weapons, including firearms, is the only practicable way of controlling the prisoner; the weapon shall be used or not be used as authorised in the paragraphs above unless the officer has a reasonable cause to believe that the amount otherwise can prevent the escape breaking out or riotous behaviours as the case may be, and has given a warning to such prisoners that he is about to use such weapon against him and such warning is unheeded.⁴⁷⁴ This provision contains elements of proportionality.

Proportionality procedure is exemplified in Court in different cases, as in the case of *Kukutia Ole Pumbuni and Another v Attorney General and Another*.⁴⁷⁵ Here, the applicant sued the Government for damages for trespass, assault and conversion. The contract to sue the Government was provided by Section 6⁴⁷⁶ with which the applicant moved the High Court to rule on the constitutionality of the said Section 6 and held that the provision is void as being against the Constitution of the United Republic of Tanzania. The High Court ruled that the section was not unconstitutional because it was properly enacted by Parliament as stipulated in Article 97,⁴⁷⁷ It is said that the law does not infringe on the provision of Articles 13 and 108 of the

⁴⁷⁴ The Prison Act, Cap. 34 R.E, 2010.

⁴⁷⁵ Court of Appeal [1993] T.L.R 159.

⁴⁷⁶ The Government Proceeding Act of 1967.

⁴⁷⁷ The Constitution of the United Republic of Tanzania, Cap.2 R.E 2008.

Constitution. The Court noted that the law which seeks to limit or derogate from the fundamental rights of an individual on the grounds of public interests would have a special requirement that the law must be lawful and not arbitrary, the limitation implied by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is known as the principle of proportionality. If the law which infringes a fundamental right does not meet both requirements, such regulation is not saved by Article 30(2) of the Constitution, and it is null and void. Any law that limits the individual's fundamental rights must be construed strictly to ensure that it conforms to this requirement. Otherwise, the guaranteed rights under the Constitution may quickly be rendered meaningless by using the derogative clawback clauses of that very same Court. Therefore, Section 6 of the Government Proceeding Act 1967, as amended by Act No.40 of 1974, was declared unconstitutional for the above reasons.

Furthermore, in the case of *Peter Ngomango v Gerson Mangwa and Attorney General at the High Court of Tanzania*,⁴⁷⁸ The plaintiff sued the first respondent in the High Court for damages for malicious prosecution. By way of third-party notice, the Attorney General was joined as the second defendant. The AG raised a preliminary objection that the suit was incompetent for want of consent of the Minister of Justice under Section 6 of the Government Proceeding Act. The plaintiff countered by raising a constitutional question as it offered under Articles 13(3), 13(6) and 30(3) of the Constitution of the United Republic of Tanzania, and so it should be declared void.

⁴⁷⁸ [1993] T.L.R 77.

In this case, the Act discussed the doctrine of proportionality. That it requires that the means employed by the Government to implement matters in the public interest should be no more than reasonably necessary to achieve legitimate aims; in other words, the Government must show that a compelling social need requires the restriction imposed on fundamental human rights and that is so framed as not to limit the rights in question more than necessary or proportionate to achieve a legitimate objective.

Moreover, in *Thomas Mjengi and Another v Republic High Court of Tanzania*,⁴⁷⁹ the two appellants were convicted of robbery with violence and were each sentenced to 30 years imprisonment. They were granted legal aid under Section 3 on appeal to the High Court.⁴⁸⁰ An advocate was assigned to prosecute the appeal. The advocate filed an amended memorandum of appeal in which he raised matters involving the interpretation of the constitutionality of the Minimum Sentences Act of 1972.⁴⁸¹ One of the grounds to appeal was the demand for their rights to free legal services at the expense of the State.

Another was that the provision for the minimum sentence of 30 years imprisonment and capital punishment provided under the Minimum Sentenced Act,⁴⁸² Were unconstitutional as the sentence amounted to inhuman and degrading punishment. The Court reasoned that any derogation clause must meet the proportionality test or reasonableness for the derogation clause to apply. It must be shown that it is required by compelling social need and that it is so framed as not to limit the rights in

⁴⁷⁹ [1992] T.L.R.

⁴⁸⁰ The Legal Aid Criminal Proceeding Act, Cap 21, R.E 2002.

⁴⁸¹ As amended by Act No of 1989.

⁴⁸² The Minimum Sentence Act, Cap 90 R.E 2010.

question more than necessary to achieve a legitimate objective, and, therefore, the limitation should be reasonable. So, 30 years imprisonment under Minimum Sentence Act⁴⁸³ It is unconstitutional and void because it was inhuman and degrading punishment.

The principle of proportionality is applicable in Tanzania via legislation and adjudication to help the Court to reach a fair judgment based on the principle. However, in some cases, the principle limits individual rights against government interests. The proportionality principle needs to be better applicable because there is a lack of excessive use of force cases, and the principle remains in books and statutes.

3.4 Institutional Framework

"The accountability and oversight mechanisms for policing form the core democratic governance and is crucial to enhancing the rule of law and assisting in restoring public confidence in the police force; to develop a culture of human rights, integrity and transparency within the police force; and to promote a good working relationship between the police and the public at large".⁴⁸⁴ It is believed that most current legal systems and policies do not follow the international standards of policing and are not protecting human rights. States need to adopt the model of policing, which stipulates the principles of equity, equality, accountability, transparency, participation, respect for diversity and protection of individual and group rights.

⁴⁸³ *Ibid.*

⁴⁸⁴ Resolution 103a: African Commission on Human and Peoples Rights.

The study analyses the international standards which apply to police accountability in Tanzania. International laws provide the rules for accountability, and the rationale of police accountability is to exercise the right to remedy. The regulations require governments to establish mechanisms for victims to seek remedy when their rights are violated. Most human rights instruments protect the rights and recognise the right to remedy. The ICCPR⁴⁸⁵ Requires each State to ensure that any person whose rights or freedom recognised under it are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; ensure that any person claiming such a remedy shall have their rights to that determined by competent judicial, administrative or legislative authorities or by other competent authority provided by the legal system of the State and to develop the possibilities of judicial remedy; and ensure that the competent authorities shall enforce such remedies when granted.

Moreover, the United Nations Code of Conduct for Law enforcement officials states that every law enforcement should be responsive and accountable to the community.⁴⁸⁶ The Code stated the actions of law enforcement officials should be responsive to public scrutiny. The Code advised the need to establish procedures and mechanisms to receive police complaints, and the procedures should be known to the public. The international standards recommend that states develop an accountability mechanism for law enforcement officials. For example, the establishment of reasonable procedures and effective review and reporting systems where human

⁴⁸⁵ Article 2(3).

⁴⁸⁶ The UN Code of Conduct for Law Enforcement Official, 1979, the preamble (a).

rights violations occur.⁴⁸⁷

The basic principle needs the superior officers to be accountable, and no criminal or disciplinary sanction will be imposed on an officer who goes contrary to the order to use force and firearms by another official.⁴⁸⁸ Other international legal instruments which expand the notion of accountability include the United Nations Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment.⁴⁸⁹ It provides police accountability mechanisms to ensure the detainee's rights are respected. In Africa, some mechanisms insist on accountability; these instruments are issued by the African Commission on Human and People's Rights. The main document is the ACHPR. *Via* this Guideline, several guidelines were made. For instance, in 2002, the Commission adopted the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa.⁴⁹⁰ And in the year 2014, the Commission adopted the Guideline on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa.⁴⁹¹

As to the international standards for police accountability, there are different levels of police accountability. Different States have other approach mechanisms for police accountability. Police accountability can be categorised into four areas regarding the levels police official operate. There is internal accountability, accountability to the State, accountability to the public and independent external oversight. The study

⁴⁸⁷ The United Nations Basic Principle on The Use of Force and Firearms by Law Enforcement Officials, 1990, Principle 6, 11(f) and 22.

⁴⁸⁸ BPUFF, Principle 25.

⁴⁸⁹ United Nations General Assembly, Resolution 43/173 of 9 December.

⁴⁹⁰ African Charter on Human and Peoples Rights Resolution on Guideline and Measurement for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa of 23 October 2002, Available at <http://bit.ly/2j3tfnX>.

⁴⁹¹ The African Charter on Human and Peoples Rights, Guideline on the Condition of Arrest, Police Custody and Pre-Trial Detention in Africa, 8 May 2014, available at <http://bit.ly/2k1MY78>.

examined the categories of police officials' accountability mechanisms in Tanzania.

3.4.1 Institutions Responsible for Internal Accountability

It is the responsibility of the police institution to monitor the policing system inside the police institution. Internal mechanism deals with the investigation of other police officers. Internal accountability includes; internal investigations, disciplinary hearings and chain-of-command reporting. The internal mechanism monitors performance, maintains discipline, investigates public complaints against Police and investigates allegations of abuse of power or criminal behaviours. Good police leadership will contribute to the culture of commitment and maintaining internal accountability. Good officers respect the rule of law and human rights. The lack of accountability emerged from institutional habitual behaviours contributed by police leadership. The police leadership is responsible for shaping the police institution in line with human rights standards. The best solution to make police officers accountable is to have responsible leadership.

Internal reporting is one of the internal accountabilities, reporting specific police actions and problems within the institutions. The international standards require police actions to be recorded and reported.⁴⁹² Situations such as detentions, arrests, refusal to grant bail, and other human rights violations occur in police custody. These police record helps in the protection of human rights to verify the conducts which need to be evaluated. The discipline mechanism proceeding is under the internal system for accountability comprised of rules and procedures which show

⁴⁹² The United Nations Code of Conducts for Law Enforcement Official, 1979 commentary (b) to article 8, also Police General Order 103 that every complaint must be recorded in the report book of the station where the complaint is made and reported immediately to the relevant regional command.

how the disciplinary offences are investigated, adjudicated and punished. These procedures are established under the Police acts, government guidelines and internal regulations.

The success of the inner discipline system needs to have procedures which are clear and formally established, should be autonomous to avoid impartiality, should be established by law, and follow due process. This internal discipline mechanism has incentives like quicker promotions, recognition and honour, and it provides for sanctions like dismissal, reduction in rank, reprimand, fines and withholding or deferment of extra duty.⁴⁹³ This is called a self-regulatory mechanism which helps with professionalism and responsibility.

The internal discipline mechanism starts with the procedure for filing a complaint; any community member can file a complaint regarding bribery, corruption, use of force and firearms, oppression, intimidation, neglect, non-performance of duty, and other Police conducts.⁴⁹⁴ This procedure is crucial for police accountability. This procedure helps the complainant form harassment and reprisal. On the other hand,

⁴⁹³ The Police Force and Auxiliary Service Act, Cap 322, Section 53 and 54, in respect of any conviction for an offence against discipline, any officer empowered to inquire S. 51 may impose any one or more of the following punishments (a) in the case of an inspector, admonishment; (b) in the case of any non-commissioned officer (i) admonishment; (ii) reprimand; (iii) a fine not exceeding ten shillings; (c) in the case of any constable (i) admonishment; (ii) confinement to quarters for any period not exceeding fourteen days; (iii) extra guards, fatigues or other duty; (iv) a fine not exceeding ten shillings; (v) disciplinary detention for any period not exceeding seven days; (d) in the case of followers (i) admonishment; (ii) a fine not exceeding ten shillings; (iii) stoppage of increment; (iv) reduction to a lower rate of pay; (v) dismissal. At any time before it is carried out, any punishment imposed under this subsection may be varied by the superintendent in charge of Police to whom the officer imposing punishment is subordinate or by the commissioner or an assistant commissioner to whom the commissioner has in writing delegated his powers under this section: provided that no punishment shall be increased unless the accused has first had an opportunity of showing cause why the punishment should not be varied. (2) an assistant commissioner or a superintendent in charge of Police to whom there are referred any proceedings for an offence against discipline may impose any one or more of the punishments mentioned in subsection (1) or any one or more of the following punishments (a) in the case of an inspector (i) severe reprimand; (ii) a fine not exceeding one month's pay; (iii) reduction of rank; (iv) stoppage of an increment of pay; (b) in the case of any member of the force below the rank of sub-Inspector (i) a fine not exceeding one month's pay; (ii) dismissal; (iii) disciplinary detention for any period not exceeding fourteen days; (iv) reduction in rank; (v) stoppage of an increment of pay.

⁴⁹⁴ The Police Force and Auxiliary Service Act Cap 322, R.E 2010, Section 51.

complaint mechanisms allow police institutions to re-examine their policing system and do justice. The police officers may also file complaints.⁴⁹⁵

Police General Order 103 requires a community member to report the allegations to the Regional Commander of the region in which the allegations are made. The civilians may complain to the Police senior officer at the Police Station, the Magistrate, the Commission of Human Rights and Good Governance, the Ministry of Home Affairs and PCCB. The Police General Orders⁴⁹⁶ state that every complaint and allegation against any police officer made by a public member shall be investigated with the greatest care. Complaints are sent to the police station and sent to senior officers by any means. The complaints shall be in writing, entered into the station report book, and investigated promptly. To minimise complaints, the senior officers are required to visit and monitor police stations each month. These inspection visits must cover; the condition of equipment, station books, exhibit register, detention register, investigation register, and knowledge of police general orders, duties and simple law.

The Internal discipline mechanism for Police in Tanzania is to the rank. The Principal Secretary of the Ministry of Public Safety and Security disciplined senior officers, with the President as the final authority. IGP disciplines officers below the level of Assistant Inspector but below senior officer.⁴⁹⁷ Disciplinary action for misconduct allegations by a fellow officer or member of the public is provided; first, if a junior officer has committed misconduct, the rule referred to is under part IV of

⁴⁹⁵*Ibid* Section 64.

⁴⁹⁶Order 106(6)

⁴⁹⁷Commonwealth Human Rights Initiative, *The Police, The People, The Politics: Police Accountability in Tanzania*, 2006, pp. 27-13.

the Police Force Service Regulations 1995.⁴⁹⁸ Suspected people may be arrested by more Senior Officers and detained in custody. The senior officer may set charges against him. The commanding officer may hear the charges and send the case to a more senior officer with instructions.⁴⁹⁹

The tribunal for proceedings is known as *maktab* informally and is not permanent. It is on a need basis to hear complaints at a time. The tribunal has a hearing officer below the rank of Inspector. The Commanding Officer acts as a prosecutor and can choose another officer. The accused must appear before the commanding officer, and the charge read to him, and he is allowed to plead guilty or not guilty. The case proceeds, and witnesses are summoned to produce evidence. The proceedings are recorded like in the Court of law procedures of hearing.⁵⁰⁰

Secondly, for disciplinary action on mid-ranking officers, the Inspector Commanding Officer determines whether the case exists to support allegations. The Commanding Inspector needs to respond to the assertion in Kiswahili and report to the IGP; if there is a case to answer, the accused person is given seven days to enter a plea in writing. Thirdly, for disciplinary action on senior officers, a proceeding of a senior officer can take place in the form of a formal hearing or summary proceedings. A legal proceeding occurs if the authority finds out the officer is guilty

⁴⁹⁸ *Ibid.*

⁴⁹⁹ The Police Force and Auxiliary Service Act Cap. 322, R.E 2010, Section.52.

⁵⁰⁰ *Ibid*, S.55(1) every officer empowered under this part to inquire into any charge or case shall have the power to summon and examine witnesses on oath or affirmation and to require the production of all documents relevant to such inquiry and to adjourn any hearing from time to time upon such terms as he shall think fit, and to remand the person accused in custody until the adjourned hearing. All proceedings shall be recorded in such manner as may be required by regulations or orders made under this Act. Section 51(2) any person summoned as a witness under the provisions of subsection (1) of this section who fails to attend at the time and place mentioned in the summons or on any adjournment, or refuses to answer any question lawfully put to him, commits an offence and shall be liable on conviction to a fine not exceeding one hundred shillings or to imprisonment for one month: provided that no such witness shall be obliged to answer any question which may tend to incriminate him or render him liable to any forfeiture or penalty.

of an allegation. Summary proceeding occurs when the proceeding instituted would not warrant dismissal or reduction in rank or attachment of salary.⁵⁰¹ For all proceedings, an officer is allowed to appeal only if the decision leads to a reduction in rank, reduction in salary, removal from service or dismissal from duty. However, such appeals are limited by law.⁵⁰²

3.4.2 Institutions Representing the State

Police institution is an organ of the State and representative of the State. It performs the coercive functions of the State. Each institution within the Government has a function to play to ensure the rule of law. Police institutions are accountable for policing within the State. The executive is a supervisor of the Police. In Tanzania, the Minister of Home Affairs can issue directions to the IGP on the operation and control of force.⁵⁰³ The relationship between the Police and the executive should save the purpose of accountability. The executive should make the police institution accountable by developing policies and adopting regulations in Tanzania. This is called the principles of operational responsibility, that the executive has a role in policy-making.

The executive also has a way of handling a complaint usually reserved for internal and independent oversight organs. The Ministry of home affairs has a complaint unit under the Ministry, which is known to be external to the Tanzania police force. These complaints emerged from the public to the Tanzania police force to

⁵⁰¹ Commonwealth Human Rights Initiative, *The Police, The People, The Politics: Police Accountability in Tanzania*, 2006, pp. 27-13.

⁵⁰² *Ibid.*

⁵⁰³ Police and Auxiliary Service Act, Cap 322, Section 7(1).

investigate. The Ministry investigates these complaints regarding promotion, transfer or dismissal.⁵⁰⁴ The abovementioned role is advised to be conducted under the Police Service Commission.

3.4.3 Parliament

The Constitution of Tanzania under Article 62 (1)⁵⁰⁵ provides for the Parliament and the national assembly, and Article 64(1)⁵⁰⁶ States the mandates of the Parliament, is legislative power in relation to union matters and all matters concerning mainland Tanzania. Parliament is one of the state institutions to legislate and review law, represent citizens and hold the executive accountable for police implementations. Parliament can make the police officers responsible via the enactment of strict rules and standards prohibiting the use of excessive force. Second, Parliament has the power to question the wrongdoing of the Police and seek account for police performance.⁵⁰⁷ This is via the questioning and answer session, debates, attention-drawing motions and private member's bills.

During question and answer, the session allows Parliament members to raise questions about police behaviours. As well the Police are answerable to the Parliament; the Defence and security committee of the Parliament of the united republic of Tanzania, this committee handles regular reports of police operations. Also, the national assembly has the power to ask questions to any minister on matters of public affairs that fall within that minister's portfolio and advise them

⁵⁰⁴ Commonwealth Human Rights Initiative, *A Force for Good? Improving the Policing in Kenya, Tanzania and Uganda*, 2014, p. 49.

⁵⁰⁵ The United Republic of Tanzania Constitution 1977, Cap. 2, R.E 2008.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid* Article 63(2) and 63(3).

accordingly. The Member of Parliament can also ask questions regarding police behaviours.

3.4.4 Judiciary

Police officers are accountable via the Judiciary. Article 107A,⁵⁰⁸ The judicial is the formal authority in dispensing justice in criminal and civil matters. Article 108B,⁵⁰⁹ In exercising their powers, courts have freedom and shall be required to observe the provisions of the Constitution. The Judiciary further has to protect human rights and freedoms, article 30(3).⁵¹⁰ It has to ensure that the executive and laws made by the Parliament comply with human rights standards. Therefore, the High Court has the power over the Police to review police exercise of power, illegal detention or where police officer violates the Constitution. Individuals also can institute private prosecutions for police violations of human rights.⁵¹¹ The Judiciary protects the victims also by bringing perpetrators to justice and ensuring the victims obtains sufficient redress. It holds police officers accountable through criminal proceedings. Judiciary as well develops and adopts standards of acceptable behaviours.

3.4.5 Community

Community policing is the collaboration between the Police and the community to solve community problems. The test of good policing is revealed to the community's perception. The responsibility of the police force to the community brings confidence in the Police as an institution. The burden of the police force includes;

⁵⁰⁸The United Republic of Tanzania Constitution 1977, Cap. 2, R.E 2008.

⁵⁰⁹*Ibid.*

⁵¹⁰*Ibid.*

⁵¹¹Commonwealth Human Rights Initiative, A Force for Good? Improving the Policing in Kenya, Tanzania and Uganda, 2014, p. 49.

the increase of police efficiency in policing tasks, acceptance and registration of complaints, and having rules sensitive to the needs of the public and public accountability. Police need the community to be cooperative to fight against crimes, and police institutions need to provide services to the community and be accountable to the citizens and the Government.

Accountability to the community requires the Police and the community to work together to address the community's problem. If the police force works with the community in good faith, the target will shift from solving crime to crime prevention. Also, to ensure that the police force is accountable to the community, the legal society, media, and academia should play their role to ensure police forces are responsible to the community. Lawyers are handling cases on behalf of victims of police misconduct. Media reports on police misconduct and crime, and the academia researches policing methods, police accountability and crime victimisation.

3.4.6 The External Oversight Mechanism

External oversight mechanism is one of the international Police standard mechanisms.⁵¹² The Constitution establishes them to secure its protection; some are incorporated into existing legislation or have a separate piece of legislation. The legislations give the oversight mechanisms strong powers and mandate to be vital to fight against human rights violations. Without external oversight mechanisms, the police force could be the Judge of their case. Victims of human rights violations will fear police victimisation and lack faith in the investigation procedure. The severe

⁵¹²Study on Police Oversight Mechanisms, Report of Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, Philip Alston, UN HRC, A/HRC/14/Add, Para 52.

cases would not be reported to criminal prosecution but to minor disciplinary measures for serious offences.

The external mechanism increases faith in the police force and its ability to address crime. The external mechanism helps the complaints against the police force not be solved in a biased manner. These institutions can handle police officers' misconduct without fearing their power and influence on the community. The external policy oversight mechanisms have a variety of forms and shapes. There are bodies committed to investigating, reviewing, and monitoring police-related complaints, and there are human rights institutions with broader mandates. Human rights institutions are also known as commissions; they investigate human rights complaints against Police to promote and protect human rights.

Tanzania has the Commission of Human Rights and Good Governance (CHRAGG) and the Prevention and Combating of Corruption Bureau (PCCB). The above institution has no mandate to watch over police force misconduct but has the order to investigate and address human rights violations by all agencies. The CHRAGG can comment and make recommendations regarding any issue involving the Police. They can institute court proceedings to enforce recommendations if the proposals have yet to be acted upon. The CHRAGG can inspect police stations, investigate complaints against Police and advise the Inspector General of Police.

3.5 Conclusion

Like any other State, Tanzania utilises police officers to prevent breaches of the peace. This is coupled with certain limitations regarding Police using force in

achieving the purposes of crime prevention and restricting violations of the peace. It has been observed that in Tanzania, Police are categorised into several units, each dealing with specific functions such as investigation and the field force, which are the actual enforcers of the law where a breach of peace arises. Officers are also accountable to a number of stakeholders, including the Judiciary, the Parliament, and the public in general, as their powers are only absolutely exercised with the form of checking them.

Legislative oversight is also present; the laws provide standards on using force, accountability, right to redress and reparations. Some statutes protect the rights of vulnerable groups, specifically children who conflict with the law. In this case, women were left behind, and there was a miss in the promotion and protection of women's rights especially detained and arrested women. Few laws limit police officers' accountability to criminal and civil proceedings, infringing on the right to reparation. Also, the institution established an oversight mechanism, the Commission for human rights and good governance, as a step toward the obligations under international standards.

CHAPTER FOUR

EXCESSIVE USE OF FORCE AND PROPORTIONALITY PRINCIPLE UNDER INTERNATIONAL, REGIONAL AND SUB-REGIONAL LEGAL INSTRUMENTS

4.1 Introduction

Excessive use of force by police officials has affected individual countries and globally. This is because the results of excessive use commonly violate the human rights of all humankind. For this reason, various international standards are set to govern and control the excessive use of force through the proportionality principle. This chapter presents a global, regional and sub-regional legal framework for using force on law enforcement officials. It examines the key human rights standards of using force, its scope and protection. It presents the use of force by police officials, police accountability and reparation system to the victims of the excessive use of force by police officials. In addition, it presents the regulations on duty to protect human rights.

The international and regional legal framework provides the parameters the law enforcement officials should base when carrying out their duties. Such parameters prohibit excessive use of force arbitrarily contrary to set standards internationally. The standards obligate countries to abide by them to avoid violating human rights through excessive use of force by police officials. The parameters to protect human rights as all human beings have rights and fundamental freedoms, including the right to life and security for their person and to be free from torture and other cruel, inhuman or degrading treatment or punishment. The key human rights which are

related to the use of force; the right to life, the right to liberty and security of person, the right to a fair trial, the right to freedom of peaceful assembly, association and freedom of expression, right to freedom from torture and other forms of ill-treatment and the right to an effective remedy. The following presents a set of international and regional instruments regulating the use of excessive force by police officers.

4.2 International Legal Framework

4.2.1 Human Rights and Proportionality Principle under the United Nations Charter

The UN Charter was established, signed on June 26, 1945, and came into force on October 24, 1945.⁵¹³ The Charter aimed to save the succeeding generations from the scourge of war. The purpose was to develop international peace and security, develop friendly relations among nations based on the principle of equal rights and self-determination of peoples, to achieve international cooperation in solving global problems, among others.⁵¹⁴ In the context of the Charter, nations reaffirm faith in fundamental human rights in the dignity and worth of the human person; equality rights of men and women; maintenance of peace and security; friendly relation based on the principle of equal rights promoting and encouraging respect for human rights and fundamental freedom for all.⁵¹⁵

Concerning excessive use of force, the Charter provides the procedure to use force. It places obligations to states not to use force unless when and if it is necessary. The Charter specified that 'nothing in the present Charter shall impair the inherent right

⁵¹³The United Nations Charter, 1945.

⁵¹⁴*Ibid*, Article 1.

⁵¹⁵The United Nations Charter, 1945.

of individual or collective self-defence if an armed attack occurs against a member of the United Nations until the Security Council has taken measure necessary to maintain international peace and security.⁵¹⁶ Force is allowed on the grounds of self-defence, but measures taken by members to exercise this right of self-defence must immediately be reported to the Security Council. Such force should not affect the authority and responsibility of the Security Council at any time, such action as it deems necessary to maintain or restore international peace and security.⁵¹⁷

Furthermore, the Charter prohibits the threat or use of force except in legitimate individual or collective self-defence, hence, allowing the customary principle of proportionality to play an essential role in the incidence of the necessary use of force. The use of the proportionality principle is there to determine the lawfulness of the use of force in self-defence. The proportionality requirement is not explicitly introduced by Article 51 of the Charter but was incorporated in the Charter as part of customary international law. Accordingly, this Charter is helpful in this study because it recognises the principle of proportionality framework to the use of force.

4.2.2 Protection of Human Rights and the Proportionality Principle under the Universal Declarations of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted and proclaimed by the United Nations General Assembly resolution 217 A (III) of December 10 1948, in Paris. The preamble to UDHR recognises the inherent dignity of the human family as the foundation of freedom, justice and peace in the world.⁵¹⁸ The document

⁵¹⁶ Ibid, Article 54.

⁵¹⁷ The United Nations Charter, 1945.

⁵¹⁸ The United Nations General Assembly adopted this document in 1946 and the official 1948 UN doc A/811.

protects and promotes the rights of every human being without discrimination as provided under different provisions and must follow all because everyone has the right to life, liberty and security. The right to life is the mother of all rights and should be protected by the State and a person.⁵¹⁹ Thus, in that case, no one shall be subjected to torture or cruel, inhuman or degrading treatment; the right to torture is protected without justification.⁵²⁰

Human beings are not angels; there are situations in a human being goes contrary to law, the person though charged with a penal offence has the right to be presumed innocent until proven guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence.⁵²¹ The law provides that everyone has the right to freedom of peaceful assembly and association, and no force shall be employed to limit the rights unless it is proportionally to the objective of the rights.⁵²² The UDHR protects the rights of a person, and interference with the requests must be allowed by law and is proportional. It is worth noting that although the UDHR is a non-binding document; its provisions are undisputed by all States to the extent that it is considered part of the customary international law. These principles, therefore, bind Tanzania.

4.2.3 The Proportionality Principle under The International Covenant on Civil and Political Rights

The International Convention on Civil and Political Rights (ICCPR) was adopted by the United Nations General Assembly in resolution 2200 A of December 16 1966, in

⁵¹⁹ The Universal Declaration of Human Rights, 1948, Article 3.

⁵²⁰ *Ibid*, Article 5.

⁵²¹ *Ibid*, Article 11.

⁵²² *Ibid*, Article 20.

New York. The ICCPR was opened for signature, ratification and accession on December 19 1966. It entered into force on March 23 1976, and Tanzania acceded to this Convention on June 11 1976. The Covenant recognises all human family members' inherent dignity and equal and inalienable rights. It provides that each State has obligations under the Charter of the United Nations to promote universal respect for and observance of human rights and freedom. It realises that each individual has a duty to others and the community.⁵²³

The ICCPR generally protects human rights, specifically civil and political rights. It incorporates the proportionality principle as part of human rights protection to balance the public and private interests in realising the request. The Covenant provides that a person's freedom may be subject to limitations prescribed by law and necessary to protect public safety, order, health and the fundamental rights and liberties of others.⁵²⁴ The exercise of rights is subject to certain restrictions, but these shall only be as provided by law and are necessary.⁵²⁵ No restriction may be placed on exercising rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of the security or public safety, public order, morals and freedom of others.⁵²⁶

The Covenant protects the right to life that every human has the right to life, and it is not allowed to be arbitrarily deprived; the limitation of the rights should be prescribed by law as previously stated. The Covenant prohibits torture of any kind. To protect human rights, no one shall be subjected to torture or cruel, inhuman or

⁵²³ The International Covenant on Civil and Political Rights, 1966, Article 1.

⁵²⁴ Article 18 ICCPR, 1966.

⁵²⁵ *Ibid*, Article 19.

⁵²⁶ Article 21 ICCPR. 1966.

degrading treatment or punishment and⁵²⁷ no one shall be held in slavery, and the slave trade in all its forms shall be prohibited.⁵²⁸ The Covenant provides that if a person commits a wrong, they are detained, a person has the right to liberty, and the security of the person should be protected. A person shall not be subjected to arbitrary arrest or detention, and no one shall be deprived of his liberty except on such grounds and with the procedure established by law.⁵²⁹ Further, everyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and entitled to trial within a reasonable time.⁵³⁰

Each State shall ensure a person whose rights and freedoms are violated has an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.⁵³¹ Any person whose rights are violated can take proceedings before a court so that the court may decide without delay on the lawfulness of his detention and order his release if the custody was not lawful.⁵³² All persons unlawfully detained have enforceable rights for compensation and redress for violating their Rights.⁵³³

Concerning the principle of proportionality, the ICCPR⁵³⁴ Imposes an obligation for States to respect the covenant rights and to ensure that States which restrict the covenant rights must demonstrate their necessity and take measures as appropriate to

⁵²⁷ *Ibid*, Article 7.

⁵²⁸ *Ibid*, Article 8.

⁵²⁹ *Ibid*, Article 9.

⁵³⁰ *Ibid*, Article 9(3).

⁵³¹ The International Covenant on Civil and Political Rights, 1966, Article 2(3).

⁵³² The International Convention against Torture and Other Cruel and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 9(4).

⁵³³ *Ibid*, Article 10.

⁵³⁴ The International Covenant on Civil and Political Rights, 1966, Article 2(1).

the pursuit of legitimate arms to ensure adequate protection of covenant rights. The Covenant requires⁵³⁵ That the rights enunciated, be exercised proportionately without discrimination in terms of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status. However, the differential treatment based on prohibited grounds will not be considered discriminatory if the justification for differentiation is reasonable and objective.

The use of the proportionality principle in restricting human rights can be further ascertained in several provisions throughout the ICCPR. Article 2(1) states that each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction that the rights recognised in the present Covenant are proportionally applied without distinction of any kind based on their status. Article 4⁵³⁶ On the other hand requires State parties to recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as determined by law only in so far this may be compatible with the nature of these rights and solely to promote the general welfare in a democratic society. Article 12(3)⁵³⁷ Allows for the right to liberty of movement, freedom to choose his residence, and space to leave any country, including his own these rights shall not be subject to any restriction except those provided by and are necessary to protect national security.

⁵³⁵ *Ibid*, Article 2(2).

⁵³⁶ The International Covenant on Civil and Political Rights, 1966.

⁵³⁷ *Ibid*.

Article 19(3)⁵³⁸ States that everyone has the right to opinions without interference, the exercise of this right may therefore be subjected to specific restrictions. Still, these shall only be provided by law and are necessary for respect of the rights and reputation of others and the protection of national security or public order. Article 21⁵³⁹ states the right to peaceful assembly, the restriction may be placed on the exercise of this right should conform with the law and which are necessary for a democratic society and Article 22⁵⁴⁰ Provides that everyone has the right of freedom of association, no restriction be placed on exercising this right other than those prescribed by law and necessary in a democratic society.

The above articles verify that where a State restricts the rights, it must demonstrate its necessity and take measures proportionate to the pursuit of legitimate aims to ensure adequate protection of covenant rights.⁵⁴¹ The proportionality principle, therefore, interferes with the restriction of human rights by supervising the enjoyment of the request by individuals and restricting the government powers of the State.

4.2.4 The Proportionality Principle under the International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the rights mentioned above. Tanzania acceded to this treaty on June 11 1976. This Convention does have a bearing on the principle of proportionality.

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

⁵⁴⁰ *Ibid.*

⁵⁴¹ The United Nations Human Rights Committee General Comments No. 31, Para 6.

Article 2(2) of the ICESCR provides that State parties to the Covenant undertake to guarantee that the rights enunciated within it be exercised without discrimination of any kind as to race, colour, sex, language, religion, political and other status. Similarly, article 5⁵⁴² Provides that State parties recognise that all persons are equal before the law and are entitled, without discrimination, to equal protection and similar benefits of the law.

On the other hand, state parties must take measures to prohibit all discrimination based on disability and guarantee to persons with disabilities; ensure equal and adequate legal protection against discrimination on all grounds. To promote equality and eliminate discrimination, state parties shall take all appropriate steps to provide reasonable accommodation. Specific measures necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the present Covenant. Therefore, Article 2(2) of the ICESCR provides for proportionality in enjoying the rights contained by requiring the requests to be enjoyed without discrimination. Where such arise, there should be a reasonable and objective cause.

4.2.5 Protection of Human Rights and Proportionality Principle under The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (CAT) was adopted by the United Nations General Assembly resolution in 1984 in New York. The CAT was opened for signature, ratification and

⁵⁴²*Ibid.*

accession on December 10, 1984, and entered into force on June 26 1987. However, this Convention has not been signed by Tanzania nor acceded to. The Convention acknowledged that States have the obligations under the United Nations Charter, particularly article 55, to promote universal respect for and observance of human rights and fundamental freedoms and to have a desire to make more effective struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.

Further, the Covenant recognises the principle proclaimed in the Charter of the United Nations that recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and those rights derived from the inherent dignity of the human person.⁵⁴³ The Convention defines torture as,

“Any act which severe pain or suffering, whether physical, mental is intentionally inflicted on a person for such purpose as obtaining from him or third person information or a confession, punishing him for an act he or third person has committed or is suspected of having committed or intimidating or coercive him or third person for any reason based on discrimination of any kind when such person or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁵⁴⁴

The CAT protects the right to freedom from torture, and States must ensure they prohibit torture in any way. The Convention requires each state party to take effective legislative, administrative, judicial or another measure to prevent measures

⁵⁴³ The Convention was adopted by General Assembly resolution 39/46 of December 1984. UN doc a/39/51/1984 was entered into force on June 26 1987.

⁵⁴⁴ The International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 1.

or acts of torture in any territory under its jurisdiction.⁵⁴⁵ Each State party is required to ensure that all acts of torture are offences under its criminal law; the same applies to attempts to commit torture and any action by any person who constitutes complicity or participation in torture.⁵⁴⁶ Also, each state party is to ensure that education and information regarding the provision against torture and ill-treatment are fully included in the training of law enforcement personnel, military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.⁵⁴⁷

Each State party has to ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to or to have his case promptly and impartially examined by its competent authorities,⁵⁴⁸ And each State shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined under Article 1.⁵⁴⁹ Steps are to be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as consequences of his complaint or any evidence government.⁵⁵⁰ Each State shall ensure that its legal system that the victim of an act of torture obtained redress and has an enforceable right to fair and adequate compensation, including means for as full rehabilitation as possible.⁵⁵¹

⁵⁴⁵*Ibid*, Article 2.

⁵⁴⁶*Ibid*, Article 4.

⁵⁴⁷*Ibid*, Article 10.

⁵⁴⁸ The International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 13.

⁵⁴⁹*Ibid*, Article 16.

⁵⁵⁰*Ibid*, Article 13.

⁵⁵¹*Ibid*, Article 14.

4.2.6 The Optional Protocol to the Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment

The protocol was adopted on December 18 2002, by the United Nations General Assembly and opened for signature and ratification on December 19 2002. It has also not been signed nor acceded to by Tanzania. The protocol reaffirms that torture and other cruel, inhuman or degrading treatment or punishment are protected and constitute a severe violation of human rights.⁵⁵² This protocol aims to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty to prevent torture and other cruel, inhuman and degrading treatment or punishment.⁵⁵³

The protocol insists that to prevent torture, each State should establish a national preventive mechanism and shall be called a national preventive mechanism. That will be one of several visiting bodies to prevent torture and other cruel, inhuman or degrading treatment or punishment. It is a mandate under the document that each State shall maintain, designate or establish at least one year after entry into force of the present protocol or of its ratification or accession; one or several independent national preventive mechanisms established by decentralisation units designed as a national protective mechanism for the current protocol.⁵⁵⁴

The mechanisms are required to be independent, and States shall take necessary measures for the experts of the national mechanism to have the required capabilities

⁵⁵² Adopted on December 18 2002, by the UN General Assembly opened for signature and ratification on December 19 2002.

⁵⁵³ The Optional Protocol to the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, 2002, Article 1.

⁵⁵⁴ *Ibid* Article 17.

and professional knowledge and be gender balanced.⁵⁵⁵ The power of the national preventive mechanisms shall be to examine the treatment of the persons deprived of their liberty in places of detention and recommend to the authority to improve the treatment and conditions of persons deprived of their freedom.⁵⁵⁶

4.2.7 Human Rights Protection under the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Declaration) was accepted by the General Assembly resolution 3452 (xxx) of December 9 1975.

This Declaration prohibits torture⁵⁵⁷ and defines it as follows;

"Torture is any act by which severe pain or suffering, whether physical/mental, is intentionally inflicted by or at the instigation of a public official on a person for such purpose as obtaining from him or third person information or confession, punishing for an act he has committed or is suspected having committed or is suspected having committed or intimidating him/other persons."

Torture is considered a denial of the United Nations Charter and a violation of human rights and fundamental freedoms stipulated under the UDHR.⁵⁵⁸ States are required not to accept torture in their jurisdiction and any acts which are inhuman or degrading treatment or punishment.⁵⁵⁹ States must take adequate measures to prevent torture and cruel or degrading treatment or punishment.⁵⁶⁰ It further requires that for

⁵⁵⁵ *Ibid*, Article 18.

⁵⁵⁶ *Ibid*, Article 19.

⁵⁵⁷ The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975, Article 1.

⁵⁵⁸ *Ibid*, Article 2.

⁵⁵⁹ *Ibid* Article 3.

⁵⁶⁰ *Ibid* Article 4.

those people deprived of their liberty, the law enforcement personnel or other public officials are responsible for ensuring the whole account is taken for the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.⁵⁶¹ Additionally, any person who alleged that he had been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to and to have his case impartially examined by a competent authority.⁵⁶² Despite its valuable protections against torture and inhumane treatment, Tanzania has not signed this treaty.

4.2.8 Human Rights and the Proportionality Principle under the Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court (Rome) was adopted in Rome on July 17 1998 and opened for signature and ratification. It entered into force in July 1998, and Tanzania duly signed it on December 29 2000. The statute establishes the International Criminal Court⁵⁶³ and provides for its jurisdiction, admissibility and applicability of the law,⁵⁶⁴ That has jurisdiction to try genocide, crimes against humanity, war crimes, and crimes of aggression. This statute deals with international criminal offences. For a long time, the international community has been looking for a mechanism to create an international mechanism for prosecuting and punishing individuals who are accused of grave human rights violations through the Rome Statute of the International Criminal Court. This is a landmark for international

⁵⁶¹ The Rome Statute of the International Criminal Court, 1998, Article 5.

⁵⁶² *Ibid*, Article 8.

⁵⁶³ The Rome Statute of the International Criminal Court, 1998, Article 1 establishment of a court and shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most severe crimes of international concern as referred to this statute and shall be complementary to national criminal jurisdiction. The provision of this statute shall govern the jurisdiction and functioning of the court.

⁵⁶⁴ The court's jurisdiction shall be limited to the most severe crimes to the international community as genocide, crime against humanity, war crimes and crimes of aggression.

development on accountability issues. By ensuring compliance and national cooperation, the court will prosecute the present serious criminals and serious crimes left unpunished.

The statute's preamble calls for State parties to end impunity by the perpetrators of crimes and, thus, contribute to preventing such crimes. This is recalling that every State must protect human rights and exercise its criminal jurisdiction over those responsible for international crimes and affirm the purposes and principles of the Charter of the United Nations. All States shall refrain from threatening or using force against any state's territorial integrity or political independence.⁵⁶⁵

The statute prohibits the use of force under Article 8⁵⁶⁶ Which incriminates war crimes.⁵⁶⁷ The statute criminalises torture which is the result of the use of force. The Rome statute under Article 2(a)(ii) and 2(c)(i) states that torture or inhuman treatment, like in some forms of biological experiments, is not allowed. Violence to persons, in particular, murder of all kinds, mutilation, cruel treatment and torture are all included under war crimes.⁵⁶⁸

The Rome statute also prohibits crimes against humanity. These are attacks directed against any civilian population. The crimes against humanity comprise murder, extermination, enslavement, imprisonment or other deprivation of physical liberty, torture and other inhuman treatment subject to great suffering. The statute protects

⁵⁶⁵ The Rome Statute of the International Criminal Court, 1998.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *Ibid.*, Article 8(2) war crimes means grave breaches of the Geneva Conventions of August 12 1949, namely any of the following acts against a person or property protected under the provision of the relevant Geneva Convention:

⁵⁶⁸ The Rome Statute of the International Criminal Court, 1998, Article 8.

the human rights of civilians and prohibits violation of human rights. As stated, exercising other rights should not be the reason to violate other rights, and the rights should be exercised proportionally not to commit the above crimes under Article 7 of the statute. The Rome statute further protects the rights of an accused person alleged to commit a crime, ensuring that all the procedural rules against the accused persons are observed under this statute.

In that regard, and as highlighted earlier, the law provides for the application of all legal trial procedures for the accused.⁵⁶⁹ since he has the right to the presumption of innocence and the right to a fair trial.⁵⁷⁰ The accused needs to be informed in detail of the nature, cause and content of the charge, to be tried without undue delay, not to be compelled to testify or to confess guilty and to remain silent without such silence being a consideration in the determination of guilt or innocence.⁵⁷¹ This also shall be observed nationally, and police officials should consider it to avoid human rights violations.

4.2.9 Human Rights Protection and Proportionality Principle under the Declaration on the Elimination of Violence against Women

The Declaration was proclaimed by General Assembly Resolution 48/104 of 1994. It protects and promotes the rights of women. Violence against women is a bar towards equal development and peace. Violence against women is a violation of the rights and fundamental freedoms of women. There are many groups of women like indigenous women, refugee women, migrant women, women living in rural areas or

⁵⁶⁹*Ibid*, Article 63.

⁵⁷⁰*Ibid*, Article 66.

⁵⁷¹*Ibid*, Article 67.

remote communities, destitute women, women in institutions or detention, female children, women with disabilities, older women and women in situations of armed conflict are vulnerable to violence.⁵⁷² All these kinds of women, in one way or another, may conflict with the law, and there are situations where women are detained or arrested.

Violence against women means an act of gender-based violence that results in physical, sexual or psychological harm or suffering to women, including the threat of such action, coercion or arbitrary deprivation of liberty, whether occurring in public/private life.⁵⁷³ Violence against women includes physical, sexual and psychological violence perpetrated or condemned by the State whenever it occurs.⁵⁷⁴ The Declaration prohibits violence against women, and women need the protection of all human rights and fundamental freedom, including the right to life and not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.⁵⁷⁵

States should protect women's rights by ratifying or acceding to the Covenant like CEDAW, refraining from engaging in violence against women and preventing them with national legislation, punish acts of violence against women perpetuated by the State or private.⁵⁷⁶ Further, the victims of violence should be given remedies for the harm they have suffered, and women should be educated on their remedies to seek redress through formal mechanisms.⁵⁷⁷

⁵⁷² The Declaration on Eliminating Violence against Women, 1993, Article 1.

⁵⁷³ *Ibid*, Article 1.

⁵⁷⁴ *Ibid*, Article 2.

⁵⁷⁵ *Ibid*, Article 3.

⁵⁷⁶ *Ibid*.

⁵⁷⁷ *Ibid*, Article 4.

4.2.10 Human Rights Protection and Proportionality Principle under the Standard Minimum Rules for the Treatment of Prisoners

The standard minimum rules for the treatment of prisoners were adopted by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Geneva in 1955 and approved by ECOSOC by its resolutions 663 C (XXIV) of July 31, 1957, and 2076 (XLII) of May 1977. The Declaration provides good rules for treating prisoners as a model to any institution. These rules shall be applicable impartially without discrimination of race, colour, sex, language, religion, nationality or other birth status.⁵⁷⁸ Different categories of prisoners should be kept separately, considering their sex criminal record, the legal reason for their Declaration and the necessity of their treatment. The untried prisoners shall be kept separate from tried prisoners, and young prisoners shall be kept different from adults.⁵⁷⁹ Instruments of restraining, like handcuff chains, irons and strait jackets, shall never be applied as punishment except during transfers or on medical grounds by the direction of a medical officer to prevent the prisoner from injuring himself.⁵⁸⁰

This Declaration has a connection with the study as the police institution has several units, and one of them is a prison unit. The prison administration should remember their work is crucial and as a social service of great importance. The personnel appointed shall be of good conduct and have standard education and intelligence. Personnel shall be trained before taking up the work. The personnel shall always conduct themselves and perform their duties to influence the prisoners and uphold

⁵⁷⁸ The Standard Minimum Rules for the Treatment of Prisoners, 1977, Article 6.

⁵⁷⁹ *Ibid*, Article 8.

⁵⁸⁰ *Ibid*, Article 33.

their respect.⁵⁸¹ Officers in the institutions are not allowed to use force except in self-defence or cases of attempted escape, or active/passive physical resistance to an order based on law/regulations. The officers who use force must use no more than is strictly necessary, and the incident must be reported to the institution director.⁵⁸² The use of force is allowed; however, it is permissible when no other means exist without hurting a human life.

The staff should only be provided with arms if trained in their use.⁵⁸³ Special training shall be given to enable them to restrain aggressive prisoners. The prisoners who are not yet convicted are called untried prisoners and are presumed innocent and shall be treated as such. This prisoner shall be separated from convicted prisoners. Those not convicted should eat food from outside if so, arranged by family or friends or provided by the administration. They shall be offered an opportunity to work but are not forced to work.

4.2.11 Human Rights Protection under the Basic Principles and Guideline on the right to a Remedy and Reparation for Victims of Crimes Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The Basic Principles and Guideline on the Right to a Remedy and Reparation for Victims of Crimes Violations of International Human Rights Law and Serious Violations of International Humanitarian Law was adopted and proclaimed by the General Assembly resolution 60/147 of December 16 2005. The UN and

⁵⁸¹ *Ibid*, Article 46.

⁵⁸² The Standard Minimum Rules for the Treatment of Prisoners, 1977, Article 54.

⁵⁸³ *Ibid*, Article 84-93.

international covenants or human rights affirm the importance of redressing the victims of gross human rights abuses and serious violations of international humanitarian law. They recommend that States take basic principles and guidelines into account to promote respect and attention to the members of government, particularly law enforcement officials, military, legislative bodies, the judiciary, victims and their representatives, human rights defenders, lawyers, the media and the public in general.⁵⁸⁴

I recall the right to remedy found in different international instruments; in particular, article 8 states that everyone has the right to an effective remedy by the competent tribunal for violation of the right granted by the constitution.⁵⁸⁵ Article 9(5) states that everyone who has been a victim of unlawful arrest or detains shall have the right to compensation,⁵⁸⁶ Article 6 provides for the Protection of Rights and remedies.⁵⁸⁷ Article 4 requires states to ensure that acts of torture are punishable and offences under criminal law,⁵⁸⁸ Article 37 provides that a child who is deprived of his liberty has the right to challenge the legality of his deprivation of freedom before a court or any competent institution,⁵⁸⁹ And Articles 68 and 75 protect victims and witnesses, their participation in the proceeding, and their right to reparations.⁵⁹⁰

The basic principle provides for the obligation to States to respect and implement human rights standards under international humanitarian law, ensuring their

⁵⁸⁴ The preamble of the Basic Principles and Guideline on the right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005.

⁵⁸⁵ The Universal Declaration of Human Rights, 1948.

⁵⁸⁶ The International Covenant on Civil and Political Rights, 1966.

⁵⁸⁷ The International Convention on Eliminating All Forms of Racial Discrimination, 1969.

⁵⁸⁸ The International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

⁵⁸⁹ The International Convention on the Rights of the Child, 1990.

⁵⁹⁰ The Rome Statute of The International Criminal Court, 1998.

domestic laws are consistent with the international legal obligations by incorporating norms of international human rights and international humanitarian law into their domestic legislations, adopting effective measures to provide access to justice to make available adequate, effective, prompt and appropriate remedies including reparation and the domestic legislation should provide a significant level of Protection to Victims as required by international obligations.⁵⁹¹ States should ensure proper implementation of international covenants and other measures to prevent violations, investigate the breach of rights, and act against those allegedly responsible following domestic and international law.⁵⁹²

The guideline explains who victims are, and they are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts/omission that constitutes a gross violation of international human rights law or serious violations of international humanitarian law.⁵⁹³ It is to the effect that victims should be treated with humanity and respect for their dignity and human rights. All appropriate measures ought to be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families.

States should ensure that their domestic laws, to the extent possible, provide that a victim who has suffered victim or trauma should benefit from special consideration and care to avoid their trauma in the course of legal and administrative procedures

⁵⁹¹ The Basic Principles and Guideline on the right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005, Article 1.

⁵⁹² *Ibid*, Article 3 (a-d).

⁵⁹³ *Ibid*, Article 8.

designed to provide justice and reparation".⁵⁹⁴

The victims have the right to remedy gross violations of international human rights and serious violations of international or humanitarian law as to equal and effective remedies, adequate and effective reparation for harm suffered, and access to relevant information concerning violation and reparation mechanisms.⁵⁹⁵ The reparation should be proportional to the gravity of harm suffered. According to domestic and international law, a state should provide reparation to victims for acts/omissions.⁵⁹⁶ States should endeavour to establish a national programme for reparation and assistance to victims if parties liable for the harm suffered are unable or unwilling to meet their obligation.⁵⁹⁷ States should provide effective mechanisms for the enforcement of reparation judgments and should enforce domestic judgments for reparations against individuals or entities liable for the harm suffered.⁵⁹⁸

Additionally, the victim should be provided with effective remedy as restitution to restore the victim to the original situation as before the gross violation of international human rights law, compensation for any economic damage suffered and to the physical and mental harm, loss of opportunities including employment, education and social benefits, moral damage, rehabilitation which include psychological care as well as social services.⁵⁹⁹

⁵⁹⁴ *Ibid*, Article 10.

⁵⁹⁵ *Ibid*, Article 11.

⁵⁹⁶ *Ibid*, Article 15.

⁵⁹⁷ *Ibid*, Article 16.

⁵⁹⁸ *Ibid*, Article 17.

⁵⁹⁹ The Basic Principles and Guideline on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005, Article 19-22.

4.2.12 Human Rights Protection under the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The Declaration was adopted by General Assembly resolution 40/34 of November 29 1985. It defines 'victims' as persons collectively suffering pain or harm, including mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts/omissions violating criminal laws. This definition applies to all victims who have suffered regardless of race, colour, sex, age, language, religion, nationality, political or other opinion.

As part of the basic principles, the victim must be treated with dignity and entitled to access to justice mechanisms and prompt redress provided by national legislation. The judicial and administrative mechanisms should be established to make sure the victims have immediate redress through formal and informal procedures, and the procedures should be fair, accessible and not expensive.⁶⁰⁰ The judicial processes for the victims should be facilitated by informing the victims of their cases, the time and scope, provide proper assistance to the victims through the legal process avoiding the unnecessary delay of cases.⁶⁰¹

The offenders and their families or dependents should retribute the victims and include payment for harm/loss suffered.⁶⁰² States should endeavour to provide financial compensation if offenders do not offer total compensation.⁶⁰³ To the victims who have sustained significant bodily injury or mental health due to serious

⁶⁰⁰ The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, Article 6.

⁶⁰¹ *Ibid*, Article 6.

⁶⁰² *Ibid*, Article 8.

⁶⁰³ *Ibid*, Article 12.

crime. The family, in particular, includes the dependents of persons who have died and become physically or mentally incapacitated. Additionally, the victims should receive the necessary medical, physiological and social assistance through governmental, voluntary and community-based entities.⁶⁰⁴ The police should also have ample knowledge, which enables them to ensure proper and prompt aid is given.⁶⁰⁵ and the State should incorporate the rules regarding abuses of power into national laws and provide remedies to the victims of such violations.

4.2.13 The Proportionality Principle under the Basic Principles for the Use of Force and Firearms by Law Enforcement Officials

The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on preventing crime and treating offenders, Havana Cuba law enforcement officials have significant importance in society. There is a need to improve their working condition. The officials have an essential role in the Protection of the Right to life, liberty and security of the person. Thus, the principles are necessary to assist Member States in promoting the proper role of law enforcement officials.

The government and law enforcement institutions shall adopt and implement rules on using force and firearms against persons by law enforcement officials.⁶⁰⁶ The basic principles for using force and firearms guide law enforcement officials. These principles are connected to the use of force and non-use of force by police officers in promoting and protecting human rights. The principles are beneficial as they detail

⁶⁰⁴*Ibid*, Article 14.

⁶⁰⁵*Ibid*, Article 16.

⁶⁰⁶ The Basic Principles for The Use of Force and Firearms by Law Enforcement Officials Law Enforcement Officials, No. 9, 1990, principle 1.

the powers and responsibilities of law enforcement officials. Based on these principles, the police are mandated to enforce the law; their commitment is to save and protect people and communities, prevent and detect crime and maintain public order. They are bound by their duty to respect the international legal framework applicable to law enforcement tasks and international human rights law.⁶⁰⁷

The law provides that a State's responsible for maintaining law and order, peace and security within its territory. In that case, the structure which the State has set, as well as the underlying law enforcement philosophies and concepts, vary across the world. Therefore, whichever choice States make, it is necessary to ensure it goes with the State obligation under international human rights law. Both domestic legislation and the practice adopted by law enforcement agencies must comply with applicable provisions of International Human Rights Law. In that case, the state officials represent the State. They are expected to fulfil the above obligations when they are on duty to maintain public order, prevent and detect crime and provide aid and assistance in all kinds of emergencies. They commit to respecting, protecting, ensuring human rights fulfilment and ending discrimination.⁶⁰⁸

Police officials have different tasks, and each has to follow and protect human rights. For instance, the duty of crime prevention is law enforcement officials' apparent obligation. In this situation, they need to promote and protect human rights for all who have become or may become victims of crime. In this regard, there are many rights in every stage of work.⁶⁰⁹ These include the right to a fair trial, the

⁶⁰⁷ International Committee of The Red Cross, *International Rules and Standards for Policing*, Geneva Switzerland, 2015, p.7.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid.*

presumption of innocence, the right to be informed about the charges, the right to defence, interrogation of the suspects must be carried out in full respect of fundamental rights, torture and other forms of cruel, inhuman and degrading treatment are prohibited at all times.

The prohibition from suffering should be absolute, not exceptional, and no situation may justify departure from this rule. In some cases, during interrogation, the temptation to use torture is a reality. To avoid torture, leadership must take a range of measures, such as regulating investigation and interrogation keenly, upholding respect for judicial processes, and safeguarding and allowing the detention points to be inspected. Law enforcement officials shall take all possible measures not to violate human rights. In every stage, law enforcement officials shall protect human rights.⁶¹⁰

Law enforcement officials may arrest a person under certain circumstances. The power to exercise the same must comply with governing law stipulated by ICCPR, which requires that.⁶¹¹ No one shall be deprived of their liberty except on such grounds and following such procedures established by law and should be necessary. The arrest must be proportional to the objective. Law enforcement officials must respect the fundamental rights of arrested persons. When law enforcement officials encounter resistance from the person attempting to arrest, they must decide carefully whether and how to resort to force or even firearms. The use of firearms, in particular, needs to be carefully assessed and is only justified if the person to be

⁶¹⁰ The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, No. 9, 1990.

⁶¹¹ The International Covenant on Civil and Political Rights, 1966, Article 9 (1).

arrested presents a danger to the life of others.⁶¹² Where the possible damage and harm caused by the use of force outweighs the legitimate interest of the arrest, law enforcement officials should refrain from carrying out the arrest.⁶¹³

An arrested person must be interrogated in compliance with existing laws. In particular, the presumption of innocence, the right not to be compelled to testify against one or to confess guilty, and the prohibition of torture and other forms of ill-treatment must be carefully considered. It is, therefore, of particular importance to safeguard the rights of those held in detention or imprisonment. Furthermore, law enforcement personnel's other duties are maintaining public order and preventing violence. Should a need to resort to force arise, the subsequent choices should be guided by legal principles (proportionality principle) in managing any public order.⁶¹⁴

Other duties, such as respect for and Protection of the Right to life, liberty and security of a person, and the duty to protect the peaceful assembly against violent acts committed by others constitute important areas of attention by law enforcement agencies. When the assemblies are considered unlawful but are peacefully taking place, law enforcement officials should refrain from actions which are not proportional.⁶¹⁵ The rules are clear that law enforcement officials have to be proportional to balance the interests at play. This also applies to the use of firearms in situations of violence. Therefore, firearms should not be considered a tactical tool

⁶¹² The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, No 9, 1990, Principle 9.

⁶¹³ *Ibid*, Principle 15 -17.

⁶¹⁴ The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, 1990, principles 4 and 13.

⁶¹⁵ *Ibid*, principle 13.

for public order situations but remain the exception and be used only where all other means have failed.

Police officials have powers to enable them to carry out their duties, power to use force and firearms, arrest and detain and carry out search and seizure. They need to observe four fundamental principles that govern all state actions with a possible impact on human rights. Some regulations and guidelines must be followed to protect human rights. These include the principle of legality, which states that each action should be based on the provision of the law. The focus on necessity entails that all efforts should only affect or restrict human rights as necessary. The principle of proportionality provides that actions should not disproportionately affect human rights, while the principle of accountability states that those acting should be fully accountable to all relevant levels.⁶¹⁶

As stated above, law enforcement officials are authorised, among other things, to use force and firearms. The way law enforcement officials use force and firearms should not be arbitrary and excessive, for that would render them unlawful. Law enforcement officials need to comply with the legal framework governing the use of force. The wrong use of force will likely negatively affect fundamental human rights, rights to life, liberty and security.⁶¹⁷ Therefore, any law enforcement action affecting those rights must result from a carefully balanced act (proportionality) or compliance with the principles governing any law enforcement power. That is the principle of legality, necessity, proportionality and accountability.⁶¹⁸

⁶¹⁶ The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials No 9, 1990, principles 4,5,7 and 9.

⁶¹⁷ Article 7 and 6(1) of the Universal Declaration of Human Rights, 1948

⁶¹⁸ International Committee of The Red Cross, International Rules and Standards for Policing, Geneva Switzerland, 2015, pp. 34-38.

Where the officials are authorised to use force and firearms, the domestic legal framework should determine the legitimate purpose and circumstances permitting the exercises of this power. They should use force when necessary and proportional to achieve their objective. Law enforcement officials shall only use force if the goal can be achieved with it, and where that is not possible, they shall resort only to the minimum force needed for that purpose and ensure as minor damage and injury as possible occur.⁶¹⁹

Law enforcement officials shall stop using force and withdrawing to pursue the legitimate objective if the negative consequences of using force would be too serious, given the reason for using such force. In particular, the utmost attention must be paid to protecting uninvolved people. Law enforcement officials must be fully accountable for their actions when resorting to force.⁶²⁰ Note that the responsibility to use force lies with an individual law enforcement official and superior officers who give unlawful orders.⁶²¹ Unlawful orders should not be obeyed if law enforcement officials have a reasonable opportunity to disobey the order.

Law enforcement officials shall not use firearms against a person except in self-defence or against an imminent threat of death or serious injury, to prevent the perpetration of a severe crime involving the grave threat of life, to arrest a person presenting such a danger and resisting their authority or to prevent their escape and only when less extreme means are insufficient to achieve those objectives.⁶²² In any event, international lethal use of firearms may only be made when strictly

⁶¹⁹ The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, 1990, No 9.

⁶²⁰ *Ibid*, Principle 22.

⁶²¹ *Ibid*, Principle 24.

⁶²² *Ibid*, Principle 9.

unavoidable to protect life. In addition, where the use of force or firearms is potentially deadly, its use will be logical if the principle of proportionality is observed and where the intention is to protect against a threat of death or severe injury.⁶²³

Domestic legislation and the established procedures of law enforcement agencies should be formulated to ensure that firearms are used only as a last resort. Law enforcement officials must identify themselves as such and issue a warning before resorting to firearms. The addressees should be given sufficient time to respond to the notification. It should be noted that firearms are not an appropriate tool for dispersing crowds, and under no circumstance shall law enforcement officials use a firearm indiscriminately in the group.⁶²⁴

In addition, protective equipment should be available to restrict the need to use force. Appropriate, less lethal weapons should be used proportionately when force becomes unavoidable to respond or minimise damage. When law enforcement officials resort to power, they must be fully accountable for their decision.⁶²⁵ Use of force in detention facilities shall be responsive to the principle of legality, necessity and proportionality. Prison officers are advised not to carry firearms and to limit their use of force, which would only be needed in exceptional circumstances.⁶²⁶

Law enforcement officials also have to provide protection and assistance to people in need or vulnerable people who may be at an increased risk of being exposed to

⁶²³*Ibid.*

⁶²⁴The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, 1990, principles 4,5,7 and 9.

⁶²⁵*Ibid*, Principle 22 and 23.

⁶²⁶*Ibid*, Principle 11.

discrimination, abuse and being denied access to the essential means of survival, and who cannot adequately look after themselves. Law enforcement officials are the first to contact victims of crimes and abuse of power, including people who suffer from physical, mental, and emotional challenges, especially where these result from violating criminal law.⁶²⁷

Also, law enforcement officials have a specific obligation concerning children; to protect the rights and welfare of children all the time, but mainly when a particular need arises. They may interact with children in different settings, for instance, when children may be witnesses or victims of crime or suspects, which law enforcement officials may sometimes need to use force against them. Regardless of the situation, law enforcement officials are required to exercise particular care and be sensitive when they deal with children and prevent them from long-lasting harm, as is exemplified in articles 32-36⁶²⁸ As protection against abuse, neglect and exploitation of children.⁶²⁹

Women are also subject to violence, disrespect and discrimination. Law enforcement officials must provide protection and assistance for women in need. The enforcement officials in the service need to protect women from violence. Violence directed at women because she is a woman or that affects women disproportionately includes acts that inflict physical, mental or sexual harm or suffering threats or such acts and other deprivations of liberty. The protection of women is the responsibility of law enforcement officials. These officials need training and, more specifically, gender-

⁶²⁷ See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, 1985, Article 1.

⁶²⁸ The International Convention on the Rights of Children, 1989.

⁶²⁹ *Ibid*, Article 32 (3)(c).

based violence training. To be trained to identify such cases or to deal with victims of such cases with appropriate empathy and sensitivity. For instance, female law enforcement officials should conduct arrests and searches of women's bags; women should be interrogated and detained under the supervision of or by female officials.⁶³⁰

Law enforcement officials are expected to ensure that the treatment of women in the administration of justice does not result in degrading treatment, torture and undue punishment. They should also respond to acts of violence against women promptly. Law enforcement officials should ensure the number of female officials is enough to conduct searches, ensure the safety and security of female detainees in the place of detention, and investigate cases of domestic and sexual violence. During the investigation, law enforcement officials must consider the situation and make every effort to respect and protect her privacy as a human right and as far as possible to avoid any traumatising'. As stipulated further under Article 18 of the Victim's Declaration provides for the rights of victims affected by such acts entitled to redress, it is the duty of enforcement officials to investigate whether the abuse of power constitutes an offence under criminal law, protect victims for such abuse of power against further harm and correct any abuse of power committed by the law enforcement official.⁶³¹

Law enforcement officials must create an operational framework following the abovementioned principles. This framework may include such measures as; peaceful

⁶³⁰ International Committee of The Red Cross, International Rules and Standards for Policing, Geneva Switzerland, 2015, pp38-44.

⁶³¹ The Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, 1995.

settlement of conflicts, adequate training in that respect, availability of protective clothing and equipment to reduce the need to resort to the use of force and evaluation of lethal weapons and equipment. Adequate reporting mechanisms should, therefore, be established, particularly where force use results in death or injury.⁶³²

Further, law enforcement officials' education and training on firearms must meet the highest possible standards to enable them to respond appropriately in stressful and dangerous situations. Responsibility for the lawful and appropriate use of firearms extends to the commanding officers, who must take all precautions to ensure that weapons are used following the legal framework and with utmost consideration of the right to life.⁶³³ In public assemblies, the use of force must follow the same principle as in all situations. Priority must be given to preventing violence and allowing negotiation. Where an assembly that does not comply with custom domestic provisions remains entirely peaceful, the use of force should be avoided.⁶³⁴

The persons affected by the use of force and firearms and their legal representative shall have access to an independent process, including a judicial process. When such persons die, this provision shall apply to their dependants accordingly.⁶³⁵ The government and law enforcement agencies should make sure superior officers are held responsible under their command for unlawful use of force and firearms. They should not use their position of power and influence to subvert the justice process for victims of police criminal acts.⁶³⁶

⁶³² The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, 1990, principles 18,19,20 and 21.

⁶³³ The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, 1990.

⁶³⁴ *Ibid*, Principle 12, 13 and 14.

⁶³⁵ *Ibid*, Principle 23.

⁶³⁶ *Ibid*, Principle 24.

Despite the availability of laws, standards and principles, law enforcement work is not a mathematical science that leads to clear-cut answers with the application of all the regulations. Law enforcement officials have to deal with many situations and conflicts of interest. So, they have a degree of discretion which needs them to make appropriate choices due to stressful environments and dangerous people suspected of different offences. How will they react as individuals to protect their rights? There are ethical standards which need to be followed by law enforcement officials following the law. The officials need to understand that when law enforcement official breaks, the law affects the institution and society.⁶³⁷

4.2.14 Human Rights Protection and Proportionality Principle under the Code of Conducts for Law Enforcement Officials

This Code of Conduct was adopted by the UN General Assembly in Resolution 34/169 of December 17 1979, in New York. The Code states that law enforcement officials shall always fulfil the duty imposed upon them by law by serving the community and protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.⁶³⁸ In performing their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.⁶³⁹

Law enforcement personnel may use force only when strictly necessary and to the extent required to perform their duty.⁶⁴⁰ The use of force by law enforcement officials should be an exception. They are authorised to use power as is reasonably

⁶³⁷The Basic Principles for the Use of Force and Firearms by Law Enforcement Officials, 1990.

⁶³⁸The Code of Conducts for Law Enforcement Officials, 1979, Article 1.

⁶³⁹*Ibid*, Article 2.

⁶⁴⁰*Ibid*, Article 3.

necessary under the circumstances for the prevention of crime or in effect or assisting in the lawful arrest of offenders or suspended offenders; no force going beyond that may be used. National laws shall restrict the use of force by law enforcement officials following a principle of proportionality.⁶⁴¹

It is understood that such a principle of proportionality is to be respected in interpreting this provision. This provision should not be construed to authorise the use of force disproportionate to the legitimate objective to be achieved. The use of firearms is considered an extreme measure, and every effort should be made to exclude it, especially against children.⁶⁴² In general, firearms should not be used except when a suspected offender offers armed resistance and otherwise jeopardises the lives of others, and less extreme measures are insufficient to restrain the suspended offenders.

Moreover, no law enforcement official may be influenced or instigated to tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a State of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.⁶⁴³ The prohibition against torture derives from the Declaration on the Protection of all Persons from being subjected to torture and other cruel, inhuman, and degrading treatment or punishment adopted by the general assembly that torture is an offence to human

⁶⁴¹ *Ibid*, Article 3(b).

⁶⁴² *Ibid*, Article 3(c).

⁶⁴³ The Code of Conducts for Law Enforcement Officials, 1979, Article 5.

dignity and shall be condemned as a denial of the purpose of the UN Charter.

4.2.15 Human Rights Protection and Proportionality Principle under the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment

The Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of December 9, 1988. These principles apply to protecting all persons under detention or imprisonment. In December 1980, the draft of a body of regulations for protecting all persons under custody emerged. This draft is essential for protecting the human rights of detained persons. All persons under any form of arrest or imprisonment shall be treated humanely with respect for the inherent dignity of the human person.⁶⁴⁴ No person under any form of detention or imprisonment shall be treated inhumanely concerning the inherent dignity of the human person.⁶⁴⁵

The principle recommends that cruel, inhumane or degrading treatment or punishment should be interpreted to the broadest extent possible for protection against abuse, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporality or permanently of the use of any of his natural senses such as sight hearing or of his awareness of place and the passing of time shall be included to a definition. The principle states that no one shall be subjected to torture or cruel, inhumane and degrading treatment or

⁶⁴⁴ The Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, 1988, Principle 1.

⁶⁴⁵ The Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, 1988, Principle 6.

punishment.⁶⁴⁶ The law should prohibit any act contrary to these principles. Any violations of this principle should be reported to the superior authority for remedial power.⁶⁴⁷ The damage that occurred due to the act/omission of public officials to the rights contained under this body of principle shall be compensated following the applicable rules provided by domestic law.⁶⁴⁸

Moreover, everyone has the right to liberty and security of person.⁶⁴⁹ No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and following such procedures established by law. According to law, everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty.⁶⁵⁰ The right to peaceful assembly shall be recognised, and no restitution may be placed on exercising this right other than those imposed in conformity with the law and in the interest of security.⁶⁵¹

4.2.16 Human Rights Protection under the Guidelines on the Role of

Prosecutors

The 8th United Nations Congress adopted the guidelines on the prevention of crime and the treatment of offenders. Havana, Cuba, August 27, September 7 1991. Resolution 7 of the Congress called for the need for guidelines for the selection, professional training and status of prosecutors because they contribute to the smooth functioning of the criminal justice system. The prosecutors, in many circumstances,

⁶⁴⁶ *Ibid*, Principle 7.

⁶⁴⁷ *Ibid*.

⁶⁴⁸ *Ibid*, Principle 35.

⁶⁴⁹ *Ibid*, Principle 8.

⁶⁵⁰ *Ibid*, Principle 14(2).

⁶⁵¹ The Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, 1988, Principle 21.

are police officers.

The guidelines stipulate that persons chosen as prosecutors must have the required qualifications, including integrity, competence and duly trained. They should be aware of the ethical duties of their office, constitutional and statutory protection of the rights of the suspect and the victims, and human rights and fundamental freedoms recognised by national and international law.⁶⁵² The State shall ensure the persecutors, like other professionals, can perform their work without intimidation, hindrance, harassment, improper interference and other liabilities and shall be protected by the government in all ways.⁶⁵³

The office of the prosecutor shall be separated from judicial functions. The prosecutor shall perform a role in criminal proceedings, investigation of a crime, and supervision of the legality of these investigations.⁶⁵⁴ The prosecutor shall, following the law, perform their duties reasonably, respect and protect human dignity and uphold human rights contributing to the due process of the criminal justice system. The prosecutor shall avoid any discrimination like social, religious, cultural, sexual and political. Prosecutors must ensure the victims are informed of their rights per the Declaration.⁶⁵⁵

Furthermore, prosecutors shall give due attention to prosecuting crimes committed by public officials, particularly corruption, abuse of power, a grave violation of human rights and other crimes recognised by international law, authorised by law, or

⁶⁵² The Guidelines on the Role of Prosecutors, 1990, Article 1.

⁶⁵³ *Ibid*, Article 3-7.

⁶⁵⁴ *Ibid*, Article 12.

⁶⁵⁵ The Guidelines on the Role of Prosecutors, 1990, Article 13(d).

consistent with local practice—investigating such offences.⁶⁵⁶ When the prosecutor obtains evidence and knows that the methods of collection of the evidence are unlawful, which constitutes a violation of the suspects human rights especially involving torture or cruel, inhumane or degrading treatment or punishment or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who use such methods and inform court to ensure those who use such methods are brought to justice.⁶⁵⁷ To ensure fairness and effectiveness of prosecution presenter shall need to have cooperation with the police, the court, the legal profession and other government agencies.⁶⁵⁸

4.2.17 The Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms

The Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 1998 The Declaration recognises the rights and responsibilities of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international level.⁶⁵⁹ According to the Declaration, everyone has the right, individually or in association with others, to promote and strive for the protection and realisation of human rights and fundamental freedoms at the national and

⁶⁵⁶ *Ibid*, Article 15.

⁶⁵⁷ *Ibid*, Article 16.

⁶⁵⁸ *Ibid*, Article 20.

⁶⁵⁹ General Assembly Resolution 53/144 was adopted at the 8th plenary meeting of December 1998.

international levels.⁶⁶⁰ Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, among other things, by adopting steps necessary to facilitate the same.⁶⁶¹ The State, individuals and any organ of society are responsible for promoting and protecting human rights.

To sum up, these international instruments require: states to implement their obligation to respect, protect and fulfil human rights, to prohibit torture or cruel, inhuman or degrading treatment within states' legal framework, and to incorporate the principle of proportionality as one of the ways for human rights protection, to respect the rights of detained or arrested persons inclusive special groups and their human rights shall be observed, insist on equality of all members in the human family, prohibition of the use of excessive force and the principles govern the use of power shall be incorporated under national jurisdictions. These instruments require legal accountability for human rights violators, and states should have national programs for reparation to assist victims of crimes and human rights violations to be compensated. And the law enforcement officials shall be trained on the use of force, and its use must be a balancing act and compliance with the principles governing the use of force.

4.3 Regional Legal Framework

4.3.1. Protection of Human Rights and Proportionality Principle under the African Charter on Human and People's Rights

The African Charter on Human and People's Rights (ACHPR) was adopted in

⁶⁶⁰ The Declaration on The Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 1998, Article 1.

⁶⁶¹ *Ibid*, Article 2.

Nairobi on June 27, 1981, and entered into force on October 21 1986. This document is one of the regional instruments for human rights protection. This instrument binds Tanzania as it ratified the same in 1984. The Charter considers the values of African civilisation, recognising fundamental human rights, and everyone has the right to enjoy their rights and freedoms.

ACHPR protects and promotes human rights at under international level. Every member state of the Organization of African Unity recognises the rights, duties and liberties provided under this Charter.⁶⁶² Everyone is entitled to the rights and freedom guaranteed in this present Charter.⁶⁶³ The Charter provides the duties besides rights that make the document unique. An individual has responsibilities towards family, society, State and other legally recognised communities at the national or international level.⁶⁶⁴ The duty extends to respecting and considering other human beings without discrimination and not violating their rights.

The Charter recognises every individual requires equality before the law and is entitled to equal protection without discrimination.⁶⁶⁵ Every human being is entitled to respect for his life and the integrity of his person, and no one is allowed to deprive the same.⁶⁶⁶ The right to life under the General Comment No. 3 of the Jurisprudence of the African Commission stipulates that the right to life should not be interpreted narrowly; the deprivation of the right shall consider; necessity, appropriateness, justice, reasonableness and necessity. An individual has the right to respect the

⁶⁶² The African Charter on Human and Peoples Rights, 1981, Article 1.

⁶⁶³ *Ibid*, Article 2.

⁶⁶⁴ *Ibid*, Article 27.

⁶⁶⁵ *Ibid*, Article 3.

⁶⁶⁶ *Ibid*, Article 4 and 19.

dignity inherent in a human being.⁶⁶⁷ And has the right to liberty and security. The law requires the deprivation of the right to freedom should follow the law, which provides the reasons and conditions to deprive the right.⁶⁶⁸

Furthermore, an individual has the right to assemble freely with others, and the restriction to the rights has to obey the law. It should be necessary for a democratic society and the interest of national security.⁶⁶⁹ The State and its agents have the duty under the ACHPR to promote and protect the rights. Suppose an individual believes his rights are violated. In that case, he has the right to appeal to the competent authority against his violation and has the right to be presumed innocent if accused of a specific crime. The accused also has the right to be defended by a counsel and the right to be tried within a reasonable time by an impartial court or tribunal.⁶⁷⁰ To protect the Charter establishes, the Commission on Human and People's Ri to protect the above-mentioned rights.⁶⁷¹

The function and duties of the Commission are to promote human and people's rights by researching matters of human rights, interpreting the provision of the law, educating the community and making recommendations. Resolution 259 of the Commission on police and human rights 2013 affirms to place police and human rights in the priority in its execution of promoting and protection mandate. Police officials should fully comply with respecting human rights and the rule of law.⁶⁷² Moreover, the Commission has been mandated to formulate policies, rules,

⁶⁶⁷The African Charter on Human and Peoples Rights, 1981, Article 5.

⁶⁶⁸*Ibid*, Article 6.

⁶⁶⁹*Ibid*, Article 1.

⁶⁷⁰*Ibid*, Article 7.

⁶⁷¹*Ibid*, Article 30.

⁶⁷² The African Commission on Human and Principles to solve legal problems Session was held from 22nd to 5th November 2013 in Banjul, the Gambia.

and principles to solve legal problems related to human rights and cooperate with African and international institutions to promote and protect human and people's rights.⁶⁷³

The proportionality principle can also be viewed in the African jurisprudence, that no derogations are allowed, meaning limitations on the rights and freedoms in the ACHPR cannot be justified by emergencies or particular circumstances. The only legitimate reason for the restriction of the rights is under Article 27(1)(2),⁶⁷⁴ That every individual shall have duties towards their family and society, the State and other legally recognised communities and the international community, the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

The African Charter on Human and Peoples Rights,⁶⁷⁵ proportionality principle is not directly observed; however, the interpretation of the provision article 4 of the Charter is that human beings are inviolable. Every human being shall be entitled to respect for his life and the person's integrity. General comment no. 3 of the jurisprudence of the African Commission on Human and People's Rights⁶⁷⁶, comments under Article 4 of the Charter⁶⁷⁷ stated the Charter imposes State responsibility to prevent deprivation of rights to life caused by state agents and individuals, the rights to life should not be interpreted narrowly. The word arbitrary should be interpreted with reference considerations such as appropriateness,

⁶⁷³ The African Charter on Human and Peoples Rights, 1981, Article 45.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ 1989.

⁶⁷⁶ 2015.

⁶⁷⁷ 1989.

reasonability, necessity and proportionality.

4.3.2 Protection of Human Rights and Proportionality Principle under the Rubben Island Guideline for the Prohibition and Prevention of Torture

The Rubben Island Guideline is a tool for preventing torture in Africa and is one of the progresses in the world against torture. Other progress against torture was the establishment of the International Criminal Court and adoption of the Optional Protocol to the United Nations Conventions against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment of December 18 2002. In Africa, torture still exists, and there are a lot of incidences of torture and ill-treatment in Africa, followed by Asia. The violation of human rights in Africa is rooted in the abuse of power by authorities. The State has to ensure respect and protection of the dignity and physical integrity of the individuals against such kinds of abuse and violation.

Lack of access to recording mechanisms for human rights violations and impunity in Africa is the ground /breeding place for torture and other inhuman treatment. There are different kinds of torture, and there are several ways to implement torture, but not limited to intimidation, mutilation, beating sticks and deprivation of sleep. The Rubben Island guideline is ideal for prohibiting and preventing suffering in Africa. This is the form of procedure to implement the prohibition of torture at regional and international levels. The guideline is divided into three parts; the prohibition of torture, prevention of torture, and response to the needs of victims.

The guideline under the prohibition of torture requires states to ratify the legislation against torture and incorporate it into their domestic legislation. The act of torture

shall be criminalised and prosecuted under national legislation.⁶⁷⁸ States also need to cooperate with African Commission on Human and People's Rights to promote and support the work of Special Rapporteur on a mission against torture.⁶⁷⁹ States should cooperate with United Nations human rights treaty bodies and the United Nations Commission on Human Rights to realise their obligations.⁶⁸⁰ In addition, the acts related to the definition of torture should be offences under national legislation, and states should prohibit gender-related forms of torture and ill-treatment of young persons.⁶⁸¹ The national courts should have competent jurisdiction to hear allegations of torture, and torture should be extradited offence.⁶⁸²

States should apply international standards to the suspects of torture, war or internal political instability, and torture is not a justification for these suspects.⁶⁸³ The notions such as necessity, national emergency and public order shall not be invoked to justify torture. The superior order is not also a justification of torture, cruelty, inhuman or degrading treatment or punishment, and no one shall be punished by disobeying superior order that amount to torture, cruel, inhuman or degrading treatment or punishment.⁶⁸⁴

Furthermore, States should combat impunity by ensuring those responsible for torture are subject to legal process.⁶⁸⁵ An independent mechanism should be established under the law, and persons can bring their allegations of torture and ill-

⁶⁷⁸ The Rubben Island Guideline for the Prohibition and Prevention of Torture, 2002, Article 1.

⁶⁷⁹ *Ibid*, Article 2.

⁶⁸⁰ *Ibid*, Article 3.

⁶⁸¹ *Ibid*, Article 4 and 5.

⁶⁸² *Ibid*, Article 6 and 7.

⁶⁸³ *Ibid*, Article 8 and 9.

⁶⁸⁴ *Ibid*, Article 10, 11 and 13.

⁶⁸⁵ *Ibid*, Article 14.

treatment. All investigations of torture shall follow the procedures under the United Nations manual on the adequate research and documentation of torture and other cruel, inhuman and degrading treatment or punishment.⁶⁸⁶

Properly constituted regulations should control detention facilities. The information obtained through torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings.⁶⁸⁷ States should ensure all persons deprived of their liberty can challenge the lawfulness of their detentions and take steps to ensure that all persons deprived should conform to international standards.⁶⁸⁸ The detainees should be cared for and separated from trial detainees. Juvenile women and vulnerable groups should be held separately in detention facilities.⁶⁸⁹

Different institutions should prohibit torture; for instance, the judiciary should be independent and never interfere with its proceedings. The professional should also prohibit torture, cruel, inhuman and degrading treatment or punishment.⁶⁹⁰ States should establish complaint mechanisms which are independent of detention facilities. Further, the enforcement mechanisms should be empowered to receive, investigate and take action against allegations. Also, there should be independent national institutions with the mandate to visit all places of detention.⁶⁹¹ Likewise, States are obligated to offer reparations to the victims and recognise families and communities that have suffered from the torture and ill-treatment one of its members

⁶⁸⁶ *Ibid*, Article 17 and 19.

⁶⁸⁷ The Rubben Island Guideline for the Prohibition and Prevention of Torture, 2002, Articles 20 and 29.

⁶⁸⁸ *Ibid*, Article 32 and 33

⁶⁸⁹ *Ibid*, Article 35-17.

⁶⁹⁰ *Ibid*, Article 38 and 39.

⁶⁹¹ *Ibid*, Article 41

received.⁶⁹²

4.3.3. Human Right Protection under the Luanda Guideline a Right Based Approach to Arrest and Pre- trial Detention in Africa

The Luanda guideline is a rights-based approach to arrest and pre-trial detention in Africa. In May 2014, the African Commission on Human and People's Rights adopted the Luanda guideline on the condition of arrest, police custody and pre-trial detention in Africa. The procedure guides policymakers and the criminal justice system, particularly in day-to-day activities in the situations of arrest and pre-trial detention in Africa. The guideline aims at the protection of rights in pre-trial justice. It is a blueprint for pre-trial justice in Africa. The unnecessary use of arbitrary arrest in pre-trial detentions leads to overcrowded African prisons. The Luanda guideline aimed at protecting fair trials in pre-detentions in Africa. It focuses on the actions and decisions taken from arrest and trial. It covers arrests and custody rules and measures to be followed, like transparency and accountability. This guideline aimed to be followed by national legislation to comply with the ACHPR.

The guideline states in police custody and pre-trial detentions, all the procedures by police officials should have legal grounds from arrest to trial. These procedures shall follow the rules under international standards.⁶⁹³ Searches should be according to the law and consistent with human dignity. Arrest should not be discriminatory based on race, ethnic group, colour, sex, language, religion or other status.⁶⁹⁴

⁶⁹² *Ibid*, Article 49 and 50.

⁶⁹³ The Luanda Guideline a Right-Based Approach to Arrest and Pre-trial Detention in Africa, 2014, Section 2.

⁶⁹⁴ *Ibid*, Section 2a.

Measures should be designed to protect the rights of arrested persons who belong to vulnerable groups such as children, women, persons with albinism and refugees; special protection should not be considered discriminatory or applied in a biased, it was designed to protect the victims in police custody and pre-trial as a measure of last resort and shall be treated with humanity and respect.⁶⁹⁵ States shall develop legislation procedures, policies and practices designed to protect the rights of particular groups subject to arrest, police custody or pre-trial detention. The rules should protect girls' and women's dignity.

The use of force shall be a measure of last resort, limited to circumstances and only when necessary to carry out an arrest. The level of force must be proportionate and always at the minimum level. The restriction to the use of force should be strict to arrest and prevent imminent threat of death or severe injury. The use of force shall be regulated under national laws in conformity with international standards, including the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁶⁹⁶ Force should be limited against persons in police custody or pre-trial detention and only in the circumstances necessary for and proportionate to the need. The limitation to using force should be under the reasons of self-defence or defence of others against imminent threats of death/ serious injury.⁶⁹⁷

The guideline provides the rights to arrested persons, the right to be free from torture and other cruel, inhuman and degrading treatment, the right to be informed of the reasons for their arrests, the right to access a lawyer, the right to bail, the right to

⁶⁹⁵*Ibid*, Section 30.

⁶⁹⁶*Ibid*, Section 3 and 25.

⁶⁹⁷*Ibid*, Section 25(b-e).

complaint to mechanisms, right to human and hygienic conditions and right to be informed the reasons of their arrests.⁶⁹⁸ If detention is in police custody, the detained has the right to access judicial authority to review, renew and appeal decisions to deny police bail and bond. The limitation to staying in police custody should be no more than 48hrs.⁶⁹⁹

The treatment of detainees in police custody shall respect the inherent dignity of the person and the principle of presumption of innocence and be consistent with the intrinsic dignity of the person, human treatment, intentions and use of force. During the arrest, police officials need to identify themselves as officials, and any vehicle used for the mission shall be visible with number plates. Search should follow the law and be consistent with the person's inherent dignity and the right to privacy.⁷⁰⁰

No detained person who was questioned or confessed shall be subjected to torture or other ill-treatment such as violence, threats, intimidations or methods of questioning which impair his capacity or judgment.⁷⁰¹ All detainees have the right to institute proceedings to an independent and impartial authority to investigate in a manner consistence with the guideline and measures for prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa. An impartial investigation shall be considered if there is torture or inhumane treatment.⁷⁰²

States should establish an internal and independent complaint mechanism for persons in police custody and pre-trial detention.⁷⁰³ All victims of arbitrary arrest and

⁶⁹⁸ *Ibid*, Section 4(a-i).

⁶⁹⁹ The Luanda Guideline a Right-Based Approach to Arrest and Pre-trial Detention in Africa, 2014, Section 7.

⁷⁰⁰ *Ibid*, Section 3 and 4.

⁷⁰¹ *Ibid*, Section 8 (c).

⁷⁰² *Ibid*, Section 22.

⁷⁰³ *Ibid*, Section 35.

detention, torture and ill-treatment during police custody or pre-trial detention have the right to seek and obtain effective remedies.⁷⁰⁴ The right to remedy is extended to family members. The remedy includes restitution, compensation, rehabilitation and satisfaction and guarantees on non-repetition.

4.4 Sub-Regional Legal Instruments

4.4.1 Protection of Human Rights and Proportionality Principle under the Southern African Regional Police Chief Cooperation Organization

This is a code of conduct for police officials which comprises of countries; Republic of Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The guideline governs policing in Southern Africa Regional and establishes principles guiding policing; respect for human life, property right and integrity.

The Code provides standards during policing; police officials should respect human rights in the performance of police duty and shall respect and protect human dignity to maintain and uphold the law,⁷⁰⁵ police officers shall treat all persons equally to avoid any form of discrimination,⁷⁰⁶ the force may be used when strictly necessary and to the extent required for the performance of their duty,⁷⁰⁷ no police officials are allowed to inflict or instigate any act of torture or other cruel, inhuman or degrading treatment or punishment to any person,⁷⁰⁸ police officials should ensure persons in custody are protected, especially in their medical health,⁷⁰⁹ victims

⁷⁰⁴ The Luanda Guideline a Right-Based Approach to Arrest and Pre-trial Detention in Africa, 2014, Section 38.

⁷⁰⁵ The Southern Africa Regional Chief Police Cooperation Organization, 2004, Article 1.

⁷⁰⁶ *Ibid*, Article 2.

⁷⁰⁷ *Ibid*, Article 3

⁷⁰⁸ *Ibid*, Article 4.

⁷⁰⁹ *Ibid*, Article 5.

of crimes shall be treated with compaction and respect,⁷¹⁰ police officials shall respect the rule of law and the present CodeCode of Conduct,⁷¹¹ and police officials should treat all persons professionally.⁷¹²

In summary, the regional and sub-regional instruments consider African civilisation and impose the duty to promote and protect human rights for every individual, inclusive State, and other legally recognised community. The instruments recognise an individual's right to equality before the law without any discrimination. Prohibit torture and other cruel, inhuman and degrading treatment. Require states to ratify and legislate against torture, and all acts of torture shall be criminalised and prosecuted. The instruments proposed, like under international instruments, have a unique mechanism which will be independent; people can bring their allegations of torture and ill-treatment. The instruments insisted all evidence obtained via torture, cruel, inhuman or degrading treatment shall not be admissible as evidence in any proceedings.

Further, particular groups' human rights should be respected and protected. Furthermore, the instruments protect the rights of detained persons, and all the procedures from arrest to pre-trial detention should have legal grounds. The use of force shall be a measure of last resort. The instrument requires all persons detained to have an internal and independent complaint mechanism and have the right to access justice and bail. Their human rights are to be respected and protected by the presumption of innocence to be observed. In case human rights are violated, they

⁷¹⁰*Ibid*, Article 6.

⁷¹¹*Ibid*, Article 7.

⁷¹²*Ibid*, Article 11.

should seek and obtain effective remedies. Lastly, police officers should respect human rights in the performance of their duties and shall protect human dignity and uphold the law.

4.5 Conclusion

This chapter outlined and presented relevant international, regional and sub-regional legal instruments. These instruments impose obligations to states to respect, promote, protect and fulfil human rights and fundamental freedoms. Further, they require states to prohibit excessive use of force using the proportionality principle. There is a need for the legal accountability of all human rights violations, specifically torture and other cruel, inhuman and degrading treatment and punishment. This could be achieved if states adopt enforcement mechanisms of the right to remedy and reparation for victims of crimes and human rights violations. By so doing, states would have complied with international standards regulating the use of force by the police, which entrench the proportionality principle.

CHAPTER FIVE

DATA ANALYSIS AND RESEARCH FINDINGS

5.1 Introduction

This chapter contains the data analysis and presentation of research findings collected from different sources. The sources of facts include documents (primary and secondary authorities) from victims, experts, books, reports, government decisions, and legal materials. The methods of gathering facts had literature reading, questionnaires, interviews and legal text tools. The study aimed to determine the legal driving force behind police officers using excessive force against individuals while executing their duties and acting contrary to the proportionality principle in Tanzania. It also examines the adequacy of the legal framework for prohibiting excessive force in situations short of armed conflict by police officers. Further, it assesses the extent to which police officers are accountable for violating the proportionality principle in cases where they used excessive force and the available reparation system to victims of excessive use of force in Tanzania.

The data collected was analyzed using doctrinal and empirical data interpretation and analysis methods. The study examined policy, declarations, principles, legislations, Charter, conventions, covenants and legal decisions as primary data in doctrinal analysis. The legal data collected was interpreted legally using the rules of statutory interpretation. This included the literal, golden and mischief rules of interpretation and the principles of logic and legal reasoning, particularly deductive and inductive reasoning. Secondary data for doctrinal research was analyzed using qualitative data analysis and interpretation. On the other hand, data from the field was analyzed and

presented using qualitative methods.

5.2 Data Analysis and Research Findings

5.2.1 Inadequacy of the Law Governing Excessive Use of Force

The excessive use of force by police officers in their official duties ought to be controlled by the law. In the absence of clear law or conflict of laws, excessive use of force is likely to cause harm to the people. The empirical evidence shows that Tanzania's police officials use force during their duties leading to violation of human rights. This empirical evidence shows that despite the law governing the excessive use of force, it was generally established that citizens and some police officers need to understand the proportionality principle and its applicability. Only 40% of the sample population appeared to know the law, including a handful of lawyers and police officers.⁷¹³ It was observed that it is hard to apply the proportionality principle when a police official faces opposition against a suspect and in dangerous situations likely to lead to excessive use of force.⁷¹⁴

On the one hand, when police officials rely on the use of force, it is inevitably the law which allows them to use such force reasonably, necessarily and proportionally.⁷¹⁵ The application of the proportionality principle is measured at the end of the action, depending on a person's attitude. In this context, Police are required to use force depending on the situation while considering multiple factors such as the crime committed, who the suspect is, the police background and

⁷¹³Anonymous, Magistrate, The Resident Magistrate Court, Mwanza, December 2019.

⁷¹⁴*Ibid.*

⁷¹⁵The Police Force and Auxiliary Service Act, Cap 322, R.E 2019.

experience, and many other factors.⁷¹⁶ In addition, it depends on the individual exercising such force in terms of their experience, character, upbringing and even knowledge of the several aspects of using force.⁷¹⁷

From the preceding, it is argued that the legal driving force for police officers to use excessive force contributes to the laws' inadequacy. The laws prohibiting excessive use of force do not strictly adhere to the standards for using force under the Basic Principles on the Use of Force and Fire Arms by Law Enforcement Officials (BPUFF). For instance, the BPUFF provides that Governments have to ensure that law enforcement's arbitrary use of force and firearms is punished as a criminal offence under their laws.⁷¹⁸ These offences must be properly punishable depending on the circumstances in which they were committed.

However, the Penal Code under Section 231 provides that any person authorized by law to use force is criminally responsible for any excess according to the nature and quality of the act which constitutes the excess. This offence has no specific punishment under it. Therefore, resort has to be made to section 35 of the Penal Code, which provides that, where no penalty is expressly provided for under the Penal Code, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both.

Considering that most of the time, the excessive use of force leads to causing severe injuries to individuals, it is posited that although acts of using excessive force by

⁷¹⁶The Situational Theory on Excessive Use of Force.

⁷¹⁷The Individual Theory.

⁷¹⁸Principle 7.

police officers have been criminalized, the punishment in this specific provision is minimal as compared to the circumstances in which the offence was committed and the harm suffered by the victim.

Another area for improvement is the Police Force and Auxiliary Service Act. This legislation allows police officers to use arms in some instances. Section 29 provides that any police officer may use arms against any person in lawful custody charged with or convicted of an offence when such a person is escaping or attempting to escape where such police officer has reasonable grounds to believe that he cannot otherwise prevent escape and has given a warning to such person that he is about to use such arms against him and such warning is unheeded.⁷¹⁹ Furthermore, a police officer is allowed to use arms where any person who by force rescues or attempts to rescue any other person from lawful custody or by force prevents or attempts to control the lawful arrest of any other person. Where a police officer has reasonable grounds to believe that he or any other person is in danger of grievous bodily harm and that he cannot otherwise effect such arrest or prevent the rescue in such circumstances, he is allowed to use arms.⁷²⁰

The above provision gives an expansive interpretation as to when police officers can use force and is against international standards on the use of force. The BPUFF⁷²¹ It requires that law enforcement officials apply non-violent means first before resorting to the use of force and firearms, and they are only allowed to use firearms where other means remain ineffective or without the promise of achieving the intended

⁷¹⁹Section 29(1)(a).

⁷²⁰Section 29(b).

⁷²¹Principles 4 and 5.

results. Similarly, the law requires police officers to exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved and to minimize damage and injury and respect and preserve human life. However, section 29 of the Act does not limit the exercise of rights; it allows Police to use force and firearms without considering how they are used and the extent to which they should be used. It gives room for the use of excessive force.

On the other hand, the term 'reasonable force', 'more force' and 'necessary', which are employed under the laws permitting the use of force under the act, are vague; the police officers use this ambiguity when applying force in self-defence, defence of a colleague, civilians and their properties, and thus justifying their use of excessive use of force. Some respondents⁷²² Stated that the reasons for excessive use of force are some laws limit police officers' accountability in criminal and civil cases and lack of severe legal training for police officers, and that leads to many police officers not knowing the proportionality principle and human rights. Some police officers must know human rights laws and other instruments for how and when to use force. These factors have contributed to the use of excessive force by police officers in Tanzania.

5.2.2 The State of Legal Framework for the Prohibition of Use of Excessive Force by the Police Officers

There are many laws under international, regional and sub-regional which prohibit the excessive use of force. These laws impose different standards which need to be applicable by police officers when using force and firearms. Hereunder, the study examines the state of these standards prohibiting excessive use of force. The laws

⁷²² Anonymous, Advocate to The Legal and Human Rights Center, Dar es Salaam, January 2021.

vest the state's power to ensure the nation's security and peace. As discussed earlier, states have obligations to respect and protect human rights and international treaties and customary international law deliver this obligation.⁷²³ As State agents, law enforcement officers have to respect human rights and take measures to protect persons within the jurisdiction who violate human rights. Similarly, states must take appropriate measures, such as adopting legislation, administrative, judicial and others, to reduce human rights violations. Finally, states need to make sure people enjoy their rights and have redress when their rights are violated.

On the state of the legal prohibition of excessive force, there are principles provided under international law that must be followed under the BPUFF, which guides the use of force by law enforcement officials. Regional and national laws should capture these principles and strictly regulate the use of force by law enforcement officials. It mandates law enforcement officials' accountability and enforcement of victims' rights against unlawful, excessive or arbitrary use of force. To have lawful use of force, the domestic laws must define its objective sufficiently transparently. Nevertheless, the use of force that occurs for personal gain should be punished for being incompatible with international law.

The Principles further insist that law enforcement officials are crucial to any State.⁷²⁴ Thus, the officials have a vital role to play in the protection of the right to life, liberty and security of the person as guaranteed by international human rights instruments. This is because every human being is entitled to respect for his life and the integrity

⁷²³ *Ibid.*

⁷²⁴ The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, principle 1.

of his person, and no one is allowed to deprive them.⁷²⁵ To protect these rights, governments should adopt and implement rules on the use of force and firearms by police officers against individuals.⁷²⁶ The use of force shall be strictly regulated under national laws following international standards. The Principles further provide that when States draft domestic laws, such rules should state when law enforcement officials are allowed to use force and for what purposes.

It is further provided that the adopted laws shall be accessible to the public and should spell out that the use of force is allowed only in achieving law enforcement objectives, and force can be used when absolutely necessary. The law should further state that law enforcement officials must use non-violent means before resorting to force and firearms.⁷²⁷ State prohibition on the use of force which does not comply with the principles shall be termed unlawful, arbitrary and excessive. Generally, the above comprise parameters for the uses of force are provided under the BPUFF. The permanent parameter is that all human beings are entitled to respect human rights and fundamental freedoms, including the right to life, security of the person and to be free from torture, cruel, inhuman or degrading treatment or punishment.

On the other hand, the Principles provide for the rights which are relevant to the use of force by law enforcement officials. One of the rights likely to be infringed by the use of force is the right to life. This right is essential since all rights are meaningless without it. The ICCPR⁷²⁸ protects the right to life that no one shall be arbitrarily deprived of his life, and the exceptional measures to take life should not be applied

⁷²⁵*Ibid*, Principle 4.

⁷²⁶*Ibid*, Principle 1.

⁷²⁷*Ibid*, Principle 4.

⁷²⁸Article 6

arbitrarily. The outstanding standards shall be accompanied by law. The prohibition is absolute and non-derogable, and it is an international law rule that no situation will justify arbitrary deprivation of the right to life as provided under international standards and principle 9 of the BPUFF.

Furthermore, international rules prohibit excessive force during arrest, although some situations generate the need to use force in case of arrest. The regulations require that an arrest not be discriminative and must be consistent with international standards concerning individual rights. In that regard, lawful use of force and firearms shall be a measure of last resort and necessary to the circumstances during detention. Similarly, the level of force used during arrest should be proportionate and almost at a minimal level. Finally, state law should limit the use of firearms only for arrest and at threat of death or severe injury.⁷²⁹

The standards on using force and firearms in certain areas and the rules under BFUFF state that while policing persons in custody or detentions, officials shall not use force except where strictly necessary for maintaining security and order within the institution. The prohibition is similarly provided under the ICCPR⁷³⁰ which states that all persons deprived of their liberty shall be treated with humanity and with respect for the interest and dignity of the human person. The use of firearms in custody is allowed in self-defence, in defence of others, against the imminent threat of death or severe injury or when preventing the escape of a person in custody. The Declaration requires that for individuals deprived of their liberty, law enforcement

⁷²⁹*Ibid*, Principle 9.

⁷³⁰Article 10(1).

personnel or other public officials are responsible for ensuring that complete account is taken for the prohibition against torture.⁷³¹

Nevertheless, states should also protect the rights of prisoners,⁷³² both tried and untried prisoners. Thus, instruments of restraints like handcuffs, chains, and irons shall never be used as punishment except during transfer or on medical grounds. Further, the officers in the prison institutions are not allowed to use force except in self-defence or escape cases. However, the permitted force in those situations should be strictly necessary. The use of force is allowed where there are no other means and without hurting a human life.

An examination of the prohibition on excessive force use on persons belonging to vulnerable groups was also done. It was stated that the DEVAW⁷³³ is one of the legal documents under international law which prohibits violence against women, whether detained or un-detained. Excessive force causes violence against women and hinders development and peace. Violence against women includes physical, sexual and psychological harm or suffering to women. The States must protect all women's rights, including the right to life and not being subjected to torture, inhumane and degrading treatment.

Conversely, international law prohibits the use of excessive force in assemblies. Police officers may use firearms in assemblies only when less dangerous means are not practicable. The BPUFF stipulates how force should be used in assemblies.

⁷³¹ The Declaration on Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975, Article 5.

⁷³² *Ibid*, Article 33.

⁷³³ The Declaration on Elimination of Violence against Women, 1993

Similarly, force and firearms may be used under principles 13 and 14. During the dispersal of unlawful but not violent assemblies, law enforcement officials shall avoid using force or, where practical. They shall restrict the same to the minimum extent. Officials are prohibited from using force except under conditions stipulated under the BPUFF that cover self-defence. The use of force is not allowed at all, only when exercising the right under principle 9, not otherwise.

Similarly, it requires the right to freedom from torture to be protected and uphold respect for the inherent dignity of humans in terms of their mental and physical well-being. The prohibition of torture forms part of customary international law and binds all states. The UNCAT prohibits torture and other cruel, inhuman and degrading treatment or punishment. It promotes respect for and observance of human rights and fundamental freedoms. The UNCAT opposes torture and prohibits any act which might end in severe punishment or suffering, whether physical or mental. The UNCAT recommends that States have the duty to ensure that they prohibit torture in any way.

Likewise, the optional protocol for the UNCAT⁷³⁴ Affirms that torture and other cruel, inhumane or degrading treatment constitutes a severe violation of human rights and shall be prohibited. Similarly, the Declaration against torture⁷³⁵ Considers acts of torture as a denial of the UN Charter and a violation of human rights. It requires States not to accept torture in their jurisdiction and any acts which are inhumane or degrading treatment or punishment.

⁷³⁴ The International Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1984.

⁷³⁵ The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975.

Notwithstanding, the Rome Statute prohibits the use of excessive force under Article 7. It prohibits crimes against humanity, such as torture and other inhuman treatment. As stated, exercising other rights should not be the reason to violate other rights. The rights should be exercised proportionally not to commit human rights violations. However, the provision that prohibits the use of force under the Rome Statute covers war crimes. Nonetheless, the prohibition of crime against humanity is the result of the use of excessive force generally.

International law imposes obligations when the use of force is unavoidable. The police officer must use power proportional and legitimate to the objective intended to be achieved. When using such force, the law enforcement official shall minimize damage and injury, respect and preserve human life, and ensure that assistance and medical aid are rendered to injured or affected persons at the earliest possible moment. Lastly, they should ensure that the relatives or close friends of the injured person are notified as early as possible.⁷³⁶

On the other hand, the Principles require the government to avoid excessive force, and they should develop non-lethal incapacitating weapons for use in appropriate situations. This will help reduce means capable of causing death or injury to persons.⁷³⁷ Principle 4⁷³⁸ Requires law enforcement officials to apply non-violent means before resorting to excessive force. The force may be used when other means are ineffective. Using force that results in pain and suffering, considered unreasonable, unjustifiable or disproportional, would be a form of ill-treatment.⁷³⁹

⁷³⁶ Principle 5.

⁷³⁷ The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, principle 3.

⁷³⁸ *Ibid.*

⁷³⁹ A/52/44(1997), A/56/44(2001).

Similarly, the use of force, which is unlawful and direct to the control of law enforcement officials during arrest, detention or riot control, may amount to torture. The right to freedom from torture and other ill-treatment is absolute, and no justification may be made to violate such a right. The state needs to review their interrogation rules, instructions, and custody arrangement; all these should be done to prevent cases of torture.

On the other hand, the United Nations Charter sets the framework for international peace, security, and procedures for using force.⁷⁴⁰ The Charter prohibits using force except when necessary and if it adheres to the proportionality principle. Similarly, the UDHR⁷⁴¹ prohibits the use of excessive force and protects all rights without discrimination to the extent that everyone has the right to life, liberty and security of the person. However, the UDHR does not directly incorporate the provisions on the prohibition of excessive use of force, but the interpretation of the above provision prohibits the use of force.

Likewise, the ICCPR⁷⁴² It protects civil and political rights, and the exercise of these rights is subject to limitations. One of those limitations is the proportionality principle which limits the excessive use of force.⁷⁴³ It states that the exercise of rights might be subject to certain restrictions, but these shall only be as provided by law and are necessary. The Convention further prohibits torture in detained areas under Article 9, which is the result of force. Moreover, there is no direct provision that prohibits the use of excessive force. Still, the interpretation of the above

⁷⁴⁰ The Charter of the United Nations, 1945, Article 51.

⁷⁴¹ The Universal Declaration of Human Rights, 1948.

⁷⁴² The International Covenant on Civil and Political, 1966.

⁷⁴³ Article 19.

provisions incorporates the prohibition of using force by States and individuals.

Nevertheless, none of the above laws provides a direct prohibition on using excessive force by a person or the state. It is important to note that many conventions do not consider the use of force by a particular person. The use of force by a person came under international law when state agents used force significantly and led to human rights violations which were not governed by international laws. Thus, the development of BPUFF became a cornerstone which prohibits the use of force by a person. The BPUFF provides the rules and principles on using force for states to adhere. However, the document only amounts to principles which have no more force in compelling States to incorporate the provisions under their national laws but only serve as guidance for them to amend their regulations in conformity with the principles.

Another set of international standards regulating the use of force at the regional level is the African Charter on Human and Peoples Rights which does not cover the use of force by law enforcement officials. However, the use of force is incorporated into the interpretation of the right to life and as a general limitation on exercising the right. In the broader sense, the right to life was interpreted under General comment No 3 of the Jurisprudence of the African Commission, that denying the right shall consider; necessity, appropriateness, justice and reasonableness. On the other hand, the African Commission on Human and People's Rights on May 2014 adopted the Guidance on Conditions of Arrest, Police Custody and Pre-trial Detention (known as the Luanda Guidelines). This followed the requirement of the provisions of articles 2,3,5,6, and 7 of the ACHPR that obligates States to provide all people with the right

to life, dignity, equality and security.

The Luanda Guideline is one of the interpretations of the African Charter following the mandates under Article 45(b) of ACHPR.⁷⁴⁴ To formulate the standards, principles and rules on which African governments can base their legislation. The Guideline prohibits excessive force on arrest and detention, and the competent authority should judge those who violate the laws. However, the document is a guideline and has no power to force many African countries to adhere to it.

Apart from the above international framework, the domestic framework prohibits excessive force used in Tanzania. The findings proved that the Constitution of the United Republic of Tanzania needs to contain more provisions on the use of force by the Police as outlined in the BPUFF. However, it provides for the protection of human rights in Tanzania, and the interpretation of the provisions somehow grasps the contents of the BPUFF. First, the Constitution protects human rights and principles. It states that the rights under the Constitution shall not be exercised in a manner that restrains the rights and freedom of others.⁷⁴⁵ The fundamental human rights standards on using force are protected under the Constitution.

Secondly, the Constitution protects human rights against the use of force by providing the right to seek administrative and judicial remedies. It states that a person whose rights are likely or being violated when exercising the right may institute proceedings for redress in the High Court.⁷⁴⁶ It further provides that every

⁷⁴⁴ The African Charter on Human and People's Rights, 1981.

¹⁰⁵¹ The United Republic of Tanzania Constitution, Cap. 2, R.E 2008, Article 30.

⁷⁴⁶ *Ibid*, Article 30(3).

person is entitled to recognition and respect of his dignity Article 12(1)(2).

⁷⁴⁷Furthermore, all persons are equal and entitled to protection before a court of law as per Article 13. Thirdly, the Constitution protects accused persons who may be the victims of the use of force, and no persons with a criminal offence shall be treated as guilty of the crime until proven guilty of that offence.⁷⁴⁸ Further, the Constitution provides that human dignity shall be protected in all activities about criminal investigations and processes and in any other matters in restraint article 13(5)(d)⁷⁴⁹ and that no person shall be subjected to torture or inhuman and degrading punishment⁷⁵⁰ And the person's life shall be protected following the law article 13 (6)(e).⁷⁵¹

Likewise, Criminal Procedure Act is one of the laws that prohibit the use of force under Section 6⁷⁵² Requires police officers to exercise their powers and duties imposed on them cautiously. During his work, a police officer is allowed to use force and not to subject a person to more indignity than necessary. It shall not cause the person's death unless it is essential to protect or prevent serious injury. Section 21⁷⁵³ and sections 55 (1) and (2)⁷⁵⁴ prohibits cruelty, inhumane and degrading treatment⁷⁵⁵ To persons under restraint and calls for respect of their dignity.

The Tanzania Evidence Act⁷⁵⁶ This guides the admission of evidence in the court of law prohibits the use of force and that a suspect under police custody should confess

⁷⁴⁷ *Ibid* Article 12(1) and (2).

⁷⁴⁸ Article 13(6)(b).

⁷⁴⁹ *Ibid*, Article 13 (5) (d).

⁷⁵⁰ *Ibid*, Article 13(5) (e).

⁷⁵¹ *Ibid*, Article 13(6)(e).

⁷⁵² The Criminal Procedure Act, Cap .20, R.E. 2019.

⁷⁵³ *Ibid*.

⁷⁵⁴ *Ibid*.

⁷⁵⁵ *Ibid*.

⁷⁵⁶ The Evidence Act, Cap. 6, R.E. 2019.

voluntarily and not by use of force or coercion.⁷⁵⁷ Further, the Police Force and Auxiliary Service Act⁷⁵⁸ Which is the central act that governs the police officers, and police institution provides for the limitation on the use of force during work. Section 29 stipulates that using arms by police officers should be a last resort and applied only when a person attempts to escape. Similarly, the officer may use components against a person in lawful custody charged with or convicted of an offense only when the police officer has reasonable grounds that he cannot prevent his escape. However, the law states that before one use force, the police officer must warn that he is about to use force, as long as it is reasonable and necessary, as per section 29 (1)(2).⁷⁵⁹

Furthermore, the use of force is allowed during assemblies whereby the police officers have the power to dispose of assemblies if such an assembly breaches the peace or prejudice the public peace and order. The force used in assemblies should be reasonable and necessary, according to Section 44.⁷⁶⁰ However, this appears to be against the BPUFF principles whereby law enforcement officials are prohibited from using force in peaceful assemblies and when persons are under control. Likewise, the officer cannot use force against rioters who escape unless they possess something dangerous. Generally, force is not permitted to be used during peaceful assembly; but if used, it should be to the minimum level, and the instruments used to employ such force should be those which do not cause loss of life.⁷⁶¹

⁷⁵⁷ *Ibid*, Section 27.

⁷⁵⁸ The Police Force and Auxiliary Service Act, Cap.322 R.E. 2019.

⁷⁵⁹ *Ibid*.

⁷⁶⁰ The Police Force and Auxiliary Service Act, Cap. 322, R.E. 2010.

⁷⁶¹ The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, Principles 12-14.

Similarly, the Penal Code spells out behaviours, offences, and punishment. The use of excessive force is punishable under section 18A⁷⁶², unless it is proved to be the proportionate force and for self-defence in case of any danger. Contrary to the above provision, a person will be guilty under Section 18B of the Penal Code⁷⁶³ Correspondingly, the Penal Code provides for punishment for excessive use of force by any person who, with malice aforethought, causes the death of another person by an unlawful act or omission. He shall be guilty of murder.⁷⁶⁴ However, the law does not incriminate acts of torture, cruelty, or inhuman and degrading treatment due to excessive use of force. According to the findings from lawyers and police officers, incidences involving the use of excessive force in Tanzania are many, and some are not reported due to fear on the part of journalists and the media in general. The following part shows examples of incidences reported in various human rights reports.

The study conducted by the Legal and Human Rights Center (LHRC) revealed the actual situation regarding the use of excessive force in Tanzania. The Report stated that it is hard to get the exact number of extra judicial killings in Tanzania because the police force either needs a specific Report or the police force is reluctant to release the same. Contrary to that fact, reports from the police force reveal that there are no extra-judicial killings in Tanzania.⁷⁶⁵ The Report revealed some incidents of excessive force from different areas in Tanzania. In 2019, the Legal and Human Rights Center said one Waziri Macha had been killed in police custody, and the

⁷⁶²*Ibid.*

⁷⁶³*Ibid.*

⁷⁶⁴*Ibid*, Section 196.

⁷⁶⁵ Legal and Human Rights Center, Human Right Report, 2015, p.26.

accused person was charged in a court of law for the alleged killing. Jackson Charles in Geita was reported beaten by Police leading to his death.⁷⁶⁶ In 2018, the LHRC was able to investigate and come out with the incidences of the use of force again. Akwilina Akwilin, a former student of NIT, was shot while on public transport after a police official fired at members of CHADEMA during a peaceful demonstration. This was purported to be an extra-judicial killing.

During the same year, a 27-year-old Sagula Chacha was reported killed by police officials while in police custody in the Mara region. The victim was stabbed with a knife by a police officer identified as William Chacha. Similarly, a fruit vendor, Allen Mapunda, was reported dead a few hours after being released from custody. Family members complained the accused was tortured while in custody, leading to his death. The Regional Police Commander refuted the claims that the police officer killed him. In Tanga, on April 2018, Tanzania Prison Service suspended 11 officers for allegedly killing one Aloyse Makala, suspected of killing their fellow officers. Before the attack, the police officers killed the deceased. In Tabora, Jumapili Juma, father of Selemani Jumapili, accused nine police officers of beating his son and causing his death. All these incidents prove there are incidences of torture, inhuman and degrading treatment which police officials pioneer.

Similarly, in August 2016 at Dar es Salaam, the Regional Commissioner of Dar es Salaam was quoted at the funeral of four police officers killed by bandits and encouraged Police to use lethal force against suspects of police killings.⁷⁶⁷ The above

⁷⁶⁶ Legal and Human Rights Center, Human Rights Report, 2019, p 14.

⁷⁶⁷ Legal and Human Rights Center, Human Right Report, 2006, p.20.

facts revealed the leaders were aware of the killing by police officials using excessive force and encouraged them to proceed, and this proves there is the inadequacy of prohibition of excessive use of force in Tanzania. Further, in 2014, the Police at Stakishari Ukonga Dar es Salaam was accused of causing the death of one Liberati Matemu, who a police officer beat at the station.⁷⁶⁸ During the same period at Kimonye village, Kilelo District in Manyara region, Police shot and killed two people, including a standard six pupil, in what was reported to be a botched security operation against individuals engaging in brewing traditional brew.⁷⁶⁹

Similarly, in September 2014, individuals from Kenya alleged to be planners in the robbery of Exim Bank along Boma road area Arusha, Tanzania, were shot and killed by the police officers at Mailimoja area Hai. The Kenya Human Rights group Oscar Foundation stated that the post-mortem results indicated that the individuals were shot at close range/execution style that proves was not self-defence. This evidence shows that police officers aimed to kill, not to protect the life, because the bullets were shot at close range.⁷⁷⁰

Furthermore, the LHRC examined the reasons behind the excessive use of force and revealed that there are statements which encouraged the excessive use of force; for instance, once the Minister of Public Safety was quoted by the media giving ambiguous statements which were construed as ordering all bandits to be killed after committing crimes. For instance, he was quoted saying that;

“Majambazi popote mlipo tena msikie kabisa kuwa mjitayarishe kuuawa kwasababu nyie ni majambazi, mkikamatwa na polisi lazima muuawe na nimeamuru jeshi la polisi kokote nchini lifanye hivyo” (You bandits

⁷⁶⁸ Legal and Human Rights Center, Human Right Report, 2014, p. 26.

⁷⁶⁹ Mugini Jacob, "Police Killed two in Botched operation", The Daily News, January 14th 2007, pp. 16-17.

⁷⁷⁰ Legal and Human Rights Center, Human Right Report, 2007, pp. 14-16.

wherever you are, listen to me carefully that you prepare yourself to be killed because you are thieves, the moment the police officials will arrest you, you shall be killed...I have commanded the police force countrywide to do so).⁷⁷¹

Also, Hon Peter Kayanza Pinda, during the parliamentary session on August 20th 2013, stated,

"If you make trouble and you are told not to do that, and you decline, you will be beaten because there is no other way.....yeah", we have to agree on one thing the country is run under the rule of law, Now, if you decline and think that you are the strong one, that you are, the most stubborn, they will beat you! and I say, just hit them! Because there is no other way we are fed up!!" [ukifanya fujo na ukaambiwa usifanye hivyo ukakataa utapigwa maana hakuna namna nyingine.....ndio...inabidi tukubaliane kila mmoja kua nchi inaendeshwa kwa sheria. Sasa ukijiona wewe ndiye mwenye nguvu ambaye wewe ndiye mkaidi Zaidi watakupiga na nasema wapige tu maana hakuna njia nyingine tumechoka]

In July 2013, reports still revealed excessive use of force in arrest and detention by police officers. Mr Jerome Dominic Mrema was beaten and had his hands broken by police officers who were identified during identification. Mr Gaudance Wililo, arrested for alleged stealing from his employer (White Sands Hotel), was reported to be tortured at the police station, leaving him with a broken left leg which remained permanently injured.⁷⁷² In the same year, some people died because of police officials using excessive force. These included Castay sole Makile (Njombe), Makisio Nginyani (Namtumbo), Christopher Mbilinyi, Sanga Rukwa, Tulia Fuyugu (Geita), Wankyo Marwa and Joram Marwa (Tarime), Deus Jacob (Rorya), Yohana Cyprian (Kinondoni Kawe), Methesela Shingoma (Singida), Fatuma Mohamedi (Mtwara), Rajabu Wilson (Mbeya) and Saidi Msabaha Lupu (Chunya).⁷⁷³

⁷⁷¹ Legal and Human Rights Center, Human Right Report, 2013, p.22.

⁷⁷² *Ibid*, pp, 51 - 52.

⁷⁷³ *Ibid* pp. 22 and 23.

During the same period, Mr Mtaki was reportedly tortured by police officers for no apparent reason. They kicked him all over his body, making him roll on his stomach and back while handcuffed and tied around his neck. Similarly, Dr Stephen Ulimboka, the then Chairperson of the Medical Doctors Association, was at around midnight in Dar es Salaam taken by an unknown group of individuals, most likely alleged state agents, who took him to Mabwepande forest. Dr Ulimboka was a champion of the rights of medical doctors and positive development in the health sector. He was taken, tortured and forced to confess by police investigation officers. Dr Ulimboka reveals that;

“wakati huo nilikua naumia sana lakini walikua wakinilazimisha nitaje suluhu nilizo kuanazo. Nikiwa kwenye chumba hicho cha mateso chini ya polisi wawili wa upelelezi kabla ya kuanza kunisulubu alikuja kijana mmoja alieonekana kuteswa sana yeye walimtundika na kumpiga na virungu mimi walinipiga na miguu yangu ilikua imevunjika na damu nyingi zilitoka sehemu za magotini na nilikuwa nahisi kujawa na maumivu nilio kuanayo”⁷⁷⁴ [At that time, I was very hurt, but they forced me to mention my solution. While I was in the torture room under two detectives and police officers before they started crucifying me, a young man who looked like he had been tortured a lot came. They hung him and beat him with sticks]

The above facts demonstrate that there is still use of excessive force by police officers in Tanzania. Yet, in 2006, Pascal Msigula, a resident of Kihesa Kilolo in Iringa Municipality, was shot by police officers after he was suspected of being a bandit.⁷⁷⁵ A Police officer in the Arusha region killed Mr Benijas Kidemi after he was suspected of being a chronic bandit in the region and later killed by a police officer.⁷⁷⁶ In January 2006, a police officer murdered three men who were mineral dealers and one taxi driver in Sinza, Dar es Salaam. During the investigation by the

⁷⁷⁴ Legal and Human Rights Center, Human Right Report, 2013, pp, 51 and 52

⁷⁷⁵ Mtanzania, Killed by Police in Iringa for Allegedly Banditry, March 13th 2006, p. 5.

⁷⁷⁶ Majira, January 17th, 2006.

Presidential Commission of Inquiry, Justice Musa Kipenka Commission, it was found that the Police officials murdered four men. The Report recommended that police officials respect and protect the person's right to life, liberty and security.⁷⁷⁷ The statement from the Commission of Inquiry validates that the government is aware of the situation of the use of excessive force by Police officers.

Furthermore, empirical evidence shows the incidences of extra-judicial killings by security forces in Tanzania. It was revealed that 246 people died at the hands of security forces between 2003 and 2012.⁷⁷⁸ Use of excessive force led to the death of several individuals, including Jackson Bhoke, (Nyamongo) Myoyo Mgoyo (Musoma Rural), Mipawa Samweli (Musoma Rural), Tangira Wansimbu (Nyamongo), Theudat Ngongoni (Songea) Mohamed Said (Songea), Ally Saidi (Songea), Hasan Mgalu (Urambo), Saidi Msababa (Mbeya), Sangivu Ndahya (Manyara), Ngerebende Likuesha (Morogoro), Kashinje Msheshiwa (Morogoro), Kulwa Luhende (Morogoro).⁷⁷⁹ All these deaths and incidents reveal that there is the actual use of excessive force by police officers which leads to deaths in Tanzania.

Notwithstanding, the cases regarding police accountability as a result of unreasonable use of force are minimal compared to the incidences of using force. For instance, six people were charged at Kisutu Resident Magistrate Court for killing two business people; out of the six people, three were police officers.⁷⁸⁰ The High Court also convicted two former police officials accused of extra-judicial killings.

⁷⁷⁷ The Basic Principles on Use of Force and Firearms by Law Enforcement Officials No. 9, 1990, Principle 13.

⁷⁷⁸ Legal and Human Rights Center, Human Right Report, The Report on Extra-judicial killings Submitted to International Criminal Court, 2012, p.8.

⁷⁷⁹ Legal and Human Rights Center, Human Rights Report, 2012, p. 21.

⁷⁸⁰ Legal and Human Rights Center, Human Rights Report, 2015, p.26.

First, Daudi Mwangosi, a former radio presenter, sentenced the accused to 15 years in prison. The High Court also found guilty and sentenced to death a former senior police officer for involvement in killing three business people.⁷⁸¹

5.2.2.1 Analysis of the Legal Framework for Prohibition of the Excessive Use of Force by Police Officers

The study found that the legal framework for prohibiting excessive use of force in Tanzania has tried to accommodate the international standards on the prohibition of excessive use of force. Although there are loopholes that need to be covered by laws, the Constitution, as the mother law of the land, does not state anything about excessive use of force; instead, it carries fundamental rights under Articles 12 to 29, which have to be interpreted by courts to include such prohibitions.

The study found that the prohibition of excessive force in Tanzania often meets international standards and obligations. The governments and police institutions are responsible for implementing rules and regulations on using force.⁷⁸² Different laws allow the use of force by police officers. The CPA, TEA, PFASA, the Penal Code and PGO provide provisions for the use of force by police officers. However, the prohibition is limited as it is restricted to self-defence, defence of another, property and other grounds. The prohibition needs to be broadened to prevent violation of human rights. The terms in these provisions need to be more specific and clear. Under these laws, no direct provision prohibits excessive use of force; it only explains the circumstances where force can be allowed.

⁷⁸¹ Legal and Human Rights Center, Human Rights Report, 2016, p.21.

⁷⁸² The Basic Principles on the Use Of Force and Firearms by Law Enforcement Officials, 1990.

The laws only incorporate some rules on using force, as elaborated under the BPUFF. For instance, under Article 4,⁷⁸³ Law enforcement officials are not allowed to use force before applying non-violent means. The use of force and firearms is allowed when other means are ineffective. Article 5(e)⁷⁸⁴ Shows that law enforcement officials are to ensure medical aid is provided to the injured person whenever the use of force is unavoidable. Further, under Article 7, arbitrary use of force and firearms is punished.⁷⁸⁵ In one way or another, this creates loopholes for law enforcement officials to violate the rights of individuals.

Tanzanian laws cover the use of force in a nutshell. A provision like "imminent threat of life", which is the core ingredient of the prohibition of excessive force and justification for the use of force, is not well placed within the law. The PGO, which is part and parcel of the rules of day-to-day procedures of police officers, prohibits the use of force but lacks international standards for the use of force. The document is not enforceable. The public does not know its contents because it is an institutional regulation.

The study revealed that not only is the prohibition of excessive use of force inadequate, but some laws in Tanzania also grant immunity to police officers on using excessive force and retracts their accountability.⁷⁸⁶ The international standards state that the use of force, which is unlawful and direct to the control of law enforcement officials during arrest, detention and riot, may amount to torture. Tanzania has not made initiatives to protect the right to freedom from torture and

⁷⁸³*Ibid.*

⁷⁸⁴*Ibid.*

⁷⁸⁵*Ibid.*

⁷⁸⁶ See Sections 6 of the Criminal Procedure Act and Section 29 of the Terrorism Act.

inhumane and degrading treatment as the result of the excessive use of force. Similarly, it does not punish torture as one of the impacts of its penal laws. This affects the protection of human rights in Tanzania, and the reasons behind it could be that there are a lot of incidences and allegations of torture, and inhumane and degrading treatments, as evidenced by several reports, these acts are left unpunished for lack of provisions to incriminate the same in Tanzania.

For example, Section 29 of the Evidence Act indirectly motivates the act of torture, that no confession which is tendered in evidence shall be rejected because promise or threat has been held out to the person confessing unless the Court believes that inducement was made in such a circumstance and was of such a nature as likely to cause an untrue admission of guilt to be made. The findings have revealed that Tanzania is one of the countries reluctant to sign and ratify the UNCAT, including Angola, Zimbabwe and Sudan. At least Angola and Sudan have signed the Convention but have yet to confirm approval. Not signing the Convention prevents the country from meeting the standards and obligations in the area.

When a State signs the Convention, it agrees to fight against impunity by making torture a crime; investigate and prosecute allegations of torture; providing redress to victims; exclude statements acquired through torture from all proceedings and take legislative and other measures to prevent torture, among other things. Though it does not mean Tanzania is free from torture prohibitions, the UDHR, ICCPR, CEDAW and CRC prohibit torture, and Tanzania has ratified it. The study found that there are challenges which States encounter when they need to draft prohibitions against torture law. This is in respect of the contents and scope of the law, challenges on

how to define cruel, inhumane and degrading treatment or punishment in national laws and the absence of independent legislation and policies in which torture could be prevented. It could also be one of the reasons why Tanzania is reluctant to ratify the UNCAT.

The study found the prohibition of excessive use of force is well elaborated at the international level than at the regional and national levels. Although the study realised that Conventions which protect human rights do not contain provisions which have a direct bearing on the prohibition of the use of excessive force, the Basic Principles on the Use of Force by Law Enforcement Officials⁷⁸⁷ It is sufficient for the prohibition of the same. At the regional level, the ACHPR needs to be improved in the prohibition of the use of excessive force. The Charter does not have any provision that directly prohibits excessive use of force nor a provision concerning the use of force.

The Luanda Guidelines act as a substitute to the African Charter following the provision of Article 45(b) of the Charter, which states the Commission for promoting human rights should formulate and lay down principles to solve legal problems relating to human rights and fundamental freedoms upon which the African governments should base their legislations. The guidelines, however, do not amount to a Convention and have no binding power to protect human rights, and not all African States adhere to these guidelines.

The study examined the state of the legal framework for the prohibition of excessive use of force and looked at different police codes of conduct in Africa to find out

⁷⁸⁷The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990.

what will become a source of problems. Several States have police codes of conduct. These are such as Mauritius (Principle of Ethics), Uganda (Disciplinary Code of Conducts under The Police Act Chapter 303), Tanzania (the code of conducts placed under part VII of The Police Force and Auxiliary Service Act Cap 322) and (The Police General Order No. 110), in Kenya (The Service Standing Orders). Also, there is a code of conduct under organisations. For example, the Southern African Regional Police Chief Cooperation Organization (SARPCCO) developed a "code of conduct for police officials" in 2001, which centred on respect for human rights, non-discrimination, use of force, torture, concern for victims of crimes and abuse of power, 2010 The African Civilians Oversight Forum (APCOF) and Commonwealth Human Rights Initiative developed "common standards for policing in east Africa". All these documents have code of conduct standards referred to under international law as the Code of Conducts to Police Officers of 1979.

The study found that whenever the use of force is legal or moral, it has consequences for human rights and their lives. It causes death, torture, economic violence, and inhumane and degrading treatment of human beings. The use of excessive force is inviolable despite Tanzania having laws and principles which limit the use of excessive force; such use of force has consequences. To prohibit the impacts of the use of force, the study found some of the provisions under the laws limit the implications of the use of force. The Penal Code contains such provisions; Section 195 provides that a person by unlawful act or omission causes the death of another is guilty of manslaughter; Section 196 provides that any person by malice causes the death of another by an illegal act or omission is guilty of murder.

However, the above provisions still contravene the international human rights standard, which prohibits the death penalty (the second optional protocol to the Covenant on Civil and political rights, aiming to abolish the death penalty).⁷⁸⁸ Section 225 punishes any acts of causing grievous bodily harm against another to seven years imprisonment; section 231 explicitly addresses excessive force by considering the circumstances in which it was used and the quality of the act itself; and section 241 deals with assaults which occasion actual bodily harm. Any person found guilty of that offence is liable to imprisonment for five years. The CPA, on the other hand, under section 55, provides that a person under restraint should be treated with humanity and respect to human dignity, and no person under restraint be subjected to cruel, inhuman and degrading treatment. In contrast, section 21 requires using reasonable force following the circumstances when executing an arrest.

The study further found that Tanzania has yet to incorporate the principle of proportionality with its legal instruments openly. For instance, unlike in the Kenyan Constitution under Article 24(e),⁷⁸⁹ The limitation of rights and fundamental freedoms, right or fundamental freedom in the Bill shall not be limited except by law to the extent limitation is reasonable and justifiably based on human dignity, equality and freedom and the relation between the regulation and its purpose and whether there are less restrictive means to achieve the objective. The proportionality principle is well covered at the international level. The legal limitations under the proportionality principle for the use of force by law enforcement officials need to be better considered at the domestic level. Tanzanian laws do not incorporate all the

⁷⁸⁸ The Second Optional Protocol to the Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, 1989.

⁷⁸⁹ The Kenya Constitution of 2010.

terms and rules under the BPUFF on the proportionality principle. In Tanzania, the CPA provides for proportional use of force in arrest, detainment and circumstances where the use of force is not an option under the CPA.⁷⁹⁰

A police officer shall not use more force or subject a person to greater indignity than is necessary to make the arrest or prevent the escape. The principle should be incorporated with its elements to deliver justice in the police field and during adjudication. For instance, the suitability test will enable the Court to analyse the means and end to achieve the proposed aim during adjudication. The necessity test, one of the elements of proportionality, is used to examine whether the measure chosen is necessary to achieve the proposed goal and the proportionality strict sense to investigate if the measure is proportionate and does not burden the individuals. The laws should incorporate these elements into the use of force provision and as the procedure for adjudication.

The study found that in Tanzania, much literature concentrates on the effects of the use of force than an analysis of the adequacy of the legal framework on the prohibition of excessive use of force. Numerous literature and reports concentrated on international and regional contexts on the use of force by states and hardly any about law enforcement officials. These documents, in one way or another, provide the prohibitions of using excessive force by States. The literature examined laws under international law prohibiting excessive force as stipulated in the literature section. Some of the literature provides for the effects of the use of force by state agents; many examine the prohibition of the use of force between States and rarely

⁷⁹⁰ The Criminal Procedure Act Cap. 20, RE 2019, Section 21(2) and (2).

cover the domestic use of force. Human rights instruments thereby govern the prohibition of excessive force, and most of the instruments cover the state's use of force and not the state's agents.⁷⁹¹

Empirical evidence shows that all statutes that affect human rights should incorporate the proportionality principle and that adherence to the proportionality principle under human rights protection helps balance the conflicting interest, government interests and individuals and does not strictly protect human rights.⁷⁹² In Tanzania, the laws are inadequate; they are proportionate and necessitate the use of force. Consequently, only some of the statutes that affect human rights in Tanzania incorporate those principles, only the CPA and the PFASA provide the procedure for using force, and they need to be revised. Police officials use the proportionality principle in their field, but many incidences of cruelty, inhuman treatment and torture are still found.

It is argued the principle of proportionality is there not to minimise force but to balance the use of force; however, there are still human rights violations by the use of force with the proportionality principle. It is evidenced that the doctrine of proportionality is relevant in limiting the exercise of rights and that there must be a conflicting norm. One must be overhead the other one to protect such a right. The application of proportionality challenges the protection of Human Rights. However, the proportionality principle allows the violation of Human Rights.

⁷⁹¹<http://eols/Eolss-sample-all-chapter.aspx> .

⁷⁹² Wade, H.W.R and Forsyth, C.F, *Administrative Law*, Oxford University Press, United Kingdom, 2008, p. 305.

The study has found that police officials have the right to use force, and the right which is affected is the right to life. The state should protect the right to life. The basic principles of using force under international law are designed to secure the use of force by police officers. The use of force shall be employed as a defence against an imminent threat, the threat of death or severe injury and not otherwise.⁷⁹³ Protecting the right to life is challenging because it is not absolute, but international law protects the arbitrary use of force and no derogation is allowed. This can at least help minimise the violations.

Lastly, it is observed that police officers must promote and protect human rights. It was stated that police officers are agents of the state and are allowed to use force where needed to achieve the aim. It is a fact that the use of force has consequences, whether legally or morally. No matter the situation, legal or illegal power affects human rights protection.⁷⁹⁴

Empirical evidence shows problems with the adequacy of a legal framework prohibiting excessive use of force by law enforcement agents. Under International law, the use of force is purely concerned with States' use of force and hardly recognises the domestic use of force by State authorities; the human rights conventions and covenant do not go into details on the prohibitions of the use of force and left out the BPUFF to be the only document that insists on the prohibition of the use of force. This document is only persuasive as it acts as a guideline and principle, but it does not have a binding force to restrict States from using excessive

⁷⁹³ Ralph, C., *Human Rights and Policing*, 2nd Revised Ed, MartinusNijhoff Publishers 2007, pp. 19-39.

⁷⁹⁴ Holmstrom, L, *et al.*, *Essentials Texts on Human Rights for the Police: A Compilation of International Instruments*; 2nd Revised Edition, 2008, pp. 1 – 38.

force and making them liable when they do so.

The study went on to find out if the domestic laws are not in line with international standards, yet the police force in Tanzania uses excessive force; what is the problem? Some reasons include the lack of knowledge of human rights laws and the essence of procedural safeguards, especially for low-ranking officers; not all police officers know the legal standards governing the use of force. Some police officers know elementary aspects of Human Rights, Criminal Law, Evidence Law and Criminal Procedure Law because these are partially offered during police training. The language of the law is sometimes difficult for them to understand and bars their knowledge.

The majorities of police officers are standard seven and form four leavers; a minimal number of them reach and complete the degree level (Bachelor of Laws) and attain law school. It is hard for most police officers to master advanced laws above their education level. During operations, these juniors are sent by the institution to the operation. The educated ones who have the rules and principles on the use of force are also few and are not the ones who are in the field to arrest, detain and so on. The junior police officers use excessive force to create fear in society. Sometimes they need to be more confident and mannered with the rules. As mentioned earlier, the point goes in tandem with the situational theory.

As the theory provides, the issue as to whether excessive force is used or not depends on the characteristics of the situation in which the police use force. It depends on the age, gender, race, and class of the suspect and the officer involved.

There is also the aspect of educational background and the upbringing of the officer. The police officer's environment highly influences their behaviour, as it was theorised that an officer with higher education and more experience is less likely to employ violence.

Restrictions under the laws on the use of force and the limitations incorporated into the laws are inadequate to prohibit excessive force use strictly. The study found that, despite inadequate laws, only a few rules meet the standards under BPUFF. The law allows the use of force that is reasonable and necessary. In practice measuring these levels of force takes a lot of work. Reasonability is measured by an individual in a dangerous circumstance, which is challenging to use force. The laws only state the cases that allow the use of excessive force and not which prohibit the use of excessive force.

Non-adherence to the relevant laws by police officers has also contributed to their excessive use of force. This is caused by limited legal education and a need for more professionalism. The proportionality principle does not mean minimal use of force; it means proportional force to reach the aim with necessity. Non-adherence to the laws and lack of accountability or impunity for police officers who are perpetrators of human rights violations are also some of the reasons. Lack of accountability is due to poor investigations or delays in the same and of proceedings in Court as police officers are the investigators and essentially become judges of their cases. The study found that the Government suppressed these cases of the use of excessive force for lack of evidence, undermining the sufficiency of national human rights mechanisms. For instance, in the Akwilina case, governments withdrew from the case for lack of

evidence.⁷⁹⁵ This is one of the reasons for the non-adherence of law by police officials.

Command from the top authorities or leaders also changes police officers' behaviour and mentality in adhering to the laws. Excessive force is sometimes triggered by orders from the foremost authorities and political competition in the country. The opposition parties are always taken as enemies of the ruling party and subjected to harsh treatment and brutal actions by the police. Many reports publicised in Tanzania show how police use excessive force on demonstrators from the opposition.⁷⁹⁶ The police are supposed to be neutral; however, this is almost impossible due to the command system. The President appoints the IGP, and IGP appoints the RPCs under Article 36(2) of the CURT.⁷⁹⁷ No police can decide not to follow the orders from the regime.⁷⁹⁸

The circumstances of the incidents were also observed to be one of the factors for police use of excessive force. The situation will determine whether force is allowed or not allowed. It could be a danger, an escape, or an imminent threat to life; these situations might lead to the excessive use of force than a reasonable one. Police need to protect their lives, civilians and their property. Officers need to be made aware of what will happen; therefore, applying the rules on using force is sometimes challenging due to the nature of the incidents. This further conforms to the situational theory, which theorised that the circumstances or the situation prevailing could lead to the police officer using excessive force. This could depend on the

⁷⁹⁵ Legal and Human Rights Center, Tanzania Human Rights Report, 2018, p. 15.

⁷⁹⁶ Refer to the incidences of police use of force in Tanzania analysed under the data analysis section.

⁷⁹⁷ The Constitution of the United Republic of Tanzania, Cap. 2 R.E. 2008

⁷⁹⁸ See Section 27 of the Police Force and Auxiliary Services Act, Cap 322 R.E. 2010.

demeanour, status and behaviour of the suspect, the seriousness of the offence, the experience level of the police officer, attitudes and disposition of the officer, visibility of the encounters, number of officers present at the scene, characteristics of the neighbourhood where the interaction takes place, and many other factors which play a crucial part in analysing the outcome of instances where police have used force. Whether police will use or even excessive force highly depends on the dictates of an intuitive grasp of the situational contingencies.

Police officers rarely have different instruments, most of the time other than firearms. The then IGP Sirro revealed that there needs to be more modern equipment to be used by police officers in the execution of their work.⁷⁹⁹ Unless police officials could have varieties of instruments, they may use different instruments or may have a clear picture of the target. The use of excessive force will be attributed to the nature of the circumstances, behaviours, personality, knowledge of the law and ethnicity. The situation might not be so dangerous or life-endangering, but still, the police officials might use excessive force because of their attitudes or ethnicity. Likewise, the situation could be dangerous, police officers could know how to handle the situation, and human rights could still be protected.

Lack of adjudication is also among the factors. There are many incidences reported of police use of excessive force. Many of these allegations do not reach the Court of Law for adjudication. Some complaints do not reach the police stations, and allegations are not forwarded to the courts for adjudication. The reasons behind this kind of case are confidentiality and lack of impartiality because they touch the

⁷⁹⁹ “Sirro Worn Commander over corruption, Hypocrisy”, The Daily News, 25 September 2019.

Government under the banner "We protect public security", and the civilians do not trust the police as they are judges of their case. For instance, the National Security Act of 1970 prohibits servants from disclosing a wide range of information, and the law requires them to keep information in the public domain.

Another reason these cases do not reach courts is because the authority to prosecute is to the Government and an individual; in some cases, the person can prosecute. However, the mandate to prosecute is vested in the government and police officials are investigators; there is discrimination against these kinds of cases and left the perpetrators free not prosecuted. Another is the reluctance of the victims to report the incidences of the use of excessive force. Victims are afraid of police and police stations, and some think that brutality or excessive force is one of the ways to punish the suspects or accused persons. With limited resources, firearms are always available compared to other facilities like tear gas, batons, dogs, horses, chemical irritants, water cannon and plastic bullets. If police officials were supplied with those facilities, there is hope that this would reduce reliance on firearms in all future occurring incidents. The use of excessive force by police officials is contributed by the scarcity of non-lethal weapons, even in situations requiring rubber bullets or other weapons.

Laws grant immunity to police officers on the use of force.⁸⁰⁰ Police officers are not to be liable in a civil or criminal suit for such death or injury caused by the use of necessary force. Section 26 of the Emergency Powers Act states no act done under this act can be called into question in a court. No civil or criminal proceedings can be

⁸⁰⁰ Section 29(6) of the Prevention of Terrorism Act, Cap 19 R.E. 2010.

instituted against anyone acting under this act. Section 6 (2) of CPA states that the police have to comply with the provisions of the Penal Code, but where they do not, it cannot lead to a civil suit being filed or the exclusion of evidence in a matter.

Lack of independence in oversight mechanisms contributes to police use of excessive force. The judiciary has power over police on the excessive use of force through adjudicating cases concerning human rights violations. The judiciary's position depends on the legal norms establishing the Court and the jurisdiction. The judiciary has been effective, although the structure of the judiciary needs to give a chance for the judiciary to be independent. Many factors cause courts' lack of independence; one is that Judges are appointed by the President Article 109(3) CURT.⁸⁰¹ And the magistrates are appointed by Judicial Service Commission Article 113(4) of CURT. In this case, the President has indirect control over their appointments. A case against the Government is hard to succeed; the prosecutors and investigators also are government personnel.

The Commission for Human Rights and Good Governance, as one of the external mechanisms for police accountability in Tanzania, is mandated to investigate the right violated and make police accountable section 6(1)(c).⁸⁰² The Commission is supposed to be independent, autonomous and free from the control of any person or authority. The study found an indirect backwards interference; the President appoints the Commissioners on the recommendation of an appointed committee Article 129 (3) CURT.⁸⁰³ The President sets their salaries, and the Commission, as bound by the

⁸⁰¹ The United Republic of Tanzania Constitution, Cap. 2, R.E. 2008.

⁸⁰² The Commission of Human Rights and Good Governance Cap 5, R.E. 2010.

⁸⁰³ *Ibid.*

Constitution, is not allowed to investigate and bring proceedings against the President. The President has the power to stop investigations for the defence and security of the country as per Section 16(4).⁸⁰⁴ The Commission only gives recommendations and does not have the power to adjudicate any allegations for human rights violations and grant remedies in section 6 (1) (i).⁸⁰⁵

Lack of transparency to discipline mechanisms would be one of the reasons for police use of excessive force. Criminal allegations might exist referred to disciplinary mechanisms that should be referred to Court for adjudication. The study found that there needs to be more transparency in the mechanism favouring and protecting the police culture. Police officials caught for excessive use of force are transferred to another station as part of the punishment. This limits police officials' accountability for criminal allegations. Also, the procedures for this mechanism have yet to be discovered by many, and the public needs access to the report from the disciplinary mechanisms on accountability. The internal mechanism provided by PGOs and legislation has made it cumbersome to obtain information about the progress of police officers' disciplinary process, as discussed in the analysis section. If they are not punished, there is a possibility for increased police use of excessive force.⁸⁰⁶

5.2.2.2 Aspects of the Use of Force and Police Officers' Accountability for Violation of the Proportionality Principle

The police accountability system in Tanzania is divided into two: the internal and

⁸⁰⁴ The Commission of Human Rights and Good Governance Cap 5, R.E. 2010.

⁸⁰⁵ *Ibid.*

⁸⁰⁶ Haki Na Usalama, Police Accountability; A Comprehensive Framework, May 2017, Pg 25.

external accountability systems. Internal accountability to the police refers to a self-regulatory mechanism for police officers' accountability.⁸⁰⁷ The internal discipline procedure mechanism helps to investigate abuse of power by police officials within the police institution. The internal procedure mechanism is under Police Service Regulation 1995, the Police Force and Prison Service Act⁸⁰⁸, the Police Force and Auxiliary Service Act and the Police General Orders. The accountability procedure for internal discipline mechanism is by rank; The Police Force and Auxiliary Service Act.⁸⁰⁹ cover the inspector and below rank, the Police Force and Prison Service Commission Act⁸¹⁰ To provide for disciplinary mechanism measures from the inspector and above rank.

Generally, the regulation for operation is governed by the Police Force Service Regulation 1995 and the Prison Service Commission Act.⁸¹¹ Charges under disciplinary proceedings are initiated by a Gazetted officer under the Police Force and Auxiliary Services Act and by the tribunal under the Police Force Regulation 1995. Appeals under the Police Force Service Regulations can be made to the Inspector General of Police, who is the final authority, or the Regional Commissioner for Investigations.⁸¹² The disciplinary offence to senior officers is under the Civil Service Act 1989, which provides for disciplinary crimes committed by police officials above the rank of inspector. The procedure for these disciplinary offences is formal hearings or summary proceedings. However, the internal

⁸⁰⁷ Commonwealth Human Rights Initiative, *The Police, The People, The Politics: Police Accountability in Tanzania*, 2006, pp. 1-14.

⁸⁰⁸ The Police Force and Auxiliary Service Act, Cap 322 R.E. 2010.

⁸⁰⁹ *Ibid.*

⁸¹⁰ The Police Force and Prison Service Commission Act, Cap 241, R.E. 2010.

⁸¹¹ *Ibid.*

⁸¹² Haki nausalama, *Police Accountability, A comprehensive framework*, May 2017.

discipline mechanism proves to have impunity and fails to fulfil its role.

Also, there needs to be more transparency in the mechanisms which protect the police culture.⁸¹³ There is also an external mechanism system for police accountability. This mechanism complements the internal procedure. This mechanism should be strong, impartial and independent. In Tanzania, external accountability covers; parliamentary oversight, civil and criminal mechanisms *via* courts, the Commission of Human Rights and Good Governance and the media. First, the judiciary is part of an external mechanism responsible for police officials' accountability to hear and settle cases for police misconduct. In Tanzania, the Judges are appointed by the President, and the Chief Justice appoints magistrates. So, the President has control over their appointment. The Police officials' accountability *via* courts the chances are limited. The reason behind this is the structure of judicial appointments. The Director of Public Prosecutions is appointed by the President and answerable to the President. Similarly, the Prosecution is run by the Director of Public Prosecution staff.

It is argued that another challenge to the judicial mechanism is that individuals and the Government can institute cases against police officers for abusing power. In this situation, the case is instituted under a court of law, and most lawyers are reluctant to take cases against police officers and the Government. It was further observed the Commission of Human Rights and Good Governance is one of the external mechanisms that can make police officials accountable. The Commission has the

⁸¹³ Commonwealth Human Rights Initiative, *The Police, The People, The Politics: Police Accountability in Tanzania*, 2006, pp. 1-14.

power to investigate human rights violations and help victims to redress.⁸¹⁴ However, the Commission is not independent and has no autonomy over human rights violations.

The empirical evidence shows when reviewed literature in East Africa as a sample to analyse the excessive use of force and police accountability for violating the proportionality principle. There are many situations in Kenya which prove police officials' violence and brutality, and there are documents showing extra-judicial killings, torture, and arbitrary detention that suggest police officials' misconduct. The reports revealed that over 100 people were killed by extra-judicial execution in Kenya. Statistics also indicate many issues, including that police forces in Kenya are corrupt and have criminal liability. The society fears the police and does not report them for police violence and corruption.⁸¹⁵

Accountability refers to the processes of a chain of command, complaint procedures, oversight mechanisms, not courts, courts of law, freedom of information laws and institutional values. Police accountability has three values, popular accountability, legal accountability and transparency. Starting with popular accountability, police are accountable to the people's will. Police officials are accountable to elected officials. No police officials can act or operate without the consent of the governed. The police official can only be accountable to elected officials, not to back channels. The second value is legal accountability; police officials should first obey the law.

⁸¹⁴ Commonwealth Human Rights Initiative, *The Police, The People, The Politics: Police Accountability in Tanzania*, 2006, pp. 1-14.

⁸¹⁵ Kivoi D., "Why Violence is a Hallmark of Kenyan Policing. And what needs to Change", *The Conversation*, 5th of June 2020, available at <https://theconversation.com/why-violence-is-a-hallmark-of-kenyan-policing-and-what-needs-to-change-139878>, last visited on 3 March 2022.

They can be liable to the Court of law with legal rules through the judiciary process. If police officials disobey the law, they will lose legitimacy as law enforcers. Police officers who violate the law shall be accountable by the rules.⁸¹⁶ The third value of accountability is transparency. States need to have a mechanism by which police officials will be required to provide information about sensitive areas of operation. The police officials need to be open, among other things, to the names and locations of arrested persons, incidences involving excessive use of force and so on. Police officials should be genuine and transparent.⁸¹⁷

Various factors face accountability mechanisms for police officers, including the culture of secrecy and restrictive laws. It is hard for an everyday citizen to obtain data concerning police accountability. For instance, it is challenging for an ordinary Kenyan to get official information about government law enforcement policy and day-to-day operations. In Kenya, it is a crime under the law to possess a government document or transfer a document to any person. The documents are not allowed to be disclosed in the republic's interest.⁸¹⁸

The second challenge facing mechanisms for police accountability, both internal and external, are few and need to be stronger functioning. As observed, the challenges facing police accountability in Kenya as an example. There is political interference and control; for instance, the President of Kenya has the authority to appoint and remove the top-ranking officer in Kenya Police Force. The law does not provide for the criteria of the President to appoint or order the removal from the office of

⁸¹⁶*Ibid*, pp. 15-24.

⁸¹⁷ Common Wealth Human Rights Initiative, *Police as a Service Organisation: An Agenda For Change*, Nairobi, April 2003, pp. 15-24.

⁸¹⁸*Ibid*, pp.39-41.

Commissioner of Police. The Commissioner has a fixed term and no security of tenure. Consequently, Police officials found their jobs seemly and personal liberty dependent on the patronage of the President.⁸¹⁹

The third challenge to these mechanisms is that the police use of excessive force is contributed by government control exerted on police officers. It was observed in the year 2000 when the Minister in the office of the President ordered police to use force. The same year in Kenya, eight suspected criminals were sent out to the streets for life and law enforcement officials ordered them to continue doing so. In 2001, Police officials again shot seven criminal suspects in the back of their heads. President Daniel Arap Moi Warned, "All those with hidden agendas who complain when we kill criminals sooner or later be required to tell Kenya what they know".⁸²⁰ Who will be liable, the police, Minister or the President? Do these mechanisms have the power to summon the President?

It is argued that if States could have a mechanism with power and an effective disciplinary system, the state would prevent such human rights violations. For instance, the internal accountability mechanisms have proved difficult for complainants to have progressive information on police investigations. Only the results of the study are easily obtained. Police also are reluctant to make the data available to the general public concerning police disciplinary proceedings or cases concerning the Prosecution of police criminality. A few police officers are charged with excessive use of force in many jurisdictions. Likewise, the investigation for

⁸¹⁹ Common Wealth Human Rights Initiative, *Police as a Service Organization: An Agenda for Change*, Nairobi, April 2003, pp.39-41.

⁸²⁰ *Ibid.*

allegations of torture revealed a 'Code of silence'. Some officers destroy evidence or threaten witnesses to cover up police violence.⁸²¹

For the external accountability mechanism, the institutions have powers to investigate complaints of human rights violations, injustices, abuse of power and unfair treatment by public officers. However, these mechanisms, for instance, the standing committee in Kenya, could not enforce its recommendations. An example from Kenya is that the standing committee in Kenya was prohibited from publishing its findings and reports for five years. The reason behind this is that the committee is not independent, and its existence is made under a Presidential order. It needed to have the permanency of a body established by statute or constitutional enactment.⁸²²

Empirical evidence shows that Tanzania faces the same challenges to the police accountability mechanisms; there is interference by the political, executive and ruling parties in police operation decisions. Tanzania law gives a chance and facilitates interference by political executives and the ruling party in police operation decisions. 2001 the Parliament created the Tanzania Commission for Human Rights and Good Governance. The Commission can investigate human rights abuses and maladministration, and issue summons, examine witnesses under oath, and require persons to provide information. The Commission does not give remedies to the victims, and it has no power to adjudicate. It recommends this measure to the relevant person or authority, and the President may prohibit the Commission from

⁸²¹ Common Wealth Human Rights Initiative, *Police as A Service Organisation: An Agenda for Change*, Nairobi, April 2003, pp .39-41.

⁸²² *Ibid.*

investigating any matter but must give the reason for doing so.⁸²³ All Commissioners are appointed for three years tenure by the President. Here the executive has indirect power to interfere with the Commission's decision.

The police have been victims and vulnerable to interference by powerful individuals outside their formal mechanism of accountability and not acting professionally to the number of incidences. The reason is that many police officers are recruited not for their academic qualifications or performance on the job but rather for how they arrest criminals and their strength in executing the task.⁸²⁴ It was observed the enemy of accountability is an impurity which occurs when an effective mechanism is absent for investigating and punishing police misconduct.

The study has also analysed another aspect of excessive use of force and police accountability in African countries. The study has found three ways for police accountability, internal control, State control and social control.⁸²⁵ Each of the ways has an accountability mechanism. The social control mechanism includes civilians' complaints, review boards, external auditors, human rights monitors, policing research and policing institutions. The media, as one of the social mechanisms for police accountability, plays a role in police officers' responsibility by investigating, reporting and publishing stories of police abuse and crimes. The study has found that there needs to be more research on the concept of promoting police accountability through state control mechanisms which require further study, and there is a need to change the police system at the local level, meaning sub-national and national

⁸²³ Common Wealth Human Rights Initiative, *Police as a Service Organization: An Agenda For Change*, Nairobi, April 2003, pp. 39-41.

⁸²⁴ *Ibid.*

⁸²⁵ Democratic Policing Series, *A Police Accountability: A Comprehensive Framework*, 2017, pp. 2-15.

level.⁸²⁶

The study has found further under international law, and the rules provide for accountability intending to provide for the right to remedy. States and police institutions are duty-bound by international law to protect the rights enshrined under the ICCPR.⁸²⁷ Which states that people whose rights are violated should have an adequate remedy. International law obliges States to establish accountability for specific law enforcement procedures. The study has similarly examined different rules that insist police officers and institutions being accountable; the United Nations Code of Conducts for Law Enforcement Officials;⁸²⁸ the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,⁸²⁹ and the United Nations Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment.⁸³⁰

The study has found further that there are varying levels of police officers' accountability: there is internal accountability, accountability to the state, accountability to the public and independent external accountability. However, the researcher has realised the literature should have talked about police officers' accountability in Tanzania and to what extent police officials are accountable for violating the principle of proportionality in situations where police use excessive force.⁸³¹

⁸²⁶ Romi S., *Harnessing Public Engagement for Public Accountability in Africa*, Institute for Security Studies Africa Report, 21 December 21, 2019, pp. 5-30.

⁸²⁷ Article 2(3) of the International Covenant on Civil and Political Rights, 1966.

⁸²⁸ The Code of Conduct for Law Enforcement Officials, 1979, Preamble (a).

⁸²⁹ Principle 6 of The United Nations Basic Principle on the Use of Force and Firearms by Law Enforcement Officials 1990

⁸³⁰ *Ibid*, Principle 29, 33 and 34.

⁸³¹ *Democratic Policing Series, A Police Accountability: A Comprehensive Framework*, 2017, pp. 2-15.

The researcher has found that police officers should be accountable for inappropriate use of force and unlawful command of the victim. Wherever there is the use of force, the principles of legality, necessity, proportionality, precaution, non-discrimination and accountability should be applied. Using force against imminent threat or death or severe injury or prevention of a particular situation, arbitrary or abusive use of force and firearms should be punished.⁸³² States should prevent arbitrary killings and extra-judicial killings by security forces. An effective, prompt, independent, and impartial investigation should be done if there is a killing incident.

As a legal requirement, States must ensure that victims have access to an effective remedy, including access to justice and reparations. As provided under principle 7 of BPUFF, Governments must ensure that law enforcement officials' arbitrary or abusive use of force and firearms is punished as a criminal under their law. Likewise, police institutions have a responsibility for the wrongdoing of their staff. This is explained further under BPUFF principle 24, that, Governments and law enforcement agencies shall be accountable under their order if they know the law enforcement official under their command is resorting or has resorted to the unlawful use of force and firearms. They did not take all measures to prevent, suppress or report such use.⁸³³

The researcher has found further that police malpractice appeared on two levels; where police contact with citizens and patrol duties. Police malpractice occurs when a person is arrested or detained for investigations and is subjected to torture, beating

⁸³² The United Nations, Use of Force and Firearms in Law Enforcement, New York, 2017. p.8-19.

⁸³³ *Ibid.*

and harassment. In these circumstances, it is infrequent for the violator to be prosecuted by the state. However, the acts of State agents lead to the violation of obligations, constituting a breach of fundamental human rights that Tanzania has ratified. The control of police malpractice is done *via* legislative and judiciary machinery. The judiciary has been effective in reducing police malpractice. However, the judiciary and its structure do not allow the Court to be independent in adjudicating allegations of police malpractice.

Also, the victims of police use of excessive force have difficulty invoking the judiciary process. It could be worthwhile set-in a motion and give force judicial authorities to initiate its motion into inquiring about the causes of death and disappearance of persons during their detention or imprisonment. Like section 17(3)⁸³⁴ In its motion, the judicial order the person to pay compensation for excessive use of force. The victims are unaware that the excess force used by State organs can be challenged in Court. This research reveals the practice of executive power in the police as an institution and law-enforcing organ. Prof. Shivji once said that murderous dictators in Africa may cause the proportional use of force and extent of violations of basic rights Africa.⁸³⁵

Further, the study has found that the Penal Code under sections 18, 18A, and 18B allows using force in self-defence against self or the defence of another. Depending on the situation, a person is allowed to use reasonable force; contrary to that, a person shall be criminally liable for any offence resulting from excessive force in

⁸³⁴The Prevention of Torture Act, No. 12 of 2017.

⁸³⁵ Kapinga W.B., the Police and Human Rights in Tanzania, Police Security Force and Human Rights in the Third World, Vol. 9, 1990.

self-defence. Similarly, the Penal Code⁸³⁶ provides for accountability for unlawful acts or omissions done unintentionally and cause the death of another, a person liable for such action or omission commits an offence of manslaughter, and as per section 196 of the same Act, a person who with malice aforethought causes the death of another commits an offence of murder.

Similarly, section 225 of the Penal Code states that when a person unlawfully causes grievous harm to another, commits an offence and is liable to imprisonment for seven years. Likewise, a person who is authorised by law or consent of the person injured that person is criminally responsible for any excess of the use of force as to the nature and quality of the act which constitutes excess.⁸³⁷ and section 241 of the Penal Code provides that a person who commits an assault or bodily harm commits an offence and is liable for five years imprisonment. However, the respondent did not address to what extent the police officials are accountable under this law.

The study has found further.⁸³⁸ That the CPA states that where a police officer contravenes or fails to comply with the provisions of this part, the contravention or failure shall not be punishable as an offence against this Act⁸³⁹, the Prevention of Terrorism Act⁸⁴⁰ Provides that a police officer is allowed to use force during investigation in cases of urgency, and a police official who employs such force as may be necessary for any purpose following the act shall not be liable in any criminal or civil proceedings for the use of force that caused death or injury or damage of the property.

⁸³⁶Section 195

⁸³⁷*Ibid*, Section 231.

⁸³⁸ Anonymous, Assistant Lecturer at Tumaini University Dar es Salaam, Dar es Salaam, January 2019.

⁸³⁹Section 6(2).

⁸⁴⁰ The Prevention of Terrorism Act, Cap. 19. R.E. 2002, Section 29(6).

However, the PFASA provides for the accountability of police officials in disciplinary offences. Section 50(t) provides that any member of the force below the rank of the inspector is liable under disciplinary offences to discharge any firearms without orders or a just cause. The punishments of disciplinary offences are provided under Section 53 of the same Act, and the power of the officer who holds an inquiry has the power and jurisdiction of a District Magistrate in such a place as provided under Section 51.⁸⁴¹ Similarly, the provisions of article 30(3) of the CURT provide for the accountability and the right to remedy for the victims of human rights violations, that a person has the right to claim for human rights violation to the right which is being, likely to be violated and has been violated and institute the proceedings for redress in the High Court.

It was observed that accountability to the police officers as individuals or as different mechanisms do an institution; there is an internal and external accountability mechanism. Internal police accountability is done *via* disciplinary procedures within the police institution and is a vehicle for accountability. The Police Force Service Regulations⁸⁴² (PFSR) under part IV and the PGO⁸⁴³ Provides for internal disciplinary mechanisms. The internal disciplinary mechanism applies to the rank, senior and junior officers. The tribunal (*Maktab*) which determines these cases of police misconduct is temporary. The tribunal hears allegations, summons witnesses and gives punishment. Further, the respondent mentioned the external mechanisms covering parliamentary oversight, civil and criminal actions through courts, the

⁸⁴¹ *Ibid.*

⁸⁴² The Police Force Service Regulation, 1995.

⁸⁴³ See Police General Orders 101-120.

Commission of Human Rights and Good Governance, the media and community policing, the Police and Prison Service Commission and civil society organisations.

The study has also found.⁸⁴⁴ Police officials are accountable to their court-martial as part of an internal accountability mechanism. Under this Court, when police officials are found guilty, they are terminated from work; however, it is rare for police officials to be terminated from employment and also rare for them to be accountable for the excessive use of force. Whenever there are incidences of police officials' use of excessive force, the IGP always states that the incident is under investigation. The investigation took time, the victims lost interest, and the accused was left unpunished.

It was argued that when inquired as to why the office of IGP took a long time to investigate, they replied that the reason behind this is that victims were not cooperative in giving evidence when the victim died and took it as a waste of time. Another reason was that many victims were ignorant and did not know their rights. The empirical evidence shows a few police officers who are caught for the excessive use of force are transferred to other stations as part of police accountability and do not face criminal charges.

Another inquiry was whether there was any reparation system for victims of excessive use of force in Tanzania, and if there is, to what extent is the system adequate to compensate victims of extreme force? It was observed that there is no reparation to victims of excessive use of force; the only help is a funeral and medical

⁸⁴⁴ Anonymous, an Advocate from the Legal and Human Rights Center, Dar es Salaam, January 2021.

expenses that the police institution offered in some incidences. The expenses are not in the form of compensation as a remedy but as part of humanitarian service. Victims do not receive reparations because many incidences of excessive use of force do not end up in Court as criminal charges due to a lack of impartiality, evidence, and the complexity of the procedure to institute cases. Although there are a lot of incidences reported against police in the use of excessive force, police officers are not cooperative with other human rights mechanisms. Also, the duty to prosecute is under public rather than human rights bodies.

The study has found further.⁸⁴⁵ The police as an institution have different mechanisms for making police officials accountable. When the police have committed wrong on duty, there is a mechanism to punish them under the disciplinary level under the internal accountability mechanism. If a police officer commits a criminal iniquity, the proper channel is the Court of law. However, there are problems faced by the victims of excessive use of force—first, a low level of understanding and knowledge of human rights.

Second, the victims are afraid of police stations and do not want to file complaints to police stations; thirdly, the police officials are not friendly with normal civilians and the victims. Fourthly, the victims have little understanding of crimes, meaning what to report and what not to be reported to police stations. This situation leads to the perpetuation of acts of excessive use of force not being reported. Consistently, victims report to other human rights bodies but not to police stations. The victims report to human rights bodies, such as the LHRC. The LHRC receives a lot of human

⁸⁴⁵ Anonymous, Magistrate, The Resident Magistrate Court, Mwanza, December 2019.

rights violations complaints via media and makes a follow-up; some of the information from the centre originated from paralegals in different areas. After investigating those incidents, the LHRC communicated with the IGP through letters, and the IGP undertook the investigation; however, as always, the response was that the police institution was under investigation.

Further, the excessive use of force by the police is not the whole institution's problem, and an individual's personality causes this behaviour; a person is violent. This is also caused by the individual's background, family history, whether the police is religious and how he was raised. It is argued also there are few criminal cases concerning excessive use of force by the police due to the structure of accountability and the reporting system. Likewise, investigating these cases takes a long time, and the police usually defend each other. Due to these reasons, victims of excessive use of force by police officials are left without hope, and reparation is rare.

5.2.2.3 Analysis of the Aspects of the Use of Force and Police Accountability for Violation of the Principle of Proportionality

The study found that there needs to be more accountability of police officials. The Government contributes to this by indirectly condoning excessive use of force by not taking action against the accused police officers who use excessive force. The DPP has the power to institute, prosecute and suspense criminal Prosecution under the National Prosecutions Service Act.⁸⁴⁶ These powers should be used side by side to protect human rights and make the perpetrators of human rights accountable. Similarly, the Constitution of the United Republic of Tanzania under Article 107A

⁸⁴⁶ The National Prosecutions Service Act, Cap 430 R.E. 2019.

states that the judiciary shall be the authority with the final decision in the dispensation of justice in the URT, the judiciary in delivering justice, be it criminal or civil, shall observe the principle of impartiality to all without due regard to one's social, position and economic status, to award the reasonable compensation to the victims of wrongdoings committed by other persons, the judiciary is required to make sure the victims of human rights violations are prosecuted as provided under the law.⁸⁴⁷ This is not the reality when it comes to cases concerning excessive use of force by police officials.

The study further found that the lack of accountability is fueled by the fact that most lawyers need to be better trained on the use of force cases and have adequate knowledge of the proportionality principle and its application. The reason is that the principle of proportionality needs to be better covered in many University curricula in Tanzania. Many curricula are taught about the use of force by the state under the public international law course rather than on a personal level, and the proportionality principle needs to be covered.

Section 19⁸⁴⁸ states when a person is charged with a criminal offence arising from the use of force, whether to the act of arrest or attempted arrest, the Court shall, in considering whether the means used were necessary or the degree of force used was reasonable, have regard to the gravity of the offence which has been/was being committed by such person and the circumstances in which such offence has been or was being committed by such person. This might cause some judicial personnel to

⁸⁴⁷ The Constitution of the United Republic of Tanzania, Cap. 2 R.E., 2008, Article 107A and B.

⁸⁴⁸ The Penal Code Cap. 16, R.E. 2019.

have a little knowledge of its application and it becomes challenging when they have cases involving such a subject matter. Sometimes, this might be why the culprits allegedly used excessive force to be set free.

The study found challenges facing the accountability mechanisms that prevent police officers from using excessive force in Tanzania. One of the challenges is that cases concerning police excessive use of energy should be reported. There are a lot of incidents of torture and ill-treatment in Tanzania, some are reported, and some are not. Many of these incidents are carried out in police stations and other areas. In courts, there are few cases in comparison to the incidences reported on the use of excessive force, as explained in the data analysis section.

The reasons behind having very few cases include ignorance of the victims in knowing their rights which are Constitutionally provided, such as the right to institute a case for human rights violation under Article 30(3), lack of cooperation by police officers on these kinds of cases, not acting professionally and impartially by the police officers, secrecy of the cases because it affects the interests of the country directly, great secrecy during investigation that leads to delays and increase of the incidences of police use of excessive force.

This finding reflects the organisational and subcultural theory. The theory provides that due to the nature of police work, there is a working personality which is attached to all members of the police force. It becomes the nature of the police force organisation, and the emphasis is put on aspects such as loyalty and secrecy to protect police officers who usually commit violence and use excessive force. The

theoretical 'blue wall of silence' which prevents other police officers from scrutiny or Prosecution applies here.

Thus, as per the above theories, the continuation of the use of excessive force is due to police officers and the police force as an organisation having a culture of disregarding other members of the police force who use such excessive force, and this diminishes the aspect of accountability of police officers. The second challenge is that the Commission for Human Rights and Good Governance, as one of the oversight mechanisms, needs to be more independent and autonomous in allegations concerning excessive use of force by police officers. This is even though it has the mandate under article 130(j)(b) of the CURT to receive complaints relating to the violation of human rights in general and to conduct an inquiry on matters of human rights relating to their infringement.

The study found that it is not easy for the Commission as an oversight mechanism to investigate and institute proceedings against police officials at the individual and institutional levels. The Commission has a mandate under section 6(e)⁸⁴⁹ To institute proceedings in Court to terminate any activities involving human rights violations, including the government institutions' malpractice and so on. The Attorney General may also be a party to the case.⁸⁵⁰ This is cumbersome due to the structure of the Commission as composed of the government personnel: the Judge of the High Court as the chairman, the vice chairman, State Attorney from the criminal investigation department Zanzibar and Commissioners.⁸⁵¹

⁸⁴⁹ The Commission for Human Rights and Good Governance Act Cap. 7, R.E. 2010.

⁸⁵⁰ Section 6(5) of the Government Proceedings Act, Cap. 5, R.E. 2019.

⁸⁵¹ Section 7 of the Commission for Human Rights and Good Governance Act Cap 7. R.E. 2010.

As a human rights institution, the Commission finds challenges to proceed with the investigation and institution of police brutality cases because there is indirect control of the Commission by the Government.⁸⁵² Under Article 130(3) of the CURT,⁸⁵³ The President may command anything he/she wishes, and Article 6 prohibits the Commission from investigating the Government, and the President is the head of the Government and armed forces. Further, using the Government is not a friendly procedure, whether a person institutes a human rights suit for redress under section 4 of the BRADEA.⁸⁵⁴ Or a criminal case, it makes the complainants lack the motivation to make their claims.

Section 6 of GPA states that civil proceedings may be instituted against the Government and no suit against the Government shall be instituted and be heard unless the claimant previously submits to the Government a notice of not less than 90 days of the intention to sue the Government. First, the procedure is challenging for any person to undertake regarding the time required to institute a suit against the Government. Then, that is when the A.G. may, unless another person ought to be sued, be sued or be joined as a co-defendant in the proceeding against the Government.⁸⁵⁵ This is also complicated for the Commission to proceed with the use of excessive force cases in which the Government has an obligation for human rights violations.

⁸⁵² Malya E., Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: Tanzania Commission for Human Rights and Good Governance EISA Research Report, No. 40, 2009. p. 16-17 & 14. The Government should have complied with the recommendation of the Commission.

⁸⁵³ The Constitution of the United Republic of Tanzania, Cap 2 R.E. 2008.

⁸⁵⁴ The Basic Rights and Duties Enforcement Act, Cap.3 R.E. 2019.

⁸⁵⁵ *Ibid*, Section 6, 6(4) (5).

5.2.3 Legal Issues on Reparation of Victims of Excessive Use of Force

The study has found that under human rights and administration of justice, a victim is a person who is nationally or internationally recognised. Human rights and fundamental freedoms have been violated due to government acts or omissions. A victim is a person who is suffering because of arbitrary killings.⁸⁵⁶ The Human Rights Committee, Inter American Court of Human Rights and the European Court of Human Rights further accepted mothers of victims of human rights violations to be considered as victims. Referring to their psychological torture and stress is regarded as a violation of their right not to be subjected to ill-treatment as prohibited under human rights standards.⁸⁵⁷

The study has realised the duty to provide domestic remedies is inherited from the duty to provide adequate human rights protection. This duty is provided under international standards, as evidenced by the UDHR⁸⁵⁸ States should provide effective remedies to the victims in competent national tribunals for actions violating fundamental rights granted by the Constitution. Each state is to ensure that a person whose rights and freedoms are violated has effective remedies, notwithstanding that the violation has been committed by persons acting in an official capacity.⁸⁵⁹ The remedy may be judicial or administrative.⁸⁶⁰

The study has found there are victims of conventional crimes, meaning crimes committed by people in their private capacity against the penal law. In such

⁸⁵⁶ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutor and Lawyer, Protection and Redress of Victims of Crime and Human Rights Violation, pp.749-801.

⁸⁵⁷ *Ibid.*

⁸⁵⁸ Article 8 of the International Declaration of Human Rights, 1948.

⁸⁵⁹ The International Covenant on Civil and Political Rights 1966, Article 2(3).

⁸⁶⁰ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutor and Lawyer, Protection and Redress of Victims of Crime and Human Rights Violation, pp.749-801.

circumstances, the Government is not responsible for illegal acts. For example, crimes like ill-treatment, murder, trafficking, sexual and other abuses, theft and burglary. The victims of human rights violations experience a violation committed by persons in the name of or on behalf of the state, for instance, Courts, Parliament, prosecutors, police officers, Government and other law enforcement officials.⁸⁶¹

So, the Government can be responsible for the acts of private individuals in certain situations. The state has a legal duty under international law to provide adequate human rights protection, which comprises the obligation to ensure good domestic remedies are available to victims of such violations. The state has a general duty to ensure the sufficient safety of human rights and specific legal obligations, the responsibility to prevent human rights violations, the duty to provide domestic remedies, the duty to investigate alleged human rights violations, to prosecute those suspected and punish them, the and duty to provide restitution or compensation to victims of human rights violation. Sufficient remedies should particularly be allowed to function freely.⁸⁶²

The right to remedy emerged when the acts complained of violating the human rights and fundamental freedoms of persons under international human rights law or domestic constitutional or ordinary legislation. In this case, there is a need for victims of crimes and human rights violations to be protected. The rules under international law do not deal with redress to victims of crimes, and there is no universal convention which deals with victims of crimes.⁸⁶³ However, in 1985, the

⁸⁶¹*Ibid.*

⁸⁶²*Ibid.*

⁸⁶³*Ibid.*

United Nations General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power. The Declaration provides who the victim is and mentions the rights of victims: right to access justice, fair treatment, restitution and compensation and assistance.

Article 3⁸⁶⁴ States that these rights should apply to all without distinction of any kind. There is a need to improve the position of victims in the administration of justice under international law. Similarly, it has been worse at the national level as the national system often focuses on the offender, and the victims are excluded. Victims need to feel that after criminal justice has been completed, actors responsible in the criminal justice system should show respect for the needs and interests of the victims. For example, when a crime is already committed, the victim's first person to communicate the crime is the police. The police officials should explain to the victims their role, scope, time and progress of the case. In addition, victims should be provided with legal assistance through the legal process. Police officials should also speak the language the victim understands, and victims should be redressed *via* formal and informal mechanisms.⁸⁶⁵

During Prosecution, the prosecutor should play the role of the police officer. The prosecutor should treat the victim with passion and dignity. There shall be no unnecessary delays; victims should be informed about the time, scope and role they are expected to play. Victims need to know the opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice.

⁸⁶⁴The Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, 1985.

⁸⁶⁵ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutor and Lawyer, Protection and Redress of Victims of Crime and Human Rights Violations, pp.749-801.

The victim shall also be shown and told how he could find the case's outcome and informed of any rights they are entitled to out of the crime committed against them.⁸⁶⁶

The study has found further the duty to provide redress for human rights violations is provided under the laws. For instance, the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,⁸⁶⁷ States that torture victims need adequate compensation, including the means for full rehabilitation. Article 2(3)(a) of the ICCPR includes the duty to provide redress for human rights violations. First, restitution is a form of redress. The offender should provide fair restitution to victims, their families and dependents. For instance, return of the property, payment for loss, harm suffered, and expenses include fault of victimisation. The offender should restore the right breached by a criminal act, which could also violate human rights. However, restitution is proper only in the case of money stolen and not possible in crimes such as murder.⁸⁶⁸

Second, compensation for the offender regarding physical or psychological injuries is crucial for the victim. When financial compensation is unavailable from the offender, the state should endeavour to provide monetary compensation to victims who have physical and mental injuries due to severe crimes, the family, and particularly dependents of the persons who died or became incapacitated. Third, rehabilitation is fundamental to the victims who suffered physical and psychological injuries. For example, victims of torture and other treatments, in addition to

⁸⁶⁶ *Ibid.*

⁸⁶⁷ Article 14.

⁸⁶⁸ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutor and Lawyer, Protection and Redress of Victims of Crime and Human Rights Violation, pp.749-801.

compensation and restitution, might need physical and mental rehabilitation, as stipulated under Article 14.⁸⁶⁹

Similarly Article 39⁸⁷⁰ Requires States to take measures to provide physical and psychological recovery to a child who suffered from cruel, inhumane or degrading treatment or punishment or armed conflict. Some of the victims need to have long-term medical care and other kind of assistance. The victims must receive the necessary materials, medical, psychological and social assistance through the Government, voluntary community based and indigenous means. The victim needs specialised treatment, especially for victims of sexual crimes. The victim also needs practical help; for instance, locks may have to be repaired in case of burglary.⁸⁷¹

The remedies should be urgent to persons who are deprived of their liberty, especially in prohibited actions under Article 7⁸⁷², namely for torture, cruel, inhumane, degrading treatment and punishment. Article 13⁸⁷³ Provides that individuals allegedly subjected to torture in any jurisdiction have the right to complain to competent authorities and have an effective remedy. Article 2(c)⁸⁷⁴ States must mandatorily protect women's legal rights to ensure effective remedies through competent national tribunals and other public institutions.

⁸⁶⁹ The United Nations Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, 1984.

⁸⁷⁰ The International Convention on the Rights of the Child, 1990.

⁸⁷¹ Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutor and Lawyer, Protection and Redress of Victims of Crime and Human Rights Violation, pp.749-801.

⁸⁷² The International Covenant on Civil and Political Rights, 1966.

⁸⁷³ The United Nations Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, 1984.

⁸⁷⁴ The Convention on the Elimination of Discrimination against Women, 1979.

Under the regional level, the right to an effective remedy is guaranteed by regional human rights treaties; article 7(1) (a)⁸⁷⁵ States that every individual has the right to appeal to competent national organs against violating their fundamental rights recognised and guaranteed by the Convention, laws, regulations and customs in force. The authorities that give remedies must be competent, independent and impartial, including the courts and legal professionals. Courts should provide judicial remedies for alleged human rights violations. The non-receipt of complaints of violation of human rights by institutions also amounts to a breach of obligations under international law.

The duty to prosecute, investigate and punish human rights violations is also inherited from the state's responsibility to ensure effective human rights protection. It is a duty emphasised by State monitoring bodies. This is provided under article 2(2)(3)⁸⁷⁶ Which requires State parties to investigate, prosecute and punish all acts prohibited under the Convention by appropriate penalties. Article 12⁸⁷⁷ Insists that competent authorities should investigate and be impartial, especially when there is a reasonable doubt that torture has been committed in the jurisdiction.

The study has found that the comparative research on the law and practice of reparation for human rights violations explained the concept of reparations as a right to victims of human rights violations. It has been observed that international law provides the obligation to States to respect and ensure they ratify international human rights treaties to facilitate human rights engagement. The commitments to

⁸⁷⁵ The African Charter on Human and People's Rights, 1981.

⁸⁷⁶ The International Covenant on Civil and Political Rights, 1966.

⁸⁷⁷ The United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, 1984.

States are explained in different activities: taking measures to prevent violations, investigating, and providing victim's access to justice and effective remedies. The right to reparation is a fundamental principle recognised under international law. Reparation is one of the rights of victims who suffer human rights violations. Reparation is crucial as it is justice to the victims, redressing the consequences of wrongful acts by preventing and deterring violations.⁸⁷⁸

Nevertheless, reparations may change laws by repeating similar violations. Reparation positively affects human rights; it should be adequate, effective, comprehensive, and proportional to the guilt of such a violation. The right to remedy or reparation is provided under international law, the United Nations Basic Principles and Guideline on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations. This document defines the nature and scope of the right to remedy, the victim, the scope of the right, and State obligations.⁸⁷⁹

In Africa, core regional instruments protect the right to reparation similarly. In the African human rights system, Article 27 gives authority to the African Court on Human and People's Rights to remedy violations of human rights order compensation or reparations. In Africa, besides the ACHPR, the African Commission adopted General Comment No. 4 on the African Charter on Human and Peoples Rights on the right to redress for victims of torture and other cruel, inhuman

⁸⁷⁸ The African Court on Human and People's Rights, Comparative Study on the Law and Practice of Reparation for Human Rights Violation, September 2019, p. 12.

⁸⁷⁹ *Ibid.*

or defending punishment or treatment.⁸⁸⁰ This document similarly provides for the definition of victims, the nature and the scope of the right, forms of reparations to victims of torture and other ill-treatment, and to help victims provide reparation for acts or omissions attributed to the state.⁸⁸¹

The study has found that various institutions, human rights courts, and bodies grant laws on reparation in practice. Human rights courts have the authority to issue binding judgments in case of reparations, but human rights bodies provide their views or issue recommendations to the relevant State party. Human rights bodies and human rights courts assess the responsibility of States and individuals to victims of human rights violations. The victim entitled to a remedy or reparation must have "suffered harm" or been directly, personally or affected. That is a person who has experienced physical or mental injury, emotional suffering, economic loss or the substantial impairment of a fundamental right.

Persons who are personally affected and require reparation are; the individuals who were illegally fired from their employment, raped, illegally detained, tortured, killed or subjected to other human rights violations. The human rights bodies also recognised the immediate victims, who are family members, to have the status of victims.⁸⁸² The immediate victims do not directly suffer, but their families disappeared, killed, and they have the right to know the fate of family members suffering from psychological torture. The next of kin is also recognised as a victim

⁸⁸⁰ The General Comment No 4, on the African Charter on Human and Peoples Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment, Article 5.

⁸⁸¹ *Ibid.*

⁸⁸² African Court on Human and People's Rights, Comparative Study on the Law and Practice of Reparation for Human Rights Violation, September 2019, pp .11-12.

of human rights violations, including spouses, children and parents; other human rights bodies recognise siblings, grandparents, grandchildren, aunts, uncles, nieces and nephews and cousins.

Human Rights courts and bodies recognise victims as natural persons and legal persons. However, human rights courts do not recognise legal persons as victims; for instance, the European Court of Human Rights does not recognise government entities as victims.⁸⁸³ Nevertheless, legal persons are accepted as victims but have limitations to the kind of legal entities which may claim reparations. Victims' status is determined concerning international law, not domestic law; this is a rule for all human rights bodies and courts. The question of whether a person is qualified as a victim can be adequately addressed concerning international standards.⁸⁸⁴

For a person to qualify as a victim and claim reparations, he or she must satisfy his burden and standard of proof. This is the first step towards obtaining reparations, and there must also be proof that the victim suffered harm and that the injury sustained was caused by the violation of the state or crime committed by the person. Two essential concepts regulate the burden of proof; the burden of proof refers to who presents such proof and the standard of proof as to what degree of proof must be provided. The burden of proof lies with the person seeking the remedy, and the burden rests with the petitioner. Also, the human rights bodies affirm the burden of proof rests on the petitioner.⁸⁸⁵

⁸⁸³ The European Convention on Human Rights, 1970, Articles 34 and 43.

⁸⁸⁴ The African Court of Human and People's Rights, Comparative Study on The Law and Practice of Reparation for Human Rights Violation, September 2019, pp.11-12.

⁸⁸⁵ The African Court on Human and People's Rights, Comparative Study on The Law and Practice of Reparation for Human Rights Violation, September 2019, pp. 12-32.

The standard of proof of human rights violation is on the balance of probabilities, meaning the victim must show it is more probable than not that she is entitled to the reparation requested. For the victims to have reparations, they need to establish a causal link between the wrongful act and alleged prejudice, meaning that the harm would not have happened without the wrongful act. Some courts require direct and clear causal connection meaning that the wrong must result directly from the wrongdoing. Other courts stated that reparations should not be limited to direct harm or immediate effects of crimes or violations. However, when losses are too remote, the state may not be held responsible for every consequence of a wrongful act. It was argued that the Human rights bodies and courts should find not only the violation of human rights but also the pecuniary or non-pecuniary harm alleged by the victim which resulted from the particular violation of crime.⁸⁸⁶

To prove that a person has suffered harm, it is not enough to state that an individual perpetrator committed a wrongful act; evidence of alleged damages and prejudice suffered is necessary. Human rights bodies and courts admitted various kinds of evidence. These bodies are not limited to types of evidence as normal courts, as circumstantial evidence is also considered. They allow all kinds of evidence because the Court understands the difficulties that human rights victims face in obtaining evidence due to human rights violations or circumstances of crime. For example, evidence of torture, rape and other sexual violations, every time experts help victims to provide evidence in the determination of monetary damages. Other issues include determining the scope of the damage, the extent of damage, loss and injury and the

⁸⁸⁶*Ibid.*

appropriate type and modality of damages.⁸⁸⁷

The empirical evidence shows different forms of reparations internationally recognised, such as restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition. Restitution as reparation restores the victim to their original situation. Restitution has the power to undo the effects of the violation and is mostly profound for breaches of international law. There are various examples of restitution; restoration of liberty, nullification of criminal judgments, etc. Sometimes, if the order is directed to the Government, owing to several forms of restitution, it may be difficult to generalise the compliance level. However, restitution is complicated for some human rights violations, such as the right to life and harm, which is time-sensitive.⁸⁸⁸

Compensation is another form of reparation to victims and is the most requested and, subsequently, most awarded form of reparation in human rights bodies. This kind of remedy cannot restore or replace rights that have been violated. For example, incidents of torture return of family members who have been killed or to restore the physical capacity of those who have been injured. Compensation as a remedy is divided into two, pecuniary and non-pecuniary. Pecuniary damages refer to the financial loss of a victim, and non-pecuniary injury refers to moral damages.

Non-pecuniary damages compensate for the loss of dignity and reputation of the victim and mental and emotional harm. An example of pecuniary damages that the

⁸⁸⁷ The African Court on Human and People's Rights, Comparative Study on The Law and Practice of Reparation for Human Rights Violation, September 2019, pp.34-44.

⁸⁸⁸ *Ibid*, pp.46-118.

Court offers includes compensation awards, loss of income, medical expenses, legal costs and expenses and loss of property, opportunities like education, employment and so on. The non-pecuniary damage is moral damage for psychological harm, any wish, grief, fear, humiliation and reputation.⁸⁸⁹ Rehabilitation as a reparation is given as a result of physical and mental rehabilitation on the part of the immediate victim. Rehabilitation includes; provisions of medical or psychological care and provision of education.⁸⁹⁰ Rehabilitation is restoring health and well-being through "Medical and psychological care as legal and social services" measures.

5.2.4 Analysis of the Findings of the Legal Issues on Reparation of Victims of Excessive Use of Force

As observed, the criminal justice system aims to protect the rights of individuals, society and the state from criminals by providing the accused for violating of law. It is the practice when an accused found guilty will be punished with imprisonment and kept in prison. The aim is to reform the person. The entire focus of criminal justice is on the offender to protect his rights as accused, to punish and improve him. The victim is left alone with no assistance coming his way. The victim is left suffering for violation of his rights, the invasion of his dignity and the actual loss incurred by him and these matters seem not to concern anyone. The role of the victim is limited to reporting the crime to officials who have the task of deciding whether to prosecute the matter, how the procedures go and what type of punishment to recommend. The victim is forgotten partly by the criminal justice system.

⁸⁸⁹ The African Court on Human and People's Rights, Comparative Study on The Law and Practice of Reparation for Human Rights Violation, September 2019, pp. 46-118.

⁸⁹⁰ *Ibid.*

The study has found that the reparation system for the victims of excessive use of force is ineffective in Tanzania. Some laws limit the accountability of police officers, such as Section 6 of the Emergency Powers Act⁸⁹¹ and section 29(6) of the Prevention of Terrorism Act.⁸⁹² There are few cases concerning police use of excessive force due to the structure of accountability in many oversight mechanisms. The individual complaints procedure could be more friendly. The system of Prosecution also acts as a bar to awarding reparations as the Government is the prosecution machinery and individuals can hardly initiate Prosecution always the mandate is to the Government, and investigators are police officers.

The few incidences concerning police officials' use of excessive force, which are reported to police stations, do not reach courts, and even if it goes to courts of law, it is difficult for victims to have reparations. The reason behind this is, first, the national system for Prosecution focuses on offenders and victims are excluded. Second, the institutions which promote and protect human rights in Tanzania are not strong, impartial and independent, especially for the victims of human rights violations. As the law requires under Article 107A⁸⁹³ The judicial shall be the authority with the last decision in the dispensation of justice and impartial to all without regard to status and not be tied with technicalities which limit justice.

Thirdly, the police institution, as one of the internal mechanisms for police accountability, is not independent (not subject to bias or influence) as sometimes the institution leaders follow the command from top authorities. If the incidence results

⁸⁹¹The Emergency Powers Act, 1986.

⁸⁹²The Prevention of Terrorism Act, Cap.19, R.E 2022.

⁸⁹³ The Constitution of the United Republic of Tanzania, 1977.

in human rights violations, the oversight mechanisms do not have the power to summon the offender. Article 130 (1)(e) gives the Commission the power to institute proceedings in Court to prevent violation of human rights; in Article 130(2), the Commission is autonomous and exercises its authority following the Constitution; however, under Article 130 (3), the President is not restricted from giving directives or orders to the Commission. Assume the command from the superior officer resulted in excessive use of force. Who would be liable? Is it the Police officer, Minister or the President? Do these mechanisms have powers to summon the President if the order originates from the President?

There are also no laws which provide compensation to victims of the use of excessive force in Tanzania. The CPA only provides for compensation for injuries, losses or death resulting from assisting the police under section 37, but not for compensation in regards to the police officer using excessive force, which could lead to death or permanent injury. The Penal Code, which provides that excessive force is a crime under section 231, also does not include punishment or provision regarding compensation to the victims or the family of an individual who died due to the use of excessive force by the police.

This shows that there is a low emphasis and awareness on police brutality and excessive use of force in Tanzania, as when compared to cases of rape, there was a specific Act, the Sexual Offences Special Provisions Act and which was enacted specifically to address cases of rape against women and the CPA was also amended to include further the payment of compensation to victims of rape under Section

348A.

The lack of the appropriate gravity by the Parliament in enacting a law to ensure that police are made accountable and payment of compensation to victims of excessive force by the police confirms that there is no system of reparations in Tanzania. Article 2(2)(3)⁸⁹⁴ Requires State parties to investigate, prosecute and punish by appropriate penalties all acts prohibited under the Convention. In Tanzania, no specific laws grant remedies for victims of crimes and human rights violations. The study examined the standards for human rights protection in Kenya, specifically rights for reparation.

The Kenya Constitution⁸⁹⁵ article 23, the High Court has jurisdiction to determine an application for redress for infringement of fundamental rights and freedoms. In any proceeding court may grant appropriate remedies; an injunction, a Declaration of rights, an order for compensation and a Declaration of invalidity of law. Also, The Prevention of Torture Act,⁸⁹⁶ this law provides for the right to reparation for victims of crimes and human rights violations. Section 1⁸⁹⁷ Defines cruel, inhuman and degrading treatment or punishment. Section 17 states the victims of torture or other cruel, inhuman or degrading treatment or punishment shall have an enforceable right to adequate reparation, including restitution, insufficient compensation and rehabilitation; section 17(2)⁸⁹⁸ Recognises the victims' dependants to entitle reparation.

⁸⁹⁴The International Covenant on Civil and Political Rights, 1966.

⁸⁹⁵The Kenya Constitution, 2010.

⁸⁹⁶The Prevention of Torture Act No 12 of 2017.

⁸⁹⁷*Ibid.*

⁸⁹⁸*Ibid.*

Further section 17(3)⁸⁹⁹ When a person is convicted of an offence under this act, the Court, on its motion or the victim's application, may order the person to order restitution or compensation. In India, the right to compensation is recognised, in the Indian Constitution, as the supreme law of the land has no specific provision for victims. However, part iv of the Constitution article 41 deals with directives principle of state policy and part v fundamental duties of state lays down the duties of the state. One is the right to public assistance in cases of undeserved want.

The interpretation of this article has been broadened to include the right to compensation as an infringement of the right to life. And in practice, the courts have the power to award compensation when a fine does not form part of the sentence. Despite having these powers, courts still need to be convinced to exercise the right. However, it is a step toward recognition of the victims that the criminal justice system has not forgotten them.

Further, for human rights protection of victims' rights in India, they have statutory schemes for compensation. It is the institutionalised payment of compensation to the victims by the state for loss or injury caused to them by the offender. The state was responsible for creating and maintaining a fund for this purpose. After that, the fund will be used when compensation is paid by an accused and is adequate, or no such compensation is payable to the situation of acquittal/discharge. The reason behind this scheme is to serve justice to the victims. Justice for victims should not depend only on the punishment of the guilty. Victims have the right to gain redress.

⁸⁹⁹*Ibid.*

The right to remedy is different from the independent right to retribution. Thus, the victim's compensation scheme, before it compensates the victim, will examine if the victim had suffered loss or injury, the gravity of the offence, severity of mental or physical harm suffered by the victim, expenditure incurred, loss of education opportunity, employment and in case of death number of dependants. And the refusal of the application for compensation is to the non-reporting of a crime, lack of cooperation with the police/court, furnishing false information; a victim does not justify an award and turning hostile in Court. This has a connection with the remedial liability theory that requires individuals to be compensated where they are harmed out of police use of excessive force. The theory requires that whenever harm arises from excessive force, the victim should always be compensated, or where the victim is dead, then their family. This is currently not legally possible as the law does not stipulate any provision which affords compensation to any victim.

The Commission of Human Rights and Good Governance is not autonomous in Tanzania. The commissioners/commission is not an independent investigation and makes its own decisions in human rights matters. This is due to the structure of the Commission, and the law bars its powers in Article 130 (3)(5).⁹⁰⁰ This is a limitation in the reparation for victims of human rights violations. Further, the study found that there is indirect or informal reparation to the victims of excessive use of force. This is offered in terms of funeral expenses to those who are injured by the use of excessive force. The reparation system is inadequate though the legal framework in Tanzania provides for the right to remedy, and there is no particular system for

⁹⁰⁰*Ibid.*

reparation to victims of excessive use of force as suggested under the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.

For the right to reparation to succeed, there should be a criminal case which succeeded and the accused was found guilty; then, the victim will have a chance to open a civil suit. Most of these cases do not succeed and leave the victims right to reparation under the "code of silence". Also, there are many human rights violation cases handled in the High Court, and there are a few High Court registries in Tanzania. The victims are required to file cases to the High Court Main Registry. Likewise, the victims are ignorant of the procedures of filing human rights cases when their constitutional rights have been, are being or are likely to be violated to apply to the High Court for redress. This limits human rights protection within the state.

5.3 Conclusion

The study observed that laws at international, regional, subregional and national levels prohibit the excessive use of force and firearms by police officers. These laws somehow incorporate the proportionality principle and rules prohibiting excessive use of force and firearms. However, the empirical evidence shows many human rights violations via excessive use of force and firearms. It is verified that the reasons for the excessive use of force by police officers, among others, are inadequate laws, lack of accountability and reparations to the victims of crimes and human rights violations.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

The problem that has made this study conducted there has been a wide misuse of force in terms of using excessive force without justifiable reasons. Even though several legal instruments require that when force is to be used, it is proportional to the act for which such force is necessitated, human rights bodies are afraid to avail the necessary information which could shed light on the police use of excessive force in Tanzania.

It has generally been found that police officials are essential in any State to execute the duty of the State of protecting its citizens. This also involves the use of force in certain circumstances. According to several legal instruments, the use of this force has to be proportional and follow the possibilities prevailing when such force is used. These legal instruments are divided into international and regional ones, which set the global framework on how the use of force ought to be exercised by police officials. On the other hand, it limits such use of force to the extent such as being reasonable and not excessive. The domestic legal framework also tries to be in tandem with international legal instruments. However, it has vaguely covered the use of force by police officials and their accountability.

However, accountability is practically made about several institutions such as the Parliament, the Judiciary, human rights bodies and the community. The police official's accountability faces challenges: restrictive laws, secrecy, the oversight mechanisms are few and not independent, there political interference and

government control. This leads to a few police officials being accountable for the excessive use of force in many jurisdictions. Tanzania is among them; lack of accountability bars a right to remedy for victims of crimes and human rights violations. Victims of human rights violations are suffered, and State must investigate alleged human rights violations, prosecute suspects, punish and give domestic remedies. In Tanzania, the right to reparation is inadequate and leads to increased incidences of excessive use of force by police officials.

The study also established that excessive force is not the problem of the whole institution and every police officer. Some police officers are aware of the human rights concept, principles and do protect human rights. Similarly, some police officers are aware of the doctrine of proportionality. Few officers applied this principle in their field when resorting to force. However, it was also realized that the principle is difficult to be implemented in dangerous situations and leads to human rights violations. The proportionality principle, even if applied effectively, does not guarantee human rights protection but only tries to set maximum standards for the use of force by police officers.

Lastly, it is difficult to compare the effectiveness of a particular legal system in one country to another on the prohibition of excessive use of force; the success of such a legal system depends on its cohesion with the geography, culture and institutional context in which it is implemented. The prohibition of the excessive use of law by the police officer does not depend on the adequacy of the law alone. Meaning having penal sanctions, accountability and a good reparation scheme. However, it is a composition of many factors, like the way theories in chapter two suggested.

Prohibiting excessive use of force needs a change from society, individual police officers, and organizations, adequate laws, accountability and reparation.

6.2 Recommendations

6.2.1 Law Reforms

- i) The Government should adopt specific legislation like how the Government of Kenya did, which explicitly addresses torture and the use of force. This would entail using power and interpreting vague words on using force. For instance, the Criminal Procedure Act only provides compensation for injuries arising from an arrest for those assisting a police officer in arresting an individual under section 37. However, no compensation is expressly provided for those who are victims of excessive force. This oversight or pure neglect shows that compensation to victims affected by police excessive use of force is not a priority. However, this can be countered through amendment of the laws explicitly allowing courts to order payment of compensation to such victims.
- ii) The legislature should annex into procedural laws a requirement of compulsory involvement of an independent mechanism in investigating grave abuse of fundamental human rights in Tanzania. The police force should be excluded entirely from investigating abuse of fundamental rights attributed to it as this would amount to making it a judge in its cause. This independent institution will allow civilians who are professionals to play a role in the investigation of allegations of police misconduct. The reason behind having independent institutions for police accountability is that in the traditional mechanisms, the Police are solely responsible for the investigation of concerned alleged police

misconduct, there is impartiality and lack of effectiveness, and there is public self-interest in allegations of police misconduct.

- iii) The legislature should also establish an independent mechanism for police force accountability with an exclusive focus on police malpractice rather than relying on institutions with more general mandates like human rights institutions. This can be achieved when the Parliament, in connection with the relevant Ministries, provides a Bill to enact legislation covering the abovementioned issue. Further, such laws should have provisions which make the police officials accountable for the misconduct they committed by using excessive force and the citizens should be able to have remedies against them.
- iv) The legislature should broaden its responsibility for controlling the police force rather than the executive branch of Government, like changing the police control mechanism from an executive to an oversight role by legislature and civilians. The Parliament should broaden the range of actors and institutions to which the Police are to be accountable such as empowering the civilian's policing boards and other actors which are within the system to broaden their services. This would be after the prompting of the change of the law by the Government.
- v) The legislature should also ensure that the law provides judicial immunity to subordinates of police officers who disobey unlawful superior orders. This will enable the police officers to act independently and professionally. The law should also fix the maximum duration in which a person may be held in remand pending investigation of a case in which he is accused and the remedy for failure to abide by the limits set by the law as it amounts to torture.

- vi) Furthermore, statutes which grant immunity to police officers should be reviewed, in particular, sections 29(6) and 33 (8) of the Prevention of Terrorism Act 2002, Section 26 of the Emergency Powers Act, 1986, Section 78 of the Penal Code, and section 6 of the Criminal Procedure Act, ought to be reviewed.
- vii) It could be worthwhile to legally empower judicial authorities to *suo mottu* conduct an inquiry into the causes of death and disappearances of persons during detention or imprisonment. Concerning extinction, the Inquests Act [Cap. 24 R.E 2019] allows the Minister, after consultation with the Principal Judge to establish a coroner's courts⁹⁰¹ which have the purpose of inquiring into the deaths of any person who, among other things, dies while in official custody.⁹⁰² However, there has hardly been any inquest while deaths have occurred in police officers' official custody. As noted, excessive force sometimes leads to deaths while individuals are under police custody. Allowing judicial authorities to conduct inquest proceedings and give force to the process will ensure the bringing to justice of police officials responsible for deaths that occur in their custody due to excessive use of force.
- viii) The law should be appropriately implemented by strengthening institutions that mandate prosecution by training judicial and investigation officers. Impunity should be eliminated by strengthening the national judicial system by improving the documentation and investigation department. The investigation department should ensure that superior officers become accountable for their command of unlawful use of force and firearms. Reparation systems should

⁹⁰¹ Section 3(1).

⁹⁰² Section 4(1)(c).

focus on and shift from the accused person to victims and survivors. The reparation schemes, for instance, restitution, compensation, satisfaction, rehabilitation and guarantee of non-repetition, should be considered for victims and survivors.

6.2.2 Institutional Reforms

- i) The Commission should be able to handle human rights allegations as per its mandate. It should be accountable to the Parliament rather than the president appointing its structure. The reports of the Commission should be available for public review, and the Parliament should discuss timely annual reports of the Commission to impact human rights protection and make follow-ups.
- ii) The Commission, as noted, has been availed with powers to receive complaints from individuals claiming the violation of their rights. However, the Commission has been given many limitations to the point where it becomes ineffective in exercising its constitutionally provided mandate to protect rights. The Commission should be given force to handle better human rights violations, including allegations of excessive use of force by police officials and to be able to order or remedy the situation in a binding manner and not only to give recommendations.
- iii) The Government should ensure that there is proper practice of interrogation in police cells to reduce incidents and complaints of torture; it should review its interrogation rules, methods and practice to avoid incidences of excessive use of force. The authorities should aim at protecting rather than violating human rights. National laws should prohibit the use of force excessively during interrogation.

Force should only be allowed under the principle of proportionality as considered in the BPUFF. The Police should go in tandem with the provisions of these laws. The use of force should not be authorized if it is disproportionate to the mission. Police officers who are remarkable for interrogation should have proper training in interrogating suspects to avoid torture.

- iv) The Government should also allocate more funds to police institutions, especially the training department, to train police officers in using force, human rights and the prohibition against torture in and outside the country. Poor payment and lack of investigative training are likely why some police use torture to extract a confession. Likewise, a police officer who lacks modern institutional technics is inefficient and may violate human rights.
- v) The Parliament should appoint the Inspector General of Police (IGP) to ensure the independence, impartiality and security of tenure to the police force. Through legislation and Governmental directives, the Government should make the police force independent from illegitimate interference: police officers have been vulnerable to powerful individuals, politicians and wealthy business owners. Their work should follow their training, be accountable to the law and the community, and not be subjected to superiors' orders. Also, the recruitment of police officers should base on academic qualifications or their performance at work rather than the number of arrests and patronage of powerful individuals. This would help combat human rights violations, especially using excessive force.
- vi) The Government should ensure that law enforcement institutions create an operational framework that enables police officers to act following the

international principles on the use of force, including the peaceful settlement of the conflict, adequate training, and education on lethal and non-lethal weapons and equipment.

- vii) Police officers who work in prison should be trained physically to deal with aggressive prisoners and avoid the excessive use of force. The Government, when recruiting police officers, ought to choose suitable individuals with good morals, psychologically fit and able to receive training physically. Police officers should also be trained on the use of force and tested for standards. They should be taught ethics and how to settle conflicts peacefully and understand crowd behaviour.
- viii) Police institutions should transform from a police force to a police service by practising democratic policing, which requires that Police consider themselves accountable to the citizens, their representatives, the State and the law. They should understand that the people's consent is needed, and they ought to be transparent in the undertakings. Police officers should, as a first position, obey the law, and when such a police officer violates the law, he should be accountable by the rules. The citizens whose rights have been violated can obtain redress via proper channels.
- ix) Individual complaint desks should be channelled to other oversight accountability mechanisms and not to police stations only. The internal reporting system under the police institution should be improved. The police officers should have the mandate to record and report occurrences of arrests, detentions, durations of interrogations and the use of firearms. Human rights violations should also be noted. There should be a system for civilians to obtain

information on the status of their complaints or any subsequent investigation. The police institution should also cooperate with other oversight mechanisms, such as the PCCB and CHRAGG, as the accountability mechanisms, and the police force should be held accountable for non-cooperation. An independent institution can also be created to take all claims relating to police use of excessive force. This would bring independence in terms of the investigation into any allegations and remove any form of biasness or culture that exists to prevent the Police from being accountable.

- x) Police commanders should have the power to make operational decisions and avoid external interference in making their decisions. Police commanders are to have full authority in deciding depending on rules governing their appointment, removal and tenure of senior police officers. If police officers had the security of tenure, it would increase their ability to resist illegitimate political interference and act following the law. First, internal and external accountability should be combined for a sound accountability system.

Secondly, the allegation of police misconduct needs a balance between external and internal accountability mechanisms. If there is a conflict between the police department and other oversight mechanisms, it could act as one factor contributing to the failure and underperformance of police accountability mechanisms now and then. And remove police officials from investigations as a solution will limit the amount of cooperation between police departments.

- xi) Further, the decision for appointment and recruitment should be transparent, fair and follows academic qualifications. To further reduce illegitimate police operations, States need to have clear criteria for recruiting and promoting police

officers. Police officers who are promoted based on the number of arrests will be different from police officers who are appointed based on investigative techniques, ability to communicate effectively with civilians and integrity.

6.2.3 Other Reforms

- i) The Government should help victims of the use of force by public officials to obtain reparations for the acts or omissions. It should be compensated following the rules and principles under national laws, which also should follow international standards. The remedies available to victims of excessive use of force by public officials should not only be monetary compensation, but other schemes should also be adopted and used. These could include restitution, medical, psychological and social assistance or any support needed. The Government should also develop a reparations policy which follows "international reparations standards" to help the victims and survivors to obtain reparation under national-level systems. As of now, there is no scheme nor funds that have been established to allow proper compensation to victims of the use of excessive force. Thus, the Government must establish a scheme for compensating such victims where the actual perpetrators cannot do so.
- ii) The Government should improve and opt for non-lethal weapons to reduce the use of lethal weapons. These weapons would help to reduce the death of uninvolved people. Where such is not possible, and a resort to using such weapons is made, the immediate victims of excessive force and firearms should have access to legal processes for reparations. The circumstances of the death of their dependents may be grounds to institute the proceedings in court.

- iii) The Government should ensure lawyers who can defend or appeal against the Government on the use of excessive force do not suffer in a sense that they should not be threatened in any way, either economically or in administration, for any action for their professional practice. This would be key in protecting individuals' rights when using excessive force.
- iv) The Government should increase efforts to educate civilians about human rights. Human rights should be taught from the primary level to the University level in all courses and not as an optional course or only for lawyers and other fields of study. This would benefit society as it would have human rights knowledge and strengthen social control mechanisms. Furthermore, lawyers should be educated. If lawyers are conversant with the terms of compensation and assistance to victims of crimes, the victims should have such information. The legal profession needs not only to understand the problem but must also have knowledge of human rights law and act impartially and independently to deliver justice.

6.3. Areas for Further Research

The study recommends two areas for further research:

- i) Reparations for the excessive use of force by police officers on women in custody or detentions focus on The Declaration on the Elimination of Violence Against Women, 1993 and The Declaration of Basic Principles of Justice for Victims and Abuse of Power, 1985.
- ii) Social oversight mechanism as one of the ways towards the prohibition of excessive use of force by police officers focuses on the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to

Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1998.

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APPENDICES

Appendix I: Open and Closed Ended Questionnaire

Introduction

Dear respondents, this questionnaire belongs to **Ms. Janeth Antony Minde** who is a Doctor of Philosophy (Ph.D.) Candidate at the Open University of Tanzania (OUT). She is undertaking a research in an area titled “**Analysis of the Use of Excessive Force by Police Officers in Tanzania under the Framework of Proportionality Principle**”.

This study is meant to analyse the impact of proportionality principle to human rights Jurisprudence and therefore, the questionnaire will be of assistance to the research as it is expected to contain information that will yield the proper findings. You are therefore humbly asked to fill in this questionnaire and your cooperation in filling the questionnaire will be of valuable addition to her research. Please note that this questionnaire is used for academic purposes only and all information shall be confidential.

GENERAL INFORMATION OF THE RESPONDENT

Name:

Position:

Phone No:

Email:

A. Issues Targeted

1. Do you think police officers are given appropriate physical and mental training before being employed as such?

YES

☐

NO

☐

-
-
-
2. What are the duties of police officers?
-
-
-
3. Do police officers use force in fulfilling their duties?
- ☐ YES ☐ NO
4. Do police officers sometimes use excessive force in execution of their duties?
- ☐ YES ☐ NO
5. If the answer in the above question is in the affirmative, what is in your opinion, the legal driving force for police officials to use excessive force against the proportionality principle in Tanzania?
-
-
-
6. Are there any legal safeguards against the use of excessive force by police officers in effecting their duties?
- YES ☐ NO ☐
-
-
-
7. Are the legal safeguards for prohibition of excessive use of force by police against civilians adequate enough to protect the civilians?
- ☐ YES ☐ NO
-
-
-

8. Are you aware of any situation(s) where police officers who used excessive force in effecting their duties were made accountable?

.....
.....
.....

9. Is there reparation system to victims of excessive use of force in Tanzania?

.....
.....
.....

10. If the answer in the above question is in the affirmative, to what extent is the system adequate to compensate victims of excessive use of force?

.....
.....
.....

Thank you

Appendix II: Interview Guide

Introduction

Dear respondents, this interview guide belong to **Ms. Janeth Antony Minde** who is a Doctor of Philosophy (Ph.D.) Candidate at the Open University of Tanzania (OUT). She is undertaking a research in an area titled “**Analysis of the Use of Excessive Force by Police Officers in Tanzania under the Framework of Proportionality Principle**”.

This study is meant to analyse the impact of proportionality principle to human rights Jurisprudence and therefore, the questionnaire will be of assistance to the research as it is expected to contain information that will yield the proper findings. You are therefore humbly asked to fill in this questionnaire and your cooperation in filling the questionnaire will be of valuable addition to her research. Please note that this questionnaire is used for academic purposes only and all information shall be confidential.

B. Issues Targeted

11. Do you think police officers are given appropriate physical and mental training before being employed as such?
12. What are the duties of police officers?
13. Do police officers use force in fulfilling their duties?
14. Do police officers sometimes use excessive force in execution of their duties?
15. If the answer in the above question is in the affirmative, what is in your opinion, the legal driving force for police officials to use excessive force against the proportionality principle in Tanzania?

16. Are there any legal safeguards against the use of excessive force by police officers in effecting their duties?
17. Are the legal safeguards for prohibition of excessive use of force by police against civilians adequate enough to protect the civilians?
18. Are you aware of any situation(s) where police officers who used excessive force in effecting their duties were made accountable?
19. Is there reparation system to victims of excessive use of force in Tanzania?
20. If the answer in the above question is in the affirmative, to what extent is the system adequate to compensate victims of excessive use of force?

Thank you

Appendix III: Letters

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OUT/MWRC/SG/VOL.III

13/10/2021 0765 481295.

To Resident Magistrate
Incharge Box 13
Mwanza.
Tanzania.



**RE: REQUEST FOR PERMISSION TO ATTEND RESEARCH FIELD WORK
INTRODUCTION TO MINDE JANETH A, REGISTRATION NUMBER
PG2017996935**

This is to inform you that **Minde Janeth A** with registration number pg201400823 is a student of the Open University of Tanzania at Mwanza regional centre pursuing PHD in the Faculty of Law. He is about to go for research field, her research title is **"The analysis of the use of excessive force by police in Tanzania under the framework of proportionality principle"**.

On behalf of the Open University of Tanzania, I kindly ask your help in assisting this student to realize her academic goals. The information collected is intended to be used only for academic purposes and not otherwise.

We anticipate your due cooperation.

Sincerely yours

THE OPEN UNIVERSITY OF TANZANIA
DIRECTOR
OPEN UNIVERSITY OF TANZANIA
MWANZA REGIONAL CENTRE
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Dr, Ancyfrida Prosper
DIRECTOR, MWANZA REGIONAL CENTRE

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OUT/MWRC/SG/VOL.III

13/10/2021

THE EXECUTIVE SECRETARY
THE COMMISSION FOR HUMAN RIGHTS AND GOVERNANCE
DA PO BOX 1049
DODOMA.

**RE: REQUEST FOR PERMISSION TO ATTEND RESEARCH FIELD WORK
INTRODUCTION TO MINDE JANETH A, REGISTRATION NUMBER
PG2017996935**

This is to inform you that **Minde Janeth A** with registration number pg201400823 is a student of the Open University of Tanzania at Mwanza regional centre pursuing PHD in the Faculty of Law. He is about to go for research field, her research title is **"The analysis of the use of excessive force by police in Tanzania under the framework of proportionality principle"**.

On behalf of the Open University of Tanzania, I kindly ask your help in assisting this student to realize her academic goals. The information collected is intended to be used only for academic purposes and not otherwise.

We anticipate your due cooperation.

Sincerely yours

THE OPEN UNIVERSITY OF TANZANIA

[Signature]
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