The weakness of police accountability systems in South Africa contributes to widespread brutality by law enforcement officers. For accountability to be strengthened, the South African Police Service (SAPS) leadership must be directly answerable for how their members use force. On their own, external oversight agencies such as the Independent Police Investigative Directorate cannot ensure accountability in police organisations such as SAPS that do not require accountability for the use of force internally.
Key findings

- Effective accountability for the use of force by the South African Police Service (SAPS) is critical to reducing police violence.
- The creation of the Independent Police Investigative Directorate (IPID) provides the SAPS with justification for not being accountable for its use of force.
- Effective police accountability cannot be achieved primarily by strengthening IPID, though this would be beneficial.
- Police services that are accountable for the use of force, monitor, record and accurately report on the use of force by their officials. The SAPS is currently unable to account for how its members generally use force.
- A culture of police accountability requires that individual police officials accept that they have to account for any force that they use. This culture does not exist in the SAPS.
- In South Africa, accountability for the use of force is conflated with criminal investigation. Linked to this, legal provisions exempt SAPS members from accounting for the use of force.
- The SAPS does not have adequate policies and accountability mechanisms in place to prevent police brutality. This contributes to relatively high levels of police brutality and low levels of public trust in both the SAPS and IPID.
- To create a ‘high accountability environment’ in which the SAPS and IPID are both more trusted by the public, the SAPS must be directly accountable for how it uses force.

Recommendations

- Parliament and the Minister of Police must hold the SAPS leadership directly accountable for when and how their police officials use force.
- SAPS systems for reporting and recording the use of force should be strengthened. The SAPS should review the apartheid-era Standing Order 251 which deals with investigating incidents where SAPS members discharge their firearms.
- The SAPS should report annually on its use of force and steps it is taking to ensure adherence to minimum force standards. A detailed report should be published each year on firearm usage by SAPS members.
- The SAPS should urgently implement the Civilian Secretariat for Police Service (CSPS) use of force policy that was approved by the Minister of Police in 2018.
- The SAPS should adopt international best practices on how to address the tension between the right to silence and the principle of accountability in criminal investigations. Police should have a duty to account for the use of force for internal processes.
- Provisions of the IPID Act that entrench a ‘right not to be accountable’ for the use of force, should be amended.
- Metropolitan police departments should also review internal systems for accountability regarding the use of force.
Introduction

Police violence has always been a major problem in South Africa. During the transition to democracy, steps were taken to ensure police compliance with human rights standards. But the abuse of force remains a systemic feature of policing. Generally, police violence is neglected partly because most of it is directed at black men and others in marginal positions in South African society. Ongoing police violence is a reflection of the limitations of police transformation in South Africa since 1994.

In 2020, the issue of police violence again came to the fore in South Africa during the early stages of the national lockdown. The lockdown was intended to assist with efforts to contain the spread of the Covid-19 pandemic as part of the national State of Disaster declared in March 2020.

During the first 40 days of the lockdown, the Independent Police Investigative Directorate (IPID) recorded 589 complaints of assault against the police, 141 complaints relating to the discharge of an official firearm, 32 deaths as a result of police action, 25 cases of torture, and eight alleged rapes by police officers. Of the total of 827 cases received during this period, 376, including 10 of the 32 deaths as a result of police action, were allegedly linked to the enforcement of the lockdown (Table 1).

Table 1: IPID data on cases received, 26 March 2020–5 May 2020

<table>
<thead>
<tr>
<th>Related to lockdown enforcement</th>
<th>Other cases received</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deaths in police custody</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>Deaths: result of police action</td>
<td>10</td>
<td>22</td>
</tr>
<tr>
<td>Complaints: discharge of an official firearm</td>
<td>79</td>
<td>62</td>
</tr>
<tr>
<td>Rape by police officer</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>Rape in custody</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Torture</td>
<td>0</td>
<td>25</td>
</tr>
<tr>
<td>Assault</td>
<td>280</td>
<td>309</td>
</tr>
<tr>
<td>Corruption</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>376</td>
<td>451</td>
</tr>
</tbody>
</table>

Source: IPID, 2020

One factor that contributes to the prevalence of violence by police is an absence of accountability. The absence of accountability of police officers who abuse force is an ongoing problem in South Africa and many other countries. This report focuses on how to strengthen police accountability for the use of force.

In this report, accountability for the use of force is understood to exist when police organisations and officials recognise and accept the duty to account
HOW TO REDUCE POLICE BRUTALITY IN SOUTH AFRICA

for any force that they use. Accountability means that individual police officers recognise that they may have to provide detailed information about any situation in which they have used force. It also means that the police organisation monitors the use of force by its members and reports on the use of force and its efforts to ensure that police conform to appropriate standards when using force.

In this report, the emphasis is placed on accountability for the use of lethal force (primarily the use of firearms). However, in principle, accountability should apply to all uses of force by the members of the police service.

**Steps to strengthen accountability for use of force**

In South Africa, discussions of police accountability frequently focus on IPID, South Africa’s constitutionally enshrined body for investigating the South African Police Service (SAPS). Many appear to believe that the problem of police violence can be resolved by strengthening IPID. Much stronger accountability is essential if police brutality is going to be reduced and strengthening IPID could contribute to this.

However, for police accountability to be strengthened significantly, the main focus needs to shift to ensure that the SAPS is directly accountable for how police use force. This means that:

- The SAPS must record information about how its members are using force to be able to report to Parliament and the public about this.
- Parliament must require that the SAPS reports to it directly about how its members are using force.
- Steps must be taken to strengthen accountability by SAPS members when they are involved in using force.

The principle should be accepted that SAPS members who use force must be willing to provide a detailed description of what occurred. Police who are not willing to fully account for any incident in which they use force should not continue to be members of the SAPS. Care must, however, be taken to ensure that the obligation to account is implemented in a manner that does not violate the right to silence in criminal proceedings that is provided for in Section 35 of the Constitution.

Police accountability for the use of force can only exist in meaningful terms when this is a clear and unambiguous priority of the police service itself. There are no international examples where police are effectively held accountable for the use of force by relying primarily on an outside body. Relying on IPID to ensure that police are accountable for the use of force, is setting it up to fail.

IPID can only be effective if it is part of a system of accountability in which the main burden of responsibility for ensuring that police do not misuse force falls on the SAPS itself. In such a system it would be possible for IPID to more effectively verify whether or not police are upholding proper standards when using force.

The SAPS should ensure that it is exercising effective control of the use of force. It should demonstrate this through reporting to Parliament on how it is using force and how it is ensuring that force is used responsibly. IPID should be understood as a mechanism for helping to ensure police accountability but not as the principal mechanism through which the SAPS accounts. It should serve to verify whether or not the SAPS is exercising effective control over how its members use force.

An accountability system that works, therefore, requires SAPS leadership to embed a commitment to high standards and real accountability measures within the SAPS. External accountability mechanisms cannot make a meaningful contribution to accountability where police are not themselves committed to ensuring accountability and high standards in respect of the use of force.

Establishing a system of accountability that reduces the misuse of force by police requires that we demand much more of SAPS leadership. They must be responsible for working purposefully to develop a culture in the police that supports accountability and adherence to high standards in using force.

The concrete measures that are motivated for in this report must be seen as part of what is necessary to create such a culture. Developing a culture that
supports accountability should be integrated with other measures that are orientated towards professionalising the police in line with the goals originally provided for in the 2012 National Development Plan. This requires political leadership that recognises the need to professionalise the police, focuses on ensuring that appropriate police leadership is appointed, and supports this leadership in working to progressively change police culture.

Police violence in South Africa and internationally

The issue of police violence has been a longstanding concern not only in South Africa but also in the United States and elsewhere in the world. During the apartheid era, police violence was a major point of contention. Incidents such as the March 1960 Sharpeville massacre, the shooting of school children in June 1976, deaths in detention, and the torture of those linked to ‘the struggle’ against the apartheid government, caused extensive anger. Opponents of apartheid were not the only targets of police violence. It was also directed at black civilians in general and alleged criminals.

Police violence continues to be a major problem in democratic South Africa. During its first seven years of operation (April 2012 to March 2019) IPID recorded 26,590 complaints of assault, 5,991 complaints relating to the discharge of an official firearm, 1,078 complaints of torture and 844 cases of rape by a police officer. During the 15 years in which it was operating (April 1997 to March 2012), IPID’s predecessor, the Independent Complaints Directorate (ICD) recorded 6,849 deaths as a result of police action. In comparison, during its first seven years in operation, IPID recorded 3,182 deaths as a result of police action in 2,806 incidents.

Most infamously, on 16 August 2012, police shot more than 100 striking mineworkers, killing 34 of them at the Marikana platinum mine in North West province. Though the incident led to the establishment of a Commission of Inquiry, little attention has been given to addressing the issues of the misuse of force by police that it highlighted.

The recommendations of the Marikana Commission of Inquiry have been largely ignored. The report of the panel of experts – established on the advice of the commission to help professionalise public order policing – has also been disregarded. Moreover, there has been no prosecution or discipline of police officers implicated in the unlawful use of force at Marikana.

As in many countries worldwide, a national lockdown was declared in South Africa to help prevent the spread of the coronavirus and avoid a situation where the health system was overloaded with seriously-ill patients. The commencement of the lockdown, on 27 March 2020, saw police violence emerge as a major focus of public concern. In the first weeks of the lockdown, numerous disturbing reports emerged of the heavy-handed and brutal enforcement of lockdown regulations by the police.

A remarkable feature of some of these incidents was the use by police of sjamboks, a type of whip used by police in the apartheid era but which is no longer part of formal police equipment. For instance, journalists in Hillbrow, Johannesburg, captured footage of police randomly chasing people in the streets and hitting them with sjamboks, apparently in an attempt to enforce compliance with lockdown regulations.

In early lockdown, IPID received 32% more complaints against police than in the same period in 2019

More disturbing were the reports that three people were killed by police enforcing the lockdown during its first three days. At this early stage of the pandemic in South Africa, this figure exceeded the number of people who had died of the virus.

IPID statistics (Table 1 above) indicate that, during the first 40 days of the lockdown, it had received 376 complaints against members of the SAPS and metro police related to the enforcement of the lockdown. This figure included 10 reports of lockdown related deaths as a result of police action. In total, during this period IPID had received 32% more complaints against the police when compared to the same period in the previous year.

The South African National Defence Force (SANDF) was also deployed, in support of the SAPS, to assist in enforcing the lockdown. Some major incidents of
alleged brutality involved SANDF members. The most notorious of these was on 10 April 2020, in which a resident of Alexandra in Johannesburg, Collins Khosa, died shortly after being assaulted by SANDF members. In affidavits presented as part of a court application, it was alleged that SANDF members choked him, slammed him against a cement wall and steel gate, hit him with the butt of a rifle, and hit, kicked and punched him in his face, stomach and ribs. 18

Although an internal SANDF inquiry cleared the soldiers19 a subsequent IPID investigation that focused on the involvement of Johannesburg metro police in the incident, confirmed the version provided in the court application.20 There is evidence that Khosa may not even have been violating the lockdown regulations at all, but that the SANDF members who allegedly assaulted him had misinterpreted these.21

Unlike with the ICD, SAPS must comply when IPID recommends disciplinary proceedings against police

Two months into the lockdown in South Africa, George Floyd, a 46-year-old black American man (the term ‘African-American’ is used in the United States) was killed by a member of the Minneapolis Police Department. Floyd died after a police officer applied pressure to the side of his neck for more than eight minutes, continuing long after he appeared to lose consciousness.

The incident, recorded on film by various closed-circuit television cameras, as well as by bystanders, caused enormous anger leading to an extended period of protest against police violence, especially that targeted against black Americans. Protests occurred throughout the US in response to police violence and racism. 22

The incident drew international attention and triggered outrage and indignation about racism and incidents of brutality in many other countries. There were calls for changes to policing across the world.23 Floyd’s killing also focused considerable attention on questions about the type of measures that would be necessary to control police violence in the US.24 These debates also highlight the inadequacy of existing measures to address police violence in South Africa.

Transition to democracy, police reform and civilian oversight

During the early 1990s, multi-party negotiations to guide the transition to democracy and develop a framework for the election of a constituent assembly and the drafting of a new Constitution were initiated. Linked to the key role that the police had played in maintaining the apartheid system, police reform was one of the issues prioritised during negotiations.25

The approach adopted to police reform was heavily influenced by international, particularly Western, thinking. In Western countries at that time, external accountability agencies were widely regarded as effective mechanisms for improving transparency and accountability and preventing police violence.26

Apartheid resulted in widespread suspicion and distrust of the police amongst South Africans. Those involved in the process of police reform believed that the establishment of an external accountability agency, along with other measures such as Community Police Forums,27 would help to restore the credibility of the police. External accountability would also ensure effective investigations into deaths in custody28 and deaths as a result of police action. These deaths had been a prominent concern during the apartheid years.29

It was therefore thought that the establishment of an external accountability agency would ensure police compliance with human rights. If the police were using force appropriately and this was verified by an independent body it was also believed that this would assist in building trust and confidence in the police.

ICD and the IPID

The importance attached to establishing an external accountability agency was reflected in the interim constitution of 1993.30 Section 222 stated that:

... there shall be established and regulated by an Act of Parliament an independent mechanism under civilian control, with the object of ensuring that complaints in respect of offences and misconduct allegedly committed by members of the [South African Police] Service are investigated in an effective and efficient manner.
In line with Section 222, South Africa’s first such agency, the ICD, was provided for in Chapter 10 of the 1995 SAPS Act. In 1996, the final constitution also indicated, somewhat indirectly, that the government must ensure that such a body exists. Specifically, it authorised provincial executives to lodge complaints with ‘an independent police complaints body established by national legislation.’

The ICD was established in 1996 and formally started its work on 1 April 1997. However, given that the ICD was provided for in terms of the SAPS Act, there were reservations about whether it had sufficient independence although the Act provided that the ICD should ‘function independently from the Service.’ For this and other reasons, new legislation was passed in 2011 to establish a new external accountability agency in South Africa. The ICD, therefore, became the IPID, on 1 April 2012.

Differences between the ICD and IPID included changes to the formal mandate of the body and an expansion of the powers of the body. Whereas the SAPS was not required to comply with ICD recommendations, the IPID Act now required it to comply with IPID recommendations for disciplinary proceedings to be implemented.

Later, in 2016, the Constitutional Court confirmed a Gauteng High Court ruling that provisions of the IPID Act about the removal of the IPID Director were unconstitutional in that they might compromise IPID’s independence. An amendment Act to rectify this shortcoming was approved by Parliament in 2019 and assented to by President Cyril Ramaphosa on 26 May 2020.

**Impact of the ICD and IPID**

One indicator which is sometimes used to assess the impact of an investigative agency is the rate of criminal convictions resulting from its investigations. This indicator suggests that IPID is having more of an impact than the ICD. For instance, during the 12 years from April 2002 to March 2012, the ICD managed to obtain a total of 291 convictions (an average of 24 per year).

During the seven-year-period April 2012 to March 2019, IPID investigations resulted in 530 criminal convictions (an average of 75 per year).

Taking into account that the mandates of the two bodies are significantly different, it may be appropriate to focus on the core element of the mandate of the ICD which is also part of the mandate of IPID. This is the investigation of deaths in custody and as a result of police action. This comparison also indicates a significant improvement in investigative outcomes.

Whereas ICD investigations resulted in 91 convictions for murder or culpable homicide over six years (an average of 15 per year), IPID investigations have resulted in 200 convictions in cases linked to deaths (average of 28 per year).

IPID is therefore more effective in securing criminal convictions than the ICD was. But this has not contributed significantly to improving police accountability for the use of force. The 530 criminal convictions obtained by the IPID constitute only 1.3% of cases received. Internal police disciplinary convictions resulting from IPID investigations where IPID recommended disciplinary action were achieved in 3.2% of cases received.

Elsewhere in the world investigations into police use of force also don’t result in many convictions

A 2020 study concluded that IPID investigations ‘translate into very few convictions for torture and other cases of alleged police brutality related to the performance of police duties’ including for complaints relating to the discharge of an official firearm and assault.

It should be noted that elsewhere in the world it is also not common for investigations into the police use of force to result in a high number of convictions. Research into the investigation of complaints against the police in eight cities in the USA indicates that ‘improper force complaints were sustained infrequently – just 2% across all agencies, with Albuquerque on the high end (5%) and Fort Wayne on the low end (0%).’

Relative to cases received, the percentage of IPID investigations that had resulted in criminal convictions during the seven-year period ending in March 2019 was 0.9% for complaints relating to the discharge of an official firearm, 0.6% for assault and 0.2% for torture.

During the same period, only 2% of the complaints relating to the discharge of an official firearm resulted
in disciplinary convictions. For torture, the figure was also 2% while for assault it was 2.8%. As compared to the outcomes achieved in the US examples referred to, IPID’s figures are therefore neither particularly good nor bad.

**Effectiveness of external accountability agencies internationally**

Internationally there are a variety of different models for investigating complaints. These range from police agencies that only investigate complaints internally (through internal affairs units), to those where only external accountability agencies investigate complaints. There are also hybrid models where external agencies may monitor internal investigations or investigate complaints where the complainant is not satisfied with the outcome of an internal investigation.

Police services need to record and monitor use of force by their members and accurately report on it

The eight cities study referred to above compared three cities where police departments only investigate complaints internally with five cities where civilian oversight bodies played a significant role at some stage in the investigations process. The US study is not comprehensive, but it is one of the few that tries to assess the efficacy of different police complaints investigation models.

The study did not find that the investigation of complaints by an external body is likely to result in more adverse findings against police officers. However, rather than investigating complaints themselves, three of the external agencies were focused on evaluating internal investigations, to assess whether they were conducted properly and whether their conclusions were consistent with the evidence.

The study did find that, in this type of role, external agencies can play a valuable part in ensuring accountability. In this study therefore, the most effective accountability systems include an external agency as well as police departments that themselves have a clear responsibility for ensuring accountability. External police oversight agencies have been created because of substantial evidence that police officials are likely to protect their colleagues, rather than conduct an impartial investigation against them. This is a notable problem in cases of alleged brutality related to the performance of police duties. In addition, even if internal police investigations are conducted properly, there is likely to be public suspicion about an outcome that exonerates the police.

Therefore, the objectives of establishing external accountability agencies are essentially twofold, firstly to ensure that police are accountable to the law, and secondly, to promote public trust and confidence in the outcomes of investigations of police.

However, there is little or no evidence showing that external accountability agencies can contribute to significant improvements in accountability in police organisations that are resistant to accountability. External accountability agencies are only likely to contribute to public confidence in the police, and trust that there is police accountability, in a context where the police themselves are at the forefront of ensuring accountability for the use of force by their members.

**Unintended consequences of establishing the ICD and IPID**

Police accountability should not hinge on addressing complaints against police. It should also not rely on the effectiveness of investigations into complaints. Accountability starts with police services and their members recognising that they are responsible for, and answerable for, how they carry out any activity.

Accountability for the use of force implies that police recognise and accept that they have to account for any force that they use. An accountable police service takes steps to ensure that the manner in which its officials use force meets the relevant legal and professional standards. This means that the police service will record and monitor the use of force by its members and accurately report on it.

In practice, there is little police accountability for the use of force in South Africa. The SAPS has used the
existence of the ICD and IPID as justification for neglecting its responsibility to monitor and control the use of force by its members. Ironically, rather than strengthening police accountability for the use of force in South Africa, the existence of these bodies has diverted attention away from the need for police leadership to be directly accountable for how their officials use force.

No monitoring of SAPS’ use of force

The SAPS provides little information to Parliament on the use of force. This information is mainly provided to Parliament in IPID reports. The IPID annual report gives a fairly general statistical overview of cases that IPID has received. There are many use of force incidents that it does not report on.51

An accountable police service ensures that the manner in which its officials use force meets the relevant legal and professional standards

For example, IPID’s 2018-19 annual report indicates there were 393 deaths as a result of police action incidents in that year.52 These included 318 incidents in which one or more people were shot dead by police (Table 2).53

Based on data indicating that roughly 25% of people who are hit by police gunfire, die from their wounds,54 it is reasonable to believe that about 1 200 to 1 300 people were shot by police in South Africa in 2018–19. Of these, at least 318 were killed55 and roughly 880 to 980 were injured.

Table 2: Mechanism of death for deaths as a result of police action incidents, April 2018–March 2019

<table>
<thead>
<tr>
<th></th>
<th>Number of incidents</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shooting (service or private firearm)</td>
<td>318</td>
<td>80.9</td>
</tr>
<tr>
<td>Assault</td>
<td>26</td>
<td>6.6</td>
</tr>
<tr>
<td>Suffocation</td>
<td>6</td>
<td>1.5</td>
</tr>
<tr>
<td>Vehicle</td>
<td>34</td>
<td>8.7</td>
</tr>
<tr>
<td>Other</td>
<td>9</td>
<td>2.3</td>
</tr>
<tr>
<td>Total incidents</td>
<td>393</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: IPID, 2020

There are therefore likely to be upwards of 1 000 incidents each year in which police shoot members of the public. If the SAPS were accountable for the use of force, it would routinely collect information and be able to provide data on these shootings.
The SAPS would also be able to provide other information related to the use of lethal force including, but not limited to:

- The number of incidents in which SAPS members have discharged firearms. There are likely to be a large number of incidents where police discharge their firearms but no one is killed or injured. These would include incidents in which SAPS members fire warning shots or miss their target.\(^56\)

- The number of police officers who have discharged their firearms and those who have been involved in multiple shooting incidents. Frequent involvement by police officers in shootings, or other incidents where force is used, is often an indicator that the police member has a disposition to using force excessively.\(^57\)

Unfortunately, the SAPS does not collect such data nor monitor shootings by its members. If the SAPS did monitor the use of force, it would also be able to provide data on:

- Other uses of force by police, notably those resulting in people being killed, injured or hospitalised.

- Trends over time regarding firearm usage by the SAPS resulting in death or injury.

- The number of instances and types of less-lethal weapons used (e.g. rubber rounds, teargas, stun grenades, water cannons) and the number of people injured or killed as a result of the use of these weapons.\(^58\)

The use of less-lethal weapons such as rubber rounds is slightly different in at least one respect from the use of firearms with live ammunition. This difference is that there is a database, the Incident Reporting Information System (IRIS), on which the use of weapons used by Public Order Policing (POP) units is supposed to be recorded. Nevertheless, this serves little by way of a productive purpose as the SAPS does not collate, analyse, or monitor this data either. Moreover, POP members only account for about 5% of all SAPS members and are not the only officials who use less-lethal weapons.

Currently, the SAPS is therefore not able to answer questions about how it uses force and therefore is not accountable for how its members use force. If the SAPS is asked for information on the police use of force, it will provide the IPID data. There is a huge accountability gap as the IPID does not receive reports on all shooting incidents. It only receives reports on deaths and ‘complaints relating to the discharge of an official firearm.’ It does not receive reports about cases where firearms are used but there are no deaths and no complaints are lodged with IPID.

SAPS doesn’t record incidents when police discharge their guns, or monitor shootings by police

The New York Police Department (NYPD) provides an example of how a police agency can collect such information. The NYPD has been linked to some controversial incidents\(^59\) and policies\(^60\) and is therefore not exemplary in all respects. But it has taken steps to control the use of lethal force by its members. This is partly reflected in a report, produced each year, on how its members have used force. In 2018 the NYPD was able to report that:

The data shows a record of increasing firearms restraint dating back to 1971, when there were 810 discharge incidents, compared with 35 discharge incidents in 2018. In 1971, 314 subjects were shot by police, of which 93 were killed. In comparison, in 2018, 15 subjects were shot, of which five were killed. Also, 2018 saw the lowest number of total discharge incidents in NYPD history. The 35 firearms discharges by members of the service in 2018, reflect a 32.7% decrease from the previous lowest year on record (52 incidents occurred in 2017). Members of the NYPD have become increasingly restrained in the use of firearms because there are clearer rules, more vigorous oversight, and more training than in years past.\(^62\)

Little accountability by individual police for using force

The existence of IPID also diverts attention from the SAPS obligation to ensure that its members are held accountable for how they use force. The SAPS frequently uses complaints reported to IPID as justification for doing nothing. The most prominent example of this is the Marikana massacre on 16 August 2012.
In the Marikana case, SAPS members shot over 100 miners, killing 34 of them. Despite a Judicial Commission of Inquiry finding that many of the shootings were possibly unlawful, not a single SAPS member who was involved in the shooting or command of the operation was even suspended. This was initially on the basis that a commission of inquiry had been appointed and later on the basis that there is an IPID investigation into the matter. The only substantial provision that the SAPS has in place for ensuring internal accountability for the use of force is a standing order that was developed during the apartheid era. No significant revisions have been made to Standing Order 251 since the transition to democracy in 1994. It provides, inter alia, that:

- SAPS members must promptly report shooting incidents to their immediate commanders.
- A member of officer rank should be immediately notified by the commander, if such a member was not present at the time of the incident, so that he or she can visit the scene to investigate the circumstances of the shooting.
- A full factual shooting incident report under 32 specified headings should then be submitted.

It is unclear what standards are used in implementing this standing order or whether it is consistently implemented at all. There is no evidence that the SAPS adequately monitors whether these investigations are conducted consistently and effectively. When these investigations are conducted, it is likely that they are often cursory.

**Impact of the right to silence**

IPID investigations are criminal investigations. This means that SAPS members are entitled to the rights provided in Section 35(1) and (2) of the constitution including the right to remain silent. As a result, police members who have been involved in a shooting are not obliged to provide a statement on the circumstances or justification for the use of lethal force, notably if they believe it may be self-incriminating.

The IPID Act further provides that self-incriminating statements made by SAPS members will not be admissible as evidence against them. The latter is a right that is not granted to anyone else facing a criminal investigation.

For reasons that are not clear, the IPID Act, therefore, entrenches the right for the police to not be accountable for the use of force and other cases against them that are investigated by IPID. This is linked to the tendency in South Africa to conflate police accountability with criminal investigation. In other countries, notably in the US, it is recognised that there is a tension between criminal investigation and accountability.

One way of dealing with this is by creating a clear separation between internal ‘departmental’ processes and any criminal investigation that may be instituted. Internal ‘departmental’ processes are necessary to uphold principles of accountability and may lead to disciplinary measures.

There is possibly no oversight body globally with IPID’s high load of serious cases against police

While the constitutional rights of police must be respected, this should not be an obstacle to entrenching the principle of accountability. As state employees who are authorised to use force on behalf of the state, it is necessary for police to be accountable – in the same way, it is generally necessary for officials of the state to be accountable. The obligation to be accountable should be even greater in respect of the use of force, considering that when using force police may hurt, injure or kill people.

If the SAPS is doing what is necessary to ensure that its members adhere to appropriate standards when using force, they should be using force in a manner that is consistent with legislation and with organisational policies. If so, there should be no objection to accountability.

This approach is reflected in the words of a senior member of the London Metropolitan Police, following a controversial use of force incident early in 2020. She said, ‘All police officers are fully aware that they will be asked to account for their actions. Officers are not exempt from the law and we would not wish to be.'
Other constraints and limitations of IPID

People tend to focus on the resourcing of IPID as a principal reason for its relative ineffectiveness.\textsuperscript{71} For instance, as a result of resource and capacity constraints, IPID investigators are not able to attend all police action or custody death scenes or post-mortems. In 2018–2019, IPID personnel did not attend 41% of deaths-in-custody scenes (88 out of 216) and 37% of deaths-in-custody post-mortems (79 out of 216).\textsuperscript{72}

Another argument that is frequently made is that IPID is still not sufficiently independent as it still reports to the Minister of Police. In 2020, a major reason for concern about this related to the minister’s influence over the process for appointing the IPID executive director. There was also the belief that Parliament played a very limited role in this appointment process.\textsuperscript{73} Where appropriate care is not taken in ensuring that the most appropriate person is appointed to this post, this may impact on IPID’s effectiveness.

However, locating IPID under a different minister, or even turning it into a Chapter 9 institution,\textsuperscript{74} does not guarantee that this or any other problem confronting IPID will be resolved.

IPID also does not have its own forensic and ballistic investigation capacity and relies on SAPS expertise for this. It is sometimes argued that this

\textbf{Figure 1: Vicious cycle characteristic of high use of force/low accountability environments}

\begin{itemize}
  \item SAPS neglects its obligation to monitor and control the use of force
  \item IPID receives large numbers of cases regarding alleged or possible misuse of force by police
  \item Police who use force are not obliged to account for its use
  \item For various reasons including investigative overload, IPID is mostly only able to do superficial investigations
  \item Trust in both the SAPS and IPID is low
  \item Low trust and accountability environment
\end{itemize}
amounts to a significant constraint on IPID’s independence. But it is unlikely that there is any country where oversight agencies have such facilities. In a developing country it is highly unlikely that an oversight agency can be provided with this kind of capacity. It is also not clear that providing this capacity to IPID would result in significant improvements in its effectiveness. There remains room for strengthening IPID’s independence, notably concerning the process for appointing its executive director. But doing so, or providing it with greater financial resources, would most likely only contribute to marginal improvements in its effectiveness.

IPID’s investigative burden is exceptional. There is possibly no oversight body anywhere else in the world responsible for investigating such a high number of complex and serious cases against police officers. The core problem is not a problem with IPID but that the SAPS does not adequately control the use of force by its members and ensuring that they are accountable for its use. IPID is thus caught in the ‘vicious cycle’ depicted in Figure 1.

This may be contrasted with the ‘virtuous circle’ depicted in Figure 2. This would come into effect if sufficient political pressure was placed on the government to improve SAPS standards in using force. It would also occur

Figure 2: Virtuous circle characteristic of high accountability/professional use of force environments
if SAPS leadership recognised that the misuse of force significantly undermines its capacity to build greater trust with communities.

The potential for the virtuous circle to come into operation depends on the SAPS putting more effective measures in place to monitor the use of force, to ensure control and accountability. A potential consequence would be that IPID had fewer cases of serious police violence to investigate and would be able to investigate cases more thoroughly.

However, because police would be exercising better control over their use of force, IPID investigations would not result in more convictions of police in respect of the use of force in these circumstances. Although there would not be more convictions, there would be greater trust and confidence in both IPID and the SAPS.

Countries, or cities, where police oversight agencies are more trusted and respected are coincidentally also places where police agencies themselves take responsibility for ensuring high standards of conduct by their own members.

**Controlling the use of force**

A key component of effective control of the use of force is for police organisations to provide clear, enforceable regulations to their members about the standards that they must comply with. These must be aligned with the law which requires that police comply with general principles of reasonableness and minimum force. But many police organisations recognise that the general directives provided by the law are inadequate.

An unintended consequence of creating IPID is that SAPS uses this to justify neglecting its duty to account for the use of force

The rules of professional bodies typically impose stricter standards of conduct than those allowed by the law. However, the distinction between legal and professional standards is not recognised by the SAPS. Generally, internal SAPS directives only restate the law in respect of the use of force.

An example of this is the directive issued by the SAPS national commissioner, Khehla Sithole, at the beginning of May 2020, in response to a Gauteng High Court judgement. This followed an application by members of the family of the late Collins Khosa. As indicated, he was allegedly killed by SANDF members enforcing the lockdown.

The directive does go beyond simply restating the law and providing detail on how it should be applied in a limited way. For instance, the directive states that when force is used for arrest ‘the purpose of using force may only be to confine the body of the person to be arrested’ and that ‘[w]hen the suspect is confined, the use of force must immediately stop.’
It does also state that ‘members are not allowed to indiscriminately use force to achieve even a legally permissible objective.’ Nevertheless, the directive falls far short of the kind of clearly articulated statement of professional standards that is necessary if the SAPS is going to effectively manage and control the use of force by its members.

A more comprehensive Use of Force Policy has already been developed for the SAPS by the Civilian Secretariat for Police Service (CSPS). The CSPS, provided for by Section 208 of the constitution, is intended to provide civilian oversight of the SAPS and advise the minister of police on policing policy.

The panel of experts on professionalising policing, established in 2016 on the recommendations of the Marikana Commission, provided input on the policy in 2017. The report of the panel, completed in mid-2018, recommended that the policy should urgently be adopted. Minister of Police, Bheki Cele, is reported to have approved the policy in November 2018. But there has been no indication from the SAPS that it is implementing the policy.

The policy includes an annex titled ‘Use of force by members of the SAPS – Legal standards and professional guidelines.’ This is intended to serve as a consolidated and accessible directive to guide the police in respect of the use of force. When compared with the CSPS policy on the use of force and the attached annex, the current SAPS directive is deficient in many respects.

The constitution requires organs of state to respect, protect and promote the Bill of Rights. The SAPS should, therefore, ensure that its members’ actions serve to protect these rights, most notably the right to life. However, currently, there are numerous gaps and silences in the SAPS directive regarding this. For example, police officers should be required to consider the risk to bystanders when they use lethal force. This is addressed in the CSPS policy on the use of force but is not addressed in the law or the SAPS directive.

A key focus of criticism in the Gauteng High Court judgment were various statements made by the minister of defence and the minister of police that could encourage police violence and other unlawful conduct. For instance, on 12 April 2020, the minister of police stated that police will ‘destroy the infrastructure’ of any location where liquor was being sold in violation of lockdown regulations. As the Gauteng High Court stated this would be ‘an unlawful act and not justified by any law or regulation.’

Statements encouraging the unlawful use of force by the police have been a recurring feature of South African politics over the last 20 years and appear to be an ever-present risk of democratic political life.81

A comprehensive Use of Force Policy has been developed by the Civilian Secretariat for Police Service

Given the tendency of senior politicians to make confusing statements about the standards that police are supposed to apply when using force, the SAPS should be obliged to ensure that proper guidance and support is provided to police or any others performing a policing function so that there can never be confusion about standards that they must uphold. A use of force policy is a critical instrument for ensuring this.

Conclusion

The ongoing problem of police violence is a manifestation of broader weaknesses of governance, leadership and management of the SAPS. An unintended consequence of the establishment of the ICD and IPID as external police investigation agencies is that this has been used by the SAPS to justify neglecting responsibility for ensuring accountability for the use of force.

While many professions have some form of independent oversight system, professions that maintain high standards do not rely on external oversight agencies to ensure that standards are maintained. An external body is unlikely to be able to impose standards on another organisation unless the latter organisation appoints leaders and managers who are committed to upholding these standards.

In respect of the use of force, such standards should be set out in a clear use of force policy and training should support compliance with the policy. Accountability...
mechanisms should serve to monitor whether police are upholding the policy. But no such policy and no effective system of accountability for the use of force is currently in operation within the SAPS.

Independent civilian oversight bodies can be a valuable element of the governance of the police and they can make an important contribution to holding police accountable. However, there is no country in the world where a substantial change in how a police organisation uses force has been brought about by a civilian oversight body.

In a country like South Africa, chronic police violence simply means that the IPID is overwhelmed with cases. Rather than leading to a focus on improving policing reform, public dissatisfaction frequently focuses on the inadequacies of IPID. On the other hand, the SAPS treats IPID with a measure of indifference and regards accountability for the use of force as if it is not their own responsibility or concern.

There is a need for a fundamental reorientation in how the use of force and related issues of accountability are addressed in the SAPS. If this is not done, the existence of IPID will continue to have little impact on police accountability. IPID can play a valuable role in serving to verify the integrity of SAPS systems for preventing police brutality. But reliance cannot be placed on IPID to ensure that the SAPS exercise control of the use of force. The SAPS must take responsibility for ensuring that police use force appropriately and are accountable when they use it.

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Notes

1 In this report the term police violence refers to the use of force by police which does not conform to minimum force principles (‘excessive force’) and which is therefore unlawful.


6 The arguments made in this paper also apply to Metro police departments in South Africa. However this paper focuses on the SAPS.

7 The external accountability agencies referred to in this report are agencies that are intended to assist in ensuring accountability by police officers for individual incidents of the use of force that they have been involved in or in respect of other types of complaints or allegations against them. There are other types of accountability agencies that focus on other aspects of accountability such as the performance of police in addressing crime.


10 Author’s calculation from figures in ICD annual reports.


15 Note that the legislation governing IPID only authorises it to investigate cases against police but not against the military.

16 IPID, Joint meeting of the PCP and SCSL, Presentation on police misconduct cases, 8 May 2020, 9, 11–20.


26 M Seneviratne, Policing the police in the United Kingdom, Policing and Society, 14:4, 2004, 329–347; S Walker, Police accountability: the role of

28 The prominence given to deaths in custody was related to the fact that a number of opponents of apartheid were believed to have been killed by the police in custody.


31 The 1991 National Peace Accord made provision for the Police Reporting Officers to be appointed. These were ‘civilians lawyers, who would receive and investigate complaints against the police’ (J Rauch, Police reform and South Africa’s transition, South African Institute for International Affairs, 2000, 3).


34 SAPS Act, 68 of 1995 Section 50(2), Provisions of the SAPS Act pertaining to the ICD were deleted by Section 38(2) of the IPID Act, 1 of 2011.


36 Independent Police Investigative Directorate Act (Act 1 of 2011).


41 Ibid., 27.

42 Ibid., 8. Some of these convictions may not be for murder or culpable homicide.

43 Ibid., 13.

44 Ibid., 3, 13.

45 W Terrill and J R Ingram, Citizen complaints against the police: an eight city examination, Police Quarterly, 19:2, 2015, 22.

46 Ibid., 10–11.

47 Ibid., 22.

48 Ibid., 24.

49 Ibid., 24.


51 D Bruce, The army may have killed Collins Khosa, but SAPS should be setting the standard for preventing brutality, Daily Maverick, 21 May 2020, www.dailymaverick.co.za/article/2020-05-21-the-army-may-have-killed-collins-khosu-but-saps-should-be-setting-the-standard-for-preventing-brutality/.

52 Note that some incidents involve more than one fatality.

53 Author’s analysis of IPID, Annual Report 2018–19, 42–43. Note that there are inconsistencies in data provided by IPID. The figure of 393 fatal incidents is slightly different from data provided elsewhere in their report indicating that in 2018–19 there were 440 deaths as a result of police action in 387 incidents (Ibid., 42).


55 More than one person may have been killed in some of these incidents.


58 Police would not be able to comprehensively report on injuries from rubber rounds as many people who are injured by rubber rounds may not report this to the police.


60 L Fang, Mike Bloomberg claims he curtailed stop-and-frisk by 95 percent — after increasing it sevenfold. The Intercept, 12 February 2020, https://theintercept.com/2020/02/11/bloomberg-stop-and-frisk/.


62 Ibid., 5.


64 As at August 2020, there is still no final indication as to what the outcome of this investigation is.


66 IPID Act 2011 (Act 1 of 2011), Section 24(4).

67 Ibid., Section 24(5).


69 Ibid.


71 A Whitfield, Under-staffed, under-capacitated, under-funded IPID has only completed 14.5% of cases, Democratic Alliance, 16 July 2019, www. dia.org.za/2019/07/under-staffed-under-capacitated-under-funded-ipid-has-only-completed-14-5-of-case.


76 South African Police Service Act (Act 68 of 1995), Section 13(3)(b).


78 Ibid., paragraph 6.2.8.

79 Ibid., paragraph 6.2.9.


About the author
David Bruce is an independent researcher specialising in policing and public security. He has written extensively on police violence in South Africa. From 2016 to 2018 he was a member of the panel of experts appointed by the Minister of Police on the recommendations of the Marikana Commission of Inquiry. He is a visiting research fellow at the Wits School of Governance.

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