



**PROFESSIONAL USE OF FORCE  
POLICY AND GUIDELINES FOR THE SOUTH  
AFRICAN POLICE SERVICE  
SEPTEMBER 2018**

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**civilian secretariat  
for police service**

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Department:  
Civilian Secretariat for Police Service  
**REPUBLIC OF SOUTH AFRICA**

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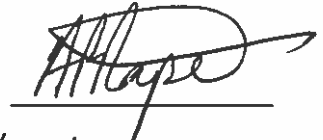
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## ACRONYMS

ACHPR	The African Charter on Human and Peoples Rights
CPA	Criminal Procedure Act
EAC	East African Community
EHW	Employee Health and Wellness.
ICCPR	The International Covenant on Civil and Political Rights
IPID	Independent Police Investigation Directorate
POP	Public Order Policing
RSA	Republic of South Africa
s	Section
SARPCCO	The Southern African Regional Police Chiefs Co-operation Organisation
SAP	South African Police
SAPS	South African Police Service
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	United Nations Convention against Torture and Other Cruel
US	United States

## Introduction

Police officials in a democratic state play a vital role in securing fundamental human rights including the right to 'life, liberty and security of the person'.<sup>1</sup> In the South African constitution this role is reflected in Section 205(3) which states that the objects of the police service are 'to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.<sup>2</sup>

As state functionaries, police are provided with specific powers to fulfil their functions. In order for the police to exercise these functions legitimately, in accordance with the rule of law, and without impunity, these powers must be subject to proper guidelines and appropriate mechanisms of accountability.<sup>3</sup>

In the work of protecting members of the public the use of force is an issue of special importance. The power of the police to use force is critical to the ability of police to carry out their functions effectively. Due to the fact that police sometimes face resistance, and even life threatening danger, police must be well trained and equipped to use force, both to ensure their effectiveness and for their own safety.

At the same time the fact that the police have the power to use force has risks. If force is wrongly used it not only may do unjustified harm to individuals as well as their families or other people associated with them. The legitimacy of the police and government is also put at risk when police power remains unconstrained and unchecked.

The authority to use force is grounded in the obligation that every police official has to comply with the laws of the Republic of South Africa. In situations where members of the South African Police Service are required to use force, they must comply with the legal and regulatory framework. Police in South Africa must recognise their obligation as officials of the state to uphold the Constitution, and the centrality of the Bill of Rights, in particular, the right to life, and freedom and security of the person from all forms of

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<sup>1</sup> United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. 1990 (UN Basic Principles)

<sup>2</sup> Constitution of the Republic of South Africa, Section 205(3) (Constitution)

<sup>3</sup> C Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, H/HRC/26/36 (Heyns), 2014, 5.

violence. The manner in which the police uphold this obligation requires a careful balance between protecting rights on the one hand, and fulfilling their legally mandated functions.

The fact that members of the SAPS have the authority to use force to protect the public, but are also accountable for this use of force, places an obligation on government and the SAPS to provide guidance to them in order to support them in meeting the best possible standards.

## **Problem Statement**

Prior to 1994, policing was characterised by the abuse of power by members of the former South African Police (SAP). In this period, the political situation characterised by the liberation struggle led to the SAP being used as a tool of repression and agent of the apartheid regime.<sup>4</sup> Police acted as the cutting edge of apartheid policies of racial discrimination. The unnecessary use of force in arrests, torture, detention without trial, solitary confinement and other oppressive practises, largely targeted at black South Africans, were common.

However, after April 1994 new forms of policing centred on principles of equality and democracy were adopted. It became imperative for the reconstituted South African Police Service that the use of excessive force by police officials be addressed.<sup>5</sup>

The new political order, reflected in the Constitution and Bill of Rights, called for a dramatic transformation of the modus operandi and ethos of policing in South African.<sup>6</sup> This required that measures be introduced to bring an end to repressive policing practises. This was done in recognition of the rights of individuals but also served to win community trust and establish the SAPS itself as a credible policing service.

Police officers are authorized to use force in specified circumstances, are trained in the use of force, and typically face numerous circumstances during their careers when use of force is unavoidable and necessary—for example, where a suspect resists arrest.

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<sup>4</sup> D Mistry, A Minaar, J Redpath, J Dlamini. Use of force by members of the SAPS -Gauteng. Institute for Human Rights and Criminal Justice Studies, Technikon SA. 2001

<sup>5</sup> Ibid

<sup>6</sup> Ibid

When the level of force exceeds the level considered justifiable under the circumstances, however, the activities of the police may come under public scrutiny.

Where there is excessive force both the law and public opinion condemn such incidents. Incidents involving the use of excessive force by the police frequently receive attention from legislators, and, in some instances, civil and even criminal courts. Use-of-force concerns are also reflected in the attention the media give to possible instances of police abuse. An accumulation of alleged abuse-of-force incidents, widely reported in the media, encourages overgeneralization by giving the impression that police brutality is rampant and that the entire police department across the country are out of control.

Crime rates in South Africa have often been cited as one of the highest globally with extremely high levels of violent crime like murder, rape and robbery. Confronted by these realities, front-line members of the SAPS regularly have to respond to situations where people are at risk and may in so doing put themselves in danger. In responding to these, often dangerous situations, police may be involved in the use of force, including lethal force. However when deaths resulting from police action take place, they are often the subject of debate, raising questions relating to, amongst others, training and the legality of force used.

### **Police safety**

One issue that is of particular concern in South Africa is the killing of police, notably where this is related to the performance of police duties. It is clear that there are significant dangers in police work. There is sometimes a concern that efforts to control the use of force by police will place police in a position where they are unable to use force effectively to defend themselves. Police safety must clearly be one of the foundations of any framework for the use of force by police in South Africa and is a key concern of this policy. Police who are not able to defend themselves properly cannot be expected to carry out their functions effectively. Improvements in police safety are likely to be one of the benefits of professionalising police use of force. But this is not achieved by violating the rights of others. This policy fully supports the right of police to defend themselves in situations where this is necessary. But reducing levels of unnecessary force, and



strengthening the use of de-escalation tactics, are also ways of ensuring that police are involved less frequently in potentially lethal confrontations, and this is also likely to have benefits for police safety.

## **Professional Use of Force**

This policy supports proposals and recommendations set out in the National Development Plan 2030 and 2016 White Paper on Policing, aimed at professionalising police in South Africa.

Police must, in performance of their duties, act professionally. Police must operate and execute their functions within the framework of the law and subject to ethical standards governing the service. Questions to do with the use of force are of special importance for a professional police service.

A professional police organisation must be guided by the law. In addition high ethical principles must be adhered to by all members. The power to use lethal force involves the potential to take the lives of other people. It also may have other very serious consequences that are irreversible, such as causing permanent and serious disability. Police must therefore use force in a manner that shows that they are conscious of the risks that force, and particularly lethal force, entails. The professional use of force demands that police are conscious of the dangers involved in the use of force and lethal force, in particular.

The professional use of force requires that police officials give high value to the protection of life. When using lethal force the protection of life should be the only objective. Application of the principle is intended to ensure that lethal force is limited to when it is clearly necessary to protect the safety of police and others against threats to their lives or of serious injury. The concern with the protection of life is broadly framed to include the lives of members of the police, suspects or others that police may be involved in armed confrontations with, and other 'bystanders' who may be harmed unintentionally. The professional use of force also clearly requires that the use of force conforms to prescribed

legal standards and that police exercise their duties without bias and in an impartial manner.

Accountability is also part and parcel of the professional use of force. The SAPS and its members must 'accept that they have a duty of public accountability and truth-telling, because they exercise force on behalf of all South Africans.'<sup>7</sup> The professional use of force requires that SAPS members should be able to provide full and truthful accounts about use of force incidents in which they have been involved. Consciously and deliberately violating the law, and negligence in the use of force are not acceptable. But for the SAPS to create an environment that supports the professional use of force, it needs to allow for the fact that SAPS members may make errors of judgement while acting with lawful intentions, or may use force in some circumstances where in retrospect it emerges that this was unjustified. An organisational environment that allows for this to be acknowledged and takes steps to ensure that errors are not repeated is an environment that will be better able to support SAPS members in recognising and achieving high professional standards.

In addition, in order for professionalism to become entrenched, the SAPS need to recognise and act in recognition of the fact that:

- i. Professionalism is predicated on police officials being properly trained and equipped to discharge their functions in compliance with legal principles.
- ii. Professionalism requires effective management at all levels of the organisation administratively and operationally.
- iii. Professionalism requires a commitment to life-long learning – the foundations of professionalism can be provided through training but professionalism needs to be deepened by members of the police through learning from their own experiences as well as those of their colleagues.

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<sup>7</sup> Marikana Commission of Inquiry, Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West province, 31 March 2015, 554 (Marikana Commission Report)

## Benefits of professional use of force

Key benefits accrue to the state, its inhabitants and the police when a police service uses force in a professional way. These benefits include:

- i. **Enhanced community respect, cooperation and a more effective police service** – a more professional police service will secure community confidence and cooperation, improving and enhancing police community relations and police ability to combat and investigate crime.
- ii. **Improved police safety** – if police are properly equipped, trained and supported in learning how to intervene in situations without exposing themselves to unnecessary risks there will be direct benefits to police safety.
- iii. **Improved police morale** – police who know that they work for an organisation that applies professional standards in the use of force have a greater sense of pride about their jobs.
- iv. **Greater respect for the law** – the police are custodians of the law and need to lead by example. Research has demonstrated that there is greater adherence to the law by communities when police themselves operate within the confines of the law.<sup>8</sup>
- v. **Reduced risk of civil and criminal liability** – SAPS members who use force professionally are less likely to give rise to civil cases against the SAPS, or civil or criminal cases against themselves in their personal capacities.
- vi. **Compliance with international and regional obligations** – strengthening of policy and operational compliance with these principles contributes to South Africa's compliance with its international and regional obligations.

In South Africa, human rights principles form part of the Constitution and the taking of human life is regarded with the utmost seriousness. The actions of a police member who kills someone must be subjected to rigorous scrutiny even though they may have been acting to the best of their abilities in order to protect society, and may have exposed themselves to great danger. The complications for a police officer may also

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<sup>8</sup> David H Bayley, Law enforcement and the rule of law: is there a tradeoff?, *Criminology and Public Policy* 2(1) (2002), 133–154.

increase if there is conflicting evidence or other reasons for questioning the appropriateness of their actions. When a police member kills a person, especially where this later proves to have been unjustified, this may also lead to emotional distress, sometimes over an extended period. Supporting professional use of force can also assist police by helping to limit their risk of these kinds of consequences.

### **Purpose of the Policy**

The goal of this policy is to improve the performance of the SAPS by professionalising the use of force. This policy exists in conjunction with a range of initiatives to strengthen and professionalise the police in South Africa. The need for police professionalism is articulated in the National Development Plan (2012) and White Paper on Policing (2016). By improving police professionalism in using force this policy aims to contribute to ensuring that policing in South Africa is carried out in a manner that ensures police effectiveness in the prevention and combatting of crime, whilst upholding human rights including the safety of the members of the police. The purpose of the policy is also to contribute to the development of an ethos of professionalism in policing in South Africa, both specifically with regard to the use of force and more generally. The policy therefore aims to contribute to ensuring that policing in South Africa is carried out in a manner that supports improved police morale, enhanced community respect and cooperation, and greater respect for the law.

### **Objectives of the Policy**

The objectives of this policy are:

- i. To institutionalise the commitment to the professional use of force as one of the foundation stones of policing in South Africa.
- ii. To provide the basis for strengthening measures within the South African Police Service so as better to support professional use of force.
- iii. To provide an integrated framework to be used by the SAPS to inform SAPS members about the standards that they should adhere to in using force. **This framework is attached as Annex A and forms part of this policy.** The

framework sets out legal standards, principles and other guidelines for SAPS members on the use of force, with a particular focus on lethal force.

The policy is therefore intended to ensure that members of the SAPS recognise the need for a professional orientation towards the use of force and have a high level of clarity about the legal and professional standards required of them when using force. In this respect the policy has as its foundation the principles and legal requirements contained in the body of law governing the legal use of force. This policy is informed by, international and regional instruments to which South Africa is party, the Constitution of the Republic of South Africa, and relevant domestic legislation. The human rights compliant approach which it articulates, must inform police management, strategy and operations. The policy further draws on best practice domestically, and from other regions and countries.

In addition the policy is also intended to provide a basis for ensuring that SAPS members are adequately supported in achieving the standards that are embodied in this policy. The policy is grounded in recognition that situations where police have to make decisions about using force often unfold very quickly, and are challenging, and even daunting, requiring courage and clear-headedness. The policy is therefore not intended to create unrealistic expectations about the use of force by police in South Africa. Rather it recognises that police, while acting with the best of intentions to uphold the law and protect their colleagues and members of the public, may not always act in a manner which conforms to the highest standards of professionalism. On the one hand therefore the policy emphasises that the possibility of error must be taken especially seriously when using lethal force as the consequences of lethal force are often irreversible. Secondly the orientation within this policy is to ensure that training and management systems help to ensure that the risk of error is minimised. Thirdly the policy aims to ensure that systems are put in place to ensure that SAPS members learn from their experiences and those of their colleagues and are able to use this to improve their ability to exercise good judgment and to skilfully deal with situations in which force may have to be used.

## **Scope of the policy – use of force in crime prevention and law enforcement**

This policy framework is intended for application in the general policing environment involving crime prevention and law enforcement. This is what might be called 'day to day' policing and includes the vast majority of situations where force is used by police in South Africa. Examples of this include: during crime prevention operations, carrying out arrests, intervening in domestic violence incidents or other violent interpersonal disputes. Where police use their firearms this is also often in crime and violence situations such as responding to robberies or cases of taxi violence or arresting suspects in cases of serious violent crime. This policy framework is to be applied by police in these situations

The policy framework is not intended to be the main policy framework governing the use of force in crowd management. This is currently dealt with in the instruction dealing with crowd management (currently National Instruction 4 of 2014). This policy is however applicable to public order situations that do not constitute crowd management.

## **Implementation – strengthening measures to support professional use of force**

Professionalising the use of force cannot be achieved solely by compliance with specific regulations or instructions. In order for the SAPS to professionalise more fully it needs to commit itself to the ethos of professionalism. Support for and investment in promoting this policy, by policy leadership, is a precondition for its success. Critically this depends on commitment by SAPS leadership to developing and enhancing understanding about professional use of force and to building commitment to it within the SAPS. Leaders need to consistently and regularly emphasise, the values, policies and law, intended to guide the use of force by police officials. Police leaders must commit themselves to learning and advancement as the process of professionalization is not an overnight one. Other factors that are a precondition for the effectiveness of this policy will clearly include: a properly trained and capacitated police establishment, and effective internal and external systems of accountability.

The National Commissioner must implement this policy and ensure the alignment of national instructions, and administrative processes including disciplinary procedures, with this policy. In addition, in order to operationalise the policy, the National Commissioner should:

1. Develop and adopt an internal instrument to inform SAPS members about the standards articulated in the Annex on legal standards and professional guidelines that is attached to, and part of, this policy (Annex A). The instrument should be equivalent in status to the Codes of Conduct and Ethics. It will not only serve an internal regulatory purpose but, both internally and externally, expresses the identity of the SAPS and the values that it embodies.
2. Strictly comply with and ensure adherence by all police officials to the requirements of section 98 of the Firearms Control Act, (Act 60 of 2000), that a permit to possess and use a firearm may only be issued if the police official –
  - a. Is a fit and proper person to possess a firearm; and
  - b. Has successfully completed the training and the test prescribed in Regulation 79(1) of the Firearm Control Regulations, 2004 for the safe use of a firearm.
3. Ensure that police officials comply with the requirement:
  - a. For periodic practical training (at least every 12 months) in the proper and safe handling and use of the relevant firearms and ammunition, as prescribed in Regulation 79(2)(b)(i) of the Firearm Control Regulations; and
  - b. To undergo psychological debriefing within 48 hours after experiencing any violent incident, discharging their firearm or witnessing a shooting (Section 79(2)(b)(ii) of the Firearm Control Regulations).
4. Ensure that the effective measures are taken to support and ensure the physical and mental fitness and health of SAPS members, inter alia through the Employee Health and Wellness (EHW) programme.

### **Accountability of commanders**

Police commanders are responsible for implementation of this policy in the operational environment. This includes:

1. Monitoring the use of force in order to ensure compliance with this policy.
2. Where there are allegations of the unlawful use of force and firearms these must be reported immediately to appropriate internal and external mechanisms.
3. Commanders are to be held accountable for failure to prevent and address contraventions of this policy if they know or should have known about them.
4. Orders that would lead to the unlawful use of force or unreasonable violation of this policy are a disciplinary offence and may amount to a criminal offence.

## Training

Police officials must be properly selected and trained to perform their functions.

1. Training and competency testing in the use of force should be aligned with this policy and should be ongoing.
2. Training in the use of force should address strategies, tactics and techniques for limiting unnecessary use of force and firearms. It should include a component on how to avoid escalation and on de-escalation tactics (negotiation, methods of persuasion) and when these can usefully and realistically be employed.
3. Training on the use of firearms, and the legal issues governing use of force, should be integrated with training on de-escalation and crisis intervention strategies, and other related topics and presented in scenario based sessions. Police should be trained to consider all of their options in realistic exercises that mirror the types of incidents they are likely to encounter.<sup>9</sup>
4. Training on decision making models should ensure that the use of force is always governed by principles of necessity and proportionality. Decision making models should not encourage unjustified escalation of the use of force when this is not justified by the threat.<sup>10</sup>
5. Operational procedures, and related training, should be the subject of periodic review. This may include reviews that take place after particular incidents (notably where the police response has clearly been unsatisfactory).

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<sup>9</sup> Police Executive Research Forum, Guiding Principles on Use of Force, 2016, 9 (PERF).

<sup>10</sup> PERF 19-20: See also the alternative decision making model suggested on page 79-87.



6. Training should also address the obligations and reporting procedures after incidents of the use of force where there has been serious injury or death. This includes calling for medical assistance and provision of first aid.

## Reporting and investigation

The current provisions regarding reporting of the use of force include that:

- a) In terms of Standing Order 251 any SAPS member who discharges a firearm must report this to his/her immediate commander and a member of officer rank must immediately be notified if not already present at the scene;
- b) In terms of the Independent Police Investigative Directorate Act, IPID must also be notified in the event of any matter falling under Section 28(1)(a) - (f). This includes, inter alia, death in custody, deaths as a result of police action, complaints relating to the discharge of a firearm, allegations of rape in custody and/or by a police officer, and any complaint of torture or assault against a police member.
- c) Crowd management and other incidents to which Public Order Police units respond are also recorded on the Incident Reporting Information System (IRIS). Entries on the IRIS system should include information on any weapons that are used by SAPS members.

In compliance with this policy:

1. In addition to discharges of a firearm, SO 251 should be updated to provide for mandatory reporting and investigation by an officer of all incidents where use of force results in the hospitalisation of a person or involves the use of electroshock weapons (Tasers).
2. Any other use of force must be reported verbally to a member's immediate commander.

The IPID should also strengthen its reporting mechanisms, and investigation of use of force incidents by police officials, in order to support assessment of the effectiveness of this policy.

## Disciplinary processes

Any disciplinary process must follow principles of fair process and take place within a reasonable time-period.

## Review and monitoring

Systems of review and monitoring should assist the SAPS in complying with this policy by ensuring that SAPS members are suitably equipped and trained, and have the competency to exercise judgement and apply strategic and tactical knowledge appropriately. They should support the SAPS in a process of on on-going learning to improve police responses to situations where the use of force is or may be required.

Administrative review should involve:

1. Approaches to investigating use of force incidents should be expanded to support evaluation of police responses to incidents in terms of this policy. This may occur where the preliminary investigation of an incident indicates that the incident did not involve criminal (deliberate unlawful or criminally negligent) conduct by a police member. This may also be initiated by a commanding officer if for other reasons he/she believes the incident justifies more in depth evaluation or that information about the police response to the incident should be shared. In such a case investigations may assess responses to incidents from the point of view of key principles highlighted in this policy (police effectiveness and safety, protection of life, de-escalation and minimising unnecessary use of force). This may involve assisting individuals members to learn from an incident that they have been involved in in order to improve their responses to possible future incidents. It may also involve publicising any examples of effective responses to a situation including situations of potential use of force where tactics were used that enabled police to de-escalate or defuse a situation. Priority should be given to this type of evaluation in units and stations where use of force is more common. Writing of accounts of successful responses to incidents, for the attention of police management and for circulation to other members, should be encouraged.

2. An Excellence Award should be established and awarded each year to a commander or unit that has excelled by using review or other measures to promote professionalization of the use of force in terms of this policy.
3. The SAPS should take steps to improve information and understanding about the use of force including:
  - a. Current systems for recording the killings of SAPS members do not adequately support efforts to understand the risk factors. Systems for recording these deaths should be strengthened in order to improve understanding about the circumstances in which they are occurring so as to better address the risk factors for these deaths. (Systems for recording deaths of SAPS members should also collect data on vehicle accidents as these are also a major contributor to non-natural deaths).
  - b. Reports on the discharge of firearms, on hospitalisation resulting from the use of force, and on the use of electroshock weapons must be collated and centrally monitored to enable police management to track incidents and the prevalence of these uses of force within the SAPS.
  - c. Monitor civil claims that have been lodged against the SAPS in order to identify possible problems relating to the use of force by SAPS members.
  - d. A national review mechanism comprised of a range of expertise including highly experienced police and IPID officials should be established to review current policy and practice on the use of force and formally recommend improvements to the Minister of Police and the National Commissioner of the SAPS.
  - e. The SAPS should publish an annual report on the use of force by SAPS members in which it assesses use of force against this policy. This should include information on the use of force by SAPS members as well as progress on the review and alignment of current processes and mechanisms including national instructions, standing orders, directives, operational procedures and protocols and training, with requirements of this Policy.

4. This policy will further enable effective monitoring and evaluation by oversight bodies of levels of compliance with this policy and directives herein which require implementation by police management.
  - a. The Civilian Secretariat for Police Service must monitor the implementation of this Policy.

### **Formal basis of the policy**

Section 206 of the Constitution of the Republic of South Africa sets out the responsibilities of the Minister of police which include determination of national policing policy.<sup>11</sup> The policy is also issued in line with Section 24(1)(a) of the South African Police Services Act, 68 of 1995. This empowers the Minister to make regulations regarding

*the exercising of policing powers and the performance by members of their duties and functions;*"

In addition, in terms of Section 64L the National Commissioner may determine national standards of policing for municipal police services. This policy may therefore also provide the basis for a national standard on professional use of force for municipal police services. This will contribute to ensuring consistency in standards between the SAPS and municipal police departments.

### **Mandate of the Civilian Secretariat for Police**

This policy is developed in terms of sections 5 and 6 of the Civilian Secretariat for Police Service Act No 2, 2011 (the Act). The Civilian Secretariat for Police derives its mandate

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<sup>11</sup> Constitution, s206 (1) "A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives."

from Section 208 of the Constitution of the Republic of South Africa.<sup>12</sup> Section 5 of the Act sets out the objectives, powers and functions of the Civilian Secretariat for Police which include providing strategic advice to the Minister of Police in respect of developing and implementing policies.<sup>13</sup>

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**MR. FA MBALULA, MP**

**MINISTER OF POLICE**

Date:

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<sup>12</sup> Constitution, s208: "A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing."

<sup>13</sup> s5(b) of the Civilian Secretariat for Police Act

## Annex A: Use of force by members of the SAPS - Legal standards and professional guidelines

### Definitions

**Arrestor** means: in this policy arrestor means an SAPS member authorised to arrest or to assist in arresting a suspect.<sup>14</sup>

**Firearm** means: firearm as defined by the Firearms Control Act (Act No. 60 of 2000) as amended.

**Force:** 'force' means any form of force which is applied to the body of a suspect and which is not of a trivial nature'.<sup>15</sup>

**Force that is of a trivial nature:** any force that does not cause pain, and is not reasonably likely to cause pain.<sup>16</sup>

**Imminent threat:** a violent crime is in progress or there is an immediate threat of attack or other violence and where lesser preventive or protective measures cannot be employed to prevent it.

**Less-lethal force:** any force that is not lethal force including the use of tactics or equipment that, if used appropriately, are not likely to result in serious injury or loss of life.

**Lethal force** (also referred to as "deadly force"):

1. The use of a firearm to shoot at a suspect (irrespective of which part of the suspect was aimed at); and
2. Any other use of a weapon, object, equipment or severe physical force, in a manner, which is reasonably likely to cause death or serious injury.<sup>17</sup>

<sup>14</sup> Criminal Procedure Act, 51 of 1977 as amended (CPA), s49(1)(a)

<sup>15</sup> National Instruction 1 of 2016 The Use of Force in Effecting an Arrest: pg. 1

<sup>16</sup> Seattle Police Department Manual (SPD Manual), 8.050 Use of force definitions,

<sup>17</sup> CPA, s49(1)(c) defines 'deadly force' as 'force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm'. National Instruction 1 of 2016 (The Use of Force in Effecting an Arrest) defines "lethal force" as 'any force which is likely to result in death of a suspect and includes the use of a firearm to shoot at a suspect (irrespective of which part of the suspect was aimed at); (also referred to as "deadly force")', p 2.

**Serious physical injury:** any injury that results in hospitalization and that creates a substantial risk of death, serious disfigurement, disability or serious loss or impairment of the functioning of any body part or organ or involves serious concussive impact to the head.

**Suspect** means: any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence.<sup>18</sup>

## Application

1. These standards and guidelines apply to all members of the South African Police Service.
2. Members of the South African Police Service are obliged to adhere to and uphold the law. Evidence of deliberate criminal conduct or recklessness or negligence in relation to the use of force should lead to criminal and disciplinary investigations against them. Use of force indicating potential criminal conduct by a police member includes but is not limited to all strikes, blows, kicks or other similar uses of force against a restrained subject who offers no resistance and any other force which is clearly unreasonable, unnecessary or disproportionate. Police officials may not use the fact that they have received an orders to use force as a defence if the order was manifestly unlawful and they had a reasonable opportunity to refuse to follow such an order.
3. Situations in which police officers use force are often stressful and dangerous. It is accepted by judges and others that assessment of the use of force by a police officer needs to be grounded in a recognition of the difficult circumstances in which decisions about the use of force are often made. The law does not take a punitive attitude to those who try to the best of their ability to act reasonably in accordance with the law.

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<sup>18</sup> CPA, s49(1)(b)

4. In addition to providing legal standards, this document also contains professional guidelines. These are based on and fall within the standards and principles embodied in the law. These are intended to support SAPS members in adhering to the law and upholding standards of professionalism in their work.
5. As a preliminary measure the SAPS should operationalise this policy including integrating it into training, educating SAPS members about it, and encouraging discussion and reflection on it. When this process is complete, which should be within less than two years, unreasonable failure of any police official to comply with provisions of this policy that are not already criminal offences, shall be a disciplinary offence.

### General principles governing the Use of Force

6. The use of force is only permissible when it complies with law. This requires that it complies with principles of reasonableness, necessity and proportionality. The three principles are all relevant to assessing whether the use of force is lawful and must be considered as a three-part test and not as isolated requirements.
7. The **reasonableness** of the use of force is assessed on the basis of facts and circumstances of each case in relation to the totality of circumstances applying at the time, particularly whether force is necessary and proportionate.<sup>19</sup> Key factors are therefore whether the situation is one that required police intervention, the presence of weapons, the seriousness of the crime, the threat or resistance to which the police officer is responding, and whether reasonable alternatives are open to the police officer. Factors such as the number of police personnel present, the types of weapons or other equipment available to them, the age, size, and

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<sup>19</sup> UN Code of Conduct for Law Enforcement Officials adopted by General Assembly resolution 34/169 of 17 December 1979 (UN Code of Conduct), Article 3: "may use force only when strictly necessary and to the extent required." Commentary on provision emphasizes that the use of force should be exceptional, force must be reasonable necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of suspects/ offenders "no force going beyond that may be used".



relative strength of the police officer and the suspect, and others, may be relevant, depending on the situation.<sup>20</sup>

8. **Necessity**<sup>21</sup> is the principle that if force is to be used there must be legally justified grounds for doing so and that the use of force may only be used in pursuit of a legitimate objective.<sup>22</sup> This includes the requirements that the use of force is not justified where reasonable alternatives that do not involve the use of force remain available to the police officer. Necessity implies that:

- a. Where it is safe and reasonably possible police will apply non-violent means first before using force or firearms.<sup>23</sup>
- b. Where it is safe and reasonably possible to do so, they should attempt to de-escalate the situation (see further below under lethal force).
- c. They may use force and firearms only if other means remain ineffective, or if they are unlikely to achieve the intended result.

9. **Proportionality** is the principle that the level of force used must be related to the risk or threat and must be necessary to achieve the legitimate lawful purpose.<sup>24</sup> This requires a reasonable assessment of the threat/ or risk and the required force necessary to overcome the resistance to achieve the lawful objective. The amount of force used must not exceed what is required to overcome the resistance.

- a. Proportionality is assessed on various grounds depending on the specific

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<sup>20</sup> See for instance Los Angeles Police Department, Use of Force 2015 Year-End Review, Executive Summary, 27 for a list of factors that may be relevant in assessing the reasonableness of use of force.

<sup>21</sup> Note that as expressed here the term necessity is understood to mean 'force is necessary' due to the absence of other alternatives. The term 'necessary force' is also sometimes used, as in 'the force necessary to overcome the resistance'. When used in this way the term is referring to the concept of proportionality which is discussed in the following paragraph.

<sup>22</sup> Heyns, 10; UN Code of Conduct, Article 3: UN Code of Conduct, Article 3: Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. Commentary on provision states that: 'the use of force by law enforcement officials should be exceptional; ... law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.'; UN Basic Principles, Article 4: Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

<sup>23</sup> East African Community Standard Operating Procedure on Use of Force (EAC SOP) A. Rule Regarding use of force (4), this reinforces principle of necessity that use of force must be last resort.

<sup>24</sup> UN Code of Conduct, Article 3, Commentary: 'the use of force by law enforcement officials should be exceptional; ... law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.' UN Basic Principles, Article 5(a): Force must be 'in proportion to the seriousness of the offence and the legitimate objective to be achieved'.

facts of the situation but primarily on the type of force or resistance that police are confronted with and have to overcome, including the type of weapons, if any, held by the suspect.

- b. Members of the SAPS must rely on their training, experience, and reasonable assessment of the situation to decide on the level of force to be applied.<sup>25</sup> The force should be sufficient to overcome the threat or resistance, but not more than this and should not continue after the purpose is achieved.<sup>26</sup>
- c. When applying force, the amount of force required, including number of members applying force, should continually be assessed, and reduced as reasonable.<sup>27</sup>

10. If force is used proportionally then it will conform to the requirement of the SAPS Act that police officials may only use the minimum force, which is reasonable in the circumstances.<sup>28</sup> Police officials who use force in terms of the principles of necessity and proportionality will uphold the principle that they should exercise restraint when using force.<sup>29</sup>

### Identification and Communication

11. In every situation where reasonably possible an SAPS member must identify himself/herself as a police official. A police official in uniform shall, at all times, wear a nametag or identifiable service number in a clearly visible part of the uniform.

### Use of force during entry and search

12. Use of force during entry and search shall comply with the provisions of this policy

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<sup>25</sup> SPD Manual, 8.200, Using force..

<sup>26</sup> SPD Manual, 8.200, Using force, 'Proportional force does not require officers to use the same type or amount of force as the opponent. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be proportional, objectively reasonable, and necessary to counter it.'

<sup>27</sup> SPD Manual, 8.200 Using force: Officers Should Assess and Modulate the Use-Of-Force as Resistance Changes For example, as resistance decreases, the use of force may decrease if this is safe; Portland Police Bureau 1010.00 Use of force (PPB Use of force) 2.1.2: When applying force, continually assess the amount of force required, including the number of officers required to control a subject, and de-escalate as reasonable.

<sup>28</sup> South African Police Service Act (SAPS Act), s13 (3)(b): Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances."

<sup>29</sup> UN Basic Principles, 5(a)

and is subject to requirements of reasonableness, necessity and proportionality. Police may only use force that is reasonably necessary to overcome resistance to search or entry of premises. The police may only dispense with requirement to audibly demand admission and notify the purpose of which he/she seeks to enter if the police official, based on reasonable grounds, is of the opinion that articles that are the subject of the search, may be destroyed or disposed of, if this provision is complied with, or, if by doing so this will undermine the operation or place the police officials or other persons at risk.<sup>30</sup>

### Overcoming resistance from and restraining people

13. When overcoming resistance from a person or restraining him or her, a police official must make every effort (when reasonably possible) to avoid tactics, which may result in serious injury:

- a. Police officials should not use techniques that may restrict or inhibit breathing (e.g. body weight restraint techniques on upper body); or targeting parts of the body that are reasonable likely to cause lethal injuries (e.g. blows to the head) except when an imminent threat of death or serious injury exists, and no other option is feasible or available due to the circumstance of that particular incident.
- b. Use of batons and other equipment directed at the head, neck, spine, groin or centre of the chest (sternum) of an unarmed person unless immediately necessary to protect the police official or another person against death or serious injury.

### Restraining persons who are under police control (in police custody)

14. Members should not use force against individuals who are restrained or otherwise controlled, unless they pose a risk of injury to themselves, police officials or others, and which cannot be contained using less extreme measures.

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<sup>30</sup> Criminal Procedure Act, 51 of 1977, as amended (CPA), s 27

15. Members should not transport people in a face down position within any vehicle. The police official must position the individual in a manner to allow free breathing, once he or she has been controlled and placed under custodial restraint using handcuffs and other authorized methods.

#### Other general provisions

16. The use of force during arrest is subject to requirements of reasonableness, necessity and proportionality.<sup>31</sup>
- a. Members should not use weapons, other than where necessary handcuffs or approved physical restraints, against suspects who passively resist.
  - b. Where possible, suspects who passively resist arrest should be carried to transportation (by two or more police officials).
17. Force must not be used when questioning a person.

#### Lethal force

##### Protect life principle

18. In carrying out their duties members of the South African Police Service must recognise and respects the value of human life. This means that SAPS members may only use lethal force in order to protect themselves and other persons against a person posing a threat of death or serious bodily harm, when there are no other reasonable alternatives. This includes an imminent threat of death or serious bodily harm (paragraph 19 below) and in terms of Section 49(2)(b) of the Criminal Procedure Act as provided for in this policy (paragraph 23 below).
19. In addition SAPS members will not discharge firearms when, in their professional judgment, doing so will unnecessarily endanger the lives of innocent persons.

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<sup>31</sup> EAC SOP Use of Force 9

## Imminent threat of death or serious bodily harm

20. Use of lethal force against an imminent threat of death or serious injury will include the use of lethal force

- a. In self-defence or defence of other persons against imminent threat of death or serious injury; or
- b. For prevention of the perpetration of a particularly serious crime involving grave threat to life.<sup>32</sup>
- c. Where reasonably possible SAPS members will try to minimise the danger of harm to victims and bystanders when using firearms in these circumstances.

21. The goal of using lethal force is to stop the imminent threat and not to kill.

- a. No further shots should be fired if the person surrenders, or is unable to continue as a result of having been injured.
- b. Where there is an imminent threat, a police officer who can stop the threat by shooting the limbs (legs or arms) of the suspect, or in another way aimed at minimizing the chance of causing death, must do so.<sup>33</sup> However SAPS members who are using a firearm should not aim for the limbs of a suspect if they are not sure of hitting this target, or if this will not stop the threat. For example a leg wound may not stop a person from continuing to shoot at or attack them. In addition a police member dealing with an imminent threat may have difficulty shooting a person's limb because of stress and the difficulty of firing a pistol with a very high level of precision. Unless they are sure of being able to stop the threat by other means a police member should shoot at the part of the body that they are most likely to be able to hit. This is usually the torso.<sup>34</sup>

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<sup>32</sup> UN Basic Principles, Article 9.

<sup>33</sup> EAC SOP, 7.2: Where reasonably possible, firearms should be used in such a manner to reduce the chance of causing death.

<sup>34</sup> New York Police Department, 2015 Annual Firearms Discharge Report, 59: The human body's center mass is the largest area available as a point of aim. The torso represents approximately one third of a human's surface area, compared to nine percent for an arm or 18 percent for a leg. The torso is also the most stationary portion of the body; extremities are much smaller and less static and therefore are a far less certain target. Additionally, shooting a subject in an extremity is far less likely to stop him or her than a shot to center mass. A leg wound, for example, does little to prevent a subject from continuing to use a knife or gun. In cases in which a subject uses cover and presents only a portion of his or her body, officers are trained to use the geometric center of the exposed portion as a target.

- c. The intentional lethal use of a firearm is only permitted if it is the only way of stopping a threat to life (is strictly necessary to protect life).<sup>35</sup>
- d. Where lethal force is used the reasonableness of a police officer's actions will be investigated<sup>36</sup> and members must account for decisions made and actions taken in this regard.

### Use of lethal force for the arrest of a fleeing person (Section 49(2)(b) of the Criminal Procedure Act)

22. In terms of this policy lethal force may only be used to protect police members and others against threats to life or threats of serious bodily injury. This is consistent with the police obligation to uphold the Constitutional principle that 'everyone has the right to be free from all forms of violence from either public or private sources.'<sup>37</sup> The state therefore has a duty not only to refrain from unjustified force but also to protect members of the public against violence. The principle Constitutional Court judgment<sup>38</sup> on the use of lethal force by police also indicates that justification for the use of lethal force for arrest is for the protection of society against persons who are likely to inflict serious harm, where there are no other means of apprehending them.<sup>39</sup>

23. In terms of this policy use of lethal force under section 49(2)(b) should be interpreted to mean that the arrestor has reasonable grounds to believe that:

- a. The suspect has committed a crime involving the infliction or threatened infliction of serious physical injury; and

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<sup>35</sup> UN Basic Principles, 9: Intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life. 'This standard governs situations where it is the deliberate intention of law enforcement to cause death. Examples would occur if police shot dead a suicide bomber who was on the point of detonating a bomb in a busy railway station, or killed a hostage-taker who was preparing to kill one or more hostages.' Geneva Academy of International Humanitarian Law and Human Rights, Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council, November 2016, 14.

<sup>36</sup> Case law as cited Marikana Commission Report, 34-35.

<sup>37</sup> Constitution, s12(1)(c)

<sup>38</sup> S v Walters, 2002 (4) SA 613 (CC).

<sup>39</sup> S v Walters, 2002 (4) SA 613 (CC) para 38. UN Basic Principles, 9. Justified circumstances for the use of firearms include to prevent the escape of a person presenting a danger involving grave threat to life and resisting police authority only when less extreme means are insufficient to achieve these objectives.

- b. There are no other reasonable means of effecting the arrest, whether at that time or later; and
- c. The use of deadly force will not endanger the lives of innocent people; and
- d. The suspect is likely to inflict death or serious bodily harm in the future if not apprehended. A suspect may be regarded as likely to inflict death or serious bodily harm in the future if the suspect is reasonably believed to have committed:
  - i. Multiple acts of this kind; or
  - ii. Rape or attempted rape involving the infliction or threatened infliction of injury with a weapon; or
  - iii. Robbery with a weapon capable of inflicting serious physical injury; or
  - iv. On other reasonable grounds.
- e. Even if the circumstances are otherwise consistent with this provision members may not use lethal force to prevent the escape of a child.<sup>40</sup>

24. The provisions of paragraph 19 above with respect to the goal of the use of lethal force also apply to use of force in terms of section 49(2)(b) subject to the qualification that the purpose is to stop the suspect from escaping rather than to stop an imminent threat.

### Reducing the risk of error

25. Even though the risk of error can be reduced by effective training and other measures to ensure professionalism in the use of force, it cannot be eliminated. The risk of error when police use lethal force is of special concern as it may result in the loss of life or other severe and irreversible consequences for the person affected, including permanent paralysis or other disability.

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<sup>40</sup> UN Code of Conduct, Article 3, Commentary: Every effort should be made to exclude the use of firearms, especially against children; Treatment of Children, National Instruction on children in conflict with the law (issued in terms of the Child Justice Act, 2008) National Instruction 2 of 2010, 32 September 2010 No 759, (1)(a).

26. Error may take a number of different forms:

- a. Police may mistakenly believe they are under attack when they are not under attack. (Where this is an honest mistake this may lead to a finding of 'putative self-defence');<sup>41</sup> Where reasonably possible tactics, such as the use of cover, should be used to provide a police member enough time to assess the situation clearly in order to avoid shooting where this is not justified.
- b. A shot that is fired may miss the target and hit another person ('bystander'): In terms of this policy, members who are using lethal force under section 49(2)(b), must not use lethal force if this is likely to endanger bystanders.<sup>42</sup>
- c. A police officer using lethal force under section 49(2)(b) may shoot at a person who has not in fact committed the crime that the police officer believes he or she has committed: In terms of this policy, members must only use lethal force in terms of s49(2)(b) if the belief is based on direct personal knowledge or other very firm and clearly justified reasonable grounds.

## De-escalation

27. In terms of the principle of necessity (see paragraph 8 above) SAPS members must, where it is reasonably possible, apply non-violent methods first before using force or firearms and attempt to de-escalate the situations.<sup>43</sup> This requirement applies to all uses of force but is to be given special priority when there is the potential that lethal force may be used.

28. De-escalation tactics and techniques are proactive actions and approaches used by officers, when feasible, to gain voluntary compliance and reduce or eliminate the need to use force. When safe and feasible to do so, and before using force

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<sup>41</sup> Marikana Commission Report, 38-39.

<sup>42</sup> As provided in 18(c) members using lethal force against an imminent threat to life or of serious bodily harm should also try to minimise the danger of harm to victims and bystanders when this is reasonably possible when using firearms in these circumstances.

<sup>43</sup> EAC SOP A. Rule Regarding use of force (4) reinforces principle of necessity that use of force must be last resort.



and/or to reduce the need for force, officers shall attempt to slow down the situation so that more time, options and resources are available for the incident to be resolved.<sup>44</sup>

29. The requirement that de-escalation be attempted is subject to considerations of feasibility and safety. There may be more scope for de-escalation if the suspect does not have a firearm in his or her possession and/or the threat is not imminent.<sup>45</sup>

30. De-escalation strategies include avoiding unnecessary actions that may escalate the situation, such as approaching the person too quickly and closely unless justified by the circumstances,<sup>46</sup> and may also include:

- a. Where feasible evaluating the persons motivations and whether the suspects failure to comply with instructions is deliberate resistance or may be attributed to mental illness, the influence of alcohol or drugs, hearing impairment or other factors.
- b. Taking steps to address difficulties communicating with the suspect, possibly related to language or other factors.
- c. Proactive use of distance, cover, concealment, and time.
- d. Hearing, listening and strategic communication or voice commands.
- e. Increasing the number of members present to increase strategic options available for bringing the suspect under control.<sup>47</sup>

### Planning of operations to minimise the potential that lethal force will be used

31. Where a police operation is initiated on the basis of advance planning, the commanders and planners of the operation must, where possible, plan and

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<sup>44</sup> Cleveland Division of Police, De-escalation, Proposed policy. See also SPD Manual, 8.100 De-escalation.

<sup>45</sup> PERF, 7-8.

<sup>46</sup> PPB Use of force, 6.2.1: Members should recognize that their approach to confrontations may influence whether force becomes necessary and the extent to which force must be used. 6.2.2: Members must not precipitate a use of force by placing themselves or others in jeopardy through actions that are inconsistent with the Police Bureau's defensive tactics and tactical training without a substantial justification for variation from recommended practices.

<sup>47</sup> Cleveland Division of Police, De-escalation, Proposed policy.

command the operations in such a way as carry out the operation effectively whilst minimising the risk that lethal force will be used.<sup>48</sup>

### Responding to shots fired from an unidentified source

32. Police should not return fire against other gunfire if they cannot identify the source of gunfire and are not able to aim their fire at the person shooting at them. In such circumstances the member should prioritise the use of cover, observation and obtaining support from other members, in order to identify the source of the gunfire and address the situation.

### Verbal warnings should be issued prior to use of firearms

33. Where reasonably possible a police official intending to use a firearm must identify him/herself and give a clear verbal warning of the intention to use a firearm, with sufficient time for the warning to be observed unless doing so would place the police official at risk of death or serious injury.<sup>49</sup>

### Warning shots

34. Generally warning shots should not be fired. By their nature warning shots are not aimed at a clearly defined target and may pose a danger to innocent persons. In addition the suspect, other police members and people in the vicinity, may not understand that the shots are warning shots. They may misinterpret the source of or reasons for gunfire. This may create confusion leading to an escalation of the situation.<sup>50</sup>

35. In exceptional circumstances warning shots may be fired subject to the requirements that:

- a. They do not pose a risk to other police officers or persons; and
- b. They are likely to assist in defusing the situation by discouraging an attack.

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<sup>48</sup> Marikana Commission Report, 34-41, 521.

<sup>49</sup> EAC SOP, 7.4.

<sup>50</sup> See International Association of Chiefs of Police (IACP), Use of Force, Concepts and Issues Paper, 6.

## Shooting at a moving vehicle

36. Firearms should not be used to stop a moving vehicle, either by shooting at the driver or the wheels of the vehicle, other than in exceptional circumstances.
- a. Shots that are fired at a vehicle may expose pedestrians or people in adjacent vehicles to danger. Shooting at the driver or shooting at the tyres of a vehicle may result in the driver losing control of the vehicle increasing the danger that it presents.<sup>51</sup> This may include danger to other vehicles, civilian pedestrians, or police.
  - b. The fact that there is a suspect in a vehicle also does not justify exposing other unidentified people who are in the vehicle to danger.
  - c. Shots that are fired at a vehicle are often ineffective.
37. Police officials should not place themselves in situations where a vehicle could be used against them i.e. approaching vehicle from front or back.
38. If they are faced with danger from a moving vehicle SAPS members should move out of the way and take cover rather than shooting at the vehicle.<sup>52</sup>
39. The use of a firearm to shoot at a vehicle or a suspect in a vehicle may be justified in exceptional circumstances where there are no other alternatives to counter an imminent threat of death or serious physical injury to the officer or another person, by a suspect in the vehicle using:
- a. The vehicle (the suspect is driving straight at a member or other person and the member or person is unable to move out of the way of the vehicle); or
  - b. Other means (someone in the vehicle is shooting at the member or other person and there is no other way to protect him or her).

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<sup>51</sup> Maphoto v Minister of Safety and Security (269/14) [2017] ZAGPPHC 103 (29 March 2017), <http://www.saflii.org/za/cases/ZAGPPHC/2017/103.html>

<sup>52</sup> Police Assessment Resource Centre, 'The Portland Police Bureau: Officer-involved shootings and in-custody deaths', 2003,191-192: Gunfire is generally ineffective as a means of bringing a vehicle to a halt. Whether shots are fired with the intention of disabling a vehicle itself, or of incapacitating the driver, the most likely outcome of such a shooting is that a vehicle will continue moving for some distance before stopping. And once shots have been fired, a vehicle is unlikely to be under control and may injure or kill people before coming to a halt. In circumstances where a vehicle is being driven at officers in order to cause them harm, the ideal response by the officers is to move out of the vehicle's path if at all possible.

- c. Where reasonably possible a member in such circumstances should take into account risks to innocent persons (other people in the vehicle, in other vehicles and pedestrians) and police members. This risk may be from his/her own use of a firearm as well as from the fact that the driver is injured or killed or otherwise loses control of the vehicle.<sup>53</sup>

### Shooting from a moving vehicle

40. In terms of this policy SAPS members are also discouraged from shooting from moving vehicles. Shooting from a moving vehicle enhances the difficulty of shooting with a reasonable degree of accuracy and may increase the risk of harm to pedestrians or people in other vehicles.

41. Members shall not discharge a firearm from a moving vehicle except in the immediate defence from the threat of death or serious physical injury to the officer or another person where no other means exists at the time to stop the threat.<sup>54</sup>

### Armed intervention in response to a crime in progress when off duty

42. SAPS members who are off duty and encounter a crime that is in progress are required to intervene to prevent the crime and carry out arrests where reasonably possible. However caution should be exercised in relation to the following:

- a. Members may be more vulnerable than when they are on duty, due to the fact that they are unarmed, are not wearing bullet proof vests, do not have back-up from other colleagues and are also not in radio communication with them.<sup>55</sup>
- b. Intervention by an off-duty member may also add to confusion about the situation. This includes the possibility that they may be mistakenly identified as one of the perpetrators of a crime in progress.

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<sup>53</sup> Based on PPB Use of force, 4.2

<sup>54</sup> EAC SOP Use of Firearms SOP 8; Also see PPB Use of force, 4.3.

<sup>55</sup> SAPS, 2009, 92.

43. Police officers who encounter crimes in progress when off duty should base their response on what is reasonable and only intervene if they have reasonable grounds for believing that they will be able to do so effectively.

- a. This assessment should include factors like the officer's personal safety and the safety of his or her family and other bystanders, the presence of cover or concealment, the officer's proficiency with his or her weapon, the danger to others from stray rounds, the number of suspects, the officer's ability to detain the suspect and control the situation, and the availability of support equipment, such as extra ammunition, handcuffs and radio'.<sup>56</sup> If there is or may be more than one suspect and/or the crime involves the use of weapons, it may not be reasonable for the member to intervene.
- b. If the member does not believe that he or she will be able to intervene successfully the members priority should be on observing the situation and calling for assistance from on-duty police.

### Obligations of police officials after use of force

44. As soon as reasonable possible after use of force, the police official must:

- a. Call for medical assistance and render first aid to any injured person as required by standing orders and national instructions.<sup>57</sup>
- b. Notify supervisors and comply with legislation, regulations or national Instructions regarding reporting of the use of force. If the member is injured and unable to submit a report, the reports regarding the use of force will be completed by an on-duty supervisor.<sup>58</sup>
- c. If a person is seriously injured, contact that person's preferred person or next of kin.

<sup>56</sup> Police Assessment Resource Centre, The Los Angeles County Sheriff's Department – 7th Semiannual report, 1997, 66.

<sup>57</sup> The provision of medical assistance in general is currently regulated by Standing Order 349 (General): Medical Treatment and Hospitalization of a Person in Custody. Section 12(2)(a)(avi)(aa) of the policy on Crime Scene Management (Policy 2 of 2005, page 9) also states that the first member upon arrival at the scene, must, with due consideration of the integrity of physical evidence, "assist the injured within the limitations of his or her training as a matter of priority". It is possible that standing orders in this regard may be further amended in line with the Marikana Commission recommendation that 'There should be a clear protocol which states that SAPS members with first aid training who are on the scene of an incident where first aid is required, should administer first aid.' (Marikana Commission Report, 553). See also par 10(1) of NI 1 of 2016.

<sup>58</sup> PPB Use of force: 9.5.2.

## Annex B: Legal Basis for Use of Force

The legal basis for the use of force by police officials is informed by international law and governed by domestic law. At an operational level, this framework is further articulated in police standing orders, instructions and operating procedures. The Courts, in particular the Constitutional Court, have also clarified the legal requirements for the use of force by law enforcement officers in a series of judgements. The legal framework set out below, underpins this policy.

### International/ Regional Instruments

There are a several instruments at an international, continental and regional level relevant to police work, and the use of police force, in particular. These inform South Africa's obligations under international law. In addition to the above, international, continental and regional bodies have issued guidelines and commentary, which provide further direction on the legitimate use of force by state agents. Key provisions of this body of law, and related commentary, include that international instruments oblige states to take steps to introduce legislative and other measures to adopt laws and other measures necessary to give effect to human rights.<sup>59</sup> Furthermore, international instruments prohibit the "arbitrary" deprivation of life.<sup>60</sup> The latter requires that limitations on the right to life must not be arbitrary but exceptional and meet certain standards.<sup>61</sup> The onus being on those who take life (in this case the State) to show it was done so within the confines of these limits.<sup>62</sup> The use of lethal force must be lawful/ justified in law, this requirement is not met if lethal force is without authority in domestic law, or if domestic law does not comply with international standards.<sup>63</sup>

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<sup>59</sup> ICCPR Article 2; ACHPR Article 1

<sup>60</sup> ICCPR Article 6; ACHPR Article 4; UDHR, Article 29 (2) requires limitations be determined by law

<sup>61</sup> Heyns C, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Human Rights Council 25 Session, A/HRC/26/36, 10.

<sup>62</sup> Ibid.

<sup>63</sup> Human Rights Committee General Comment NO. 6 (1982), para 3 cited in Heyns p. 10

## Universal Declaration of Human Rights<sup>64</sup>

The Universal Declaration of Human Rights establishes human rights as:

*“a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secured their universal and effective recognition and observance...”*<sup>65</sup>

The Declaration recognises the fundamental human right to life:

*“Everyone has the right to life, liberty and security of the person”*<sup>66</sup>

And further prohibits the use of torture:

*“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.*<sup>67</sup>

## International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR)<sup>68</sup> reaffirms the rights enshrined in the Declaration on Human Rights It stipulates that the right to life must be protected by law and prohibits the arbitrary deprivation of life.<sup>69</sup>

## The Convention Against Torture (UNCAT)

The United Nations Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (UNCAT)<sup>70</sup> requires each state to take steps legislative, administrative and judicial measures to prevent acts of torture.<sup>71</sup>

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<sup>64</sup> Adopted by the United Nations General Assembly on 10 December 1948.

<sup>65</sup> UDHR, Preamble.

<sup>66</sup> UDHR, Article 3.

<sup>67</sup> UDHR, Article 5.

<sup>68</sup> Adopted and opened for signature, ratification and accession by General Assembly, 16 December 1966 (South Africa signed 3/10/1994, ratified 10/12/1998)

<sup>69</sup> ICCPR, Article 6(1)

<sup>70</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution of 10 December 1984 (South Africa signed 29/01/1993, ratified 10/12/1998).

<sup>71</sup> UNCAT, Article 2 (1).

## African Charter on Human and Peoples Rights

The African Charter on Human and Peoples Rights (ACHPR)<sup>72</sup> affirms the right to life, the prohibition of torture.<sup>73</sup>

The Charter requires member states of the African Union to undertake and adopt legislative and other measures to give effect to the rights, duties and freedoms enshrined in the Charter.<sup>74</sup>

## Other international and regional instruments relevant to policing

### UN Code of Conduct for Law Enforcement Officials (1979)<sup>75</sup>

The UN Code of Conduct for Law Enforcement Officials applies to *“all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest and detention”* including other state security forces which exercise police powers.<sup>76</sup>

The Code requires that law enforcement officials shall:

- a. Respect and protect human dignity and maintain and uphold human rights.<sup>77</sup>

Human Rights referred to are those protected in national and international Law including UDHR, ICCPR, Declaration on Protection of All Person from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>78</sup> The Code requires that national commentaries indicate regional or national provisions identifying and protecting these rights.<sup>79</sup>

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<sup>72</sup> Entered into force 21 October 1986 (South Africa signed and ratified 09/07/1996)

<sup>73</sup> ACHPR, Article 4.

<sup>74</sup> ACHPR, Article 1.

<sup>75</sup> Adopted by General Assembly resolution 34/169 of 17 December 1979.

<sup>76</sup> Code of Conduct for Law Enforcement Officials adopted by General Assembly resolution 34/169 of 17 December 1979, Commentary to Article 1 (UN Code of Conduct).

<sup>77</sup> UN Code of Conduct, Article 2.

<sup>78</sup> UN Code of Conduct, Article 2, Commentary.

<sup>79</sup> UN Code of Conduct, Article 2, Commentary.



- b. Only use force when strictly necessary and to the extent required for the performance of their duty.<sup>80</sup>

Use of force should be exceptional and used for circumstances provided in law for preventing crime or for effecting a lawful arrest, subject to national laws restricting use of force, in accordance with the principle of proportionality.<sup>81</sup>

- c. Firearms

Firearms should be considered, as an “extreme measure” and every effort should be made to exclude use of firearms, especially against children.

“In general, firearms should not be used except when a suspected offender offers armed resistance or jeopardizes lives of others and less extreme measures are insufficient to restrain or apprehend the suspect.”<sup>82</sup>

“In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.”

- d. Torture

*“No law enforcement official may inflict, instigate or 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 of national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or*

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<sup>80</sup> UN Code of Conduct, Article 3, Commentary.

<sup>81</sup> UN Code of Conduct, Article 4, Commentary.

<sup>82</sup> UN Code of Conduct, Article 5, Commentary.

*punishment.”*

The Code specifically includes law enforcement officers who are present when acts of torture occur i.e. “tolerate any act...”

e. Provision of medical treatment

Law enforcement officials shall secure medical attention for victims of violations of law. <sup>83</sup>

f. Obligations on law enforcement officers to report violations of the Code.

*“Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities, and where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.”<sup>84</sup>*

A law enforcement official, who reports violations of the Code or threat thereof, should not be subject to penalties.<sup>85</sup> The obligation on law enforcement officers to report violations of the Code extends to external/independent bodies if internal remedies are exhausted.<sup>86</sup>

### United Nations (UN) Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)<sup>87</sup>

The Principles have been formulated.

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<sup>83</sup> UN Code of Conduct, Article 6, Commentary

<sup>84</sup> UN Code of Conduct, Article 8, Commentary.

<sup>85</sup> UN Code of Conduct, Article 8, Commentary.

<sup>86</sup> UN Code of Conduct, Article 8, Commentary.

<sup>87</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. In accordance with the commentary to article 1 of the Code of Conduct for Law Enforcement Officials, the term “law enforcement officials” includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

*"to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials, should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public."*

The Principles set obligations on government, law enforcement agencies and principles for law enforcement officers.

- a. To develop rules governing use of force and firearms.<sup>88</sup>
  - Government and law enforcement agencies to develop rules governing the use of force.
  - Firearm rules and regulations on the use of firearms should include guidelines on:
    - Authorization of officials to carry firearms and ammunition; appropriate use of firearms and in a manner likely to decrease unnecessary harm;
    - Prohibition of use of firearms and ammunition that cause unwarranted injury or risk;
    - Control, storage and issuing of firearms;
    - Warnings to be given when firearms are to be discharged;
    - Systems of reporting whenever firearms are used in performance of their duty.<sup>89</sup>

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<sup>88</sup> UN Basic Principles 1: Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

<sup>89</sup> UN Basic Principles 11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:  
(a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;  
(b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;  
(c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;  
(d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;  
(e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;  
(f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

- b. To equip and train law enforcement agencies on appropriate use of force.
- To equip law enforcement agencies with necessary equipment and weapons for differentiated use of force including non-lethal incapacitating weapons.<sup>90</sup>
  - To train law enforcement officials on police ethics and human rights; alternatives to use of force and firearms; crowd control negotiation and mediation and technical means to limit use of force, and further to review training programmes and operational procedure in light of particular incidents.<sup>91</sup>
  - To make available stress counselling to law enforcement officials involved in incidents.<sup>92</sup>
  - To ensure proper screening procedures for law enforcement officials (appropriate moral, psychological and physical qualities) and continuous professional training, and continued fitness to be subject of periodic review.<sup>93</sup>
  - Provision of training to appropriate proficiency standards in use of force. Authorisation of firearms should be subject to completion of special training in their use.<sup>94</sup>
- c. To impose criminal sanctions for abuse of force.

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<sup>90</sup> UN Basic Principles 2: Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bulletproof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind. 3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

<sup>91</sup> UN Basic Principles 20: In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

<sup>92</sup> UN Basic Principles 21. Governments and law enforcement agencies shall make stress counseling available to law enforcement officials who are involved in situations where force and firearms are used.

<sup>93</sup> UN Basic Principles 18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

<sup>94</sup> UN Basic Principles 19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

- Obligations on governments to punish arbitrary or abusive use of force criminally<sup>95</sup>
  - That superior officers are held responsible *"if they know, or should have known"* that officers under their command resorted to unlawful use of force and firearms.<sup>96</sup>
  - That obedience to orders is no defence if law enforcement officials knew order was manifestly unlawful. Further, law enforcement officers who refuse to obey an unlawful order and who report such, should not be subjected to criminal or disciplinary sanction (in compliance with the Code of Conduct of Law Enforcement Officials).<sup>97</sup>
- d. Provide guidelines governing use of force by law enforcement officers.
- When using force to apply non-violent means as far as possible before resorting to use of force and firearms, and ONLY if other means remain ineffective.<sup>98</sup>
  - Where use of force or firearms are unavoidable to use restraint and act in proportion to the seriousness of the offence and legitimate objective;<sup>99</sup>
  - To minimise damage, injury and preserve human life.<sup>100</sup>
  - Firearms should only be used:
    - In self-defence or defence of others against imminent threat of death

<sup>95</sup> UN Basic Principles 7: Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law. 8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

<sup>96</sup> UN Basic Principles 24: Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

<sup>97</sup> UN Basic Principles 25: Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the UN Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials. 26. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders.

<sup>98</sup> UN Basic Principles 4: Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

<sup>99</sup> UN Basic Principles 5: Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

<sup>100</sup> UN Basic Principles 5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:... b ) Minimize damage and injury, and respect and preserve human life;

or serious injury,

- To prevent perpetration of a serious crime involving grave threat to life;
- To arrest a person presenting danger (life or serious injury) and resisting authority, or his or her escape, and only when less extreme means are insufficient;

- Intentional lethal use of firearms may only be used when strictly unavoidable in order to protect life (Principle 9).<sup>101</sup>
- When using a firearm law enforcement officer shall identify themselves and give a clear warning of intent to use firearms, with sufficient time of warning observed (unless to do so would unduly place law enforcement officials at risk or create risk of death or serious harm to others, or would be inappropriate or pointless in circumstances of incident).<sup>102</sup>

e. Provides Guidelines on policing unlawful assemblies

- In dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force, where not practicable, to restrict such force to minimum extent necessary.<sup>103</sup>
- In dispersal of violent assemblies, use of firearms only when less dangerous means are not practicable and only to minimum extent necessary. The uses of firearms are restricted to circumstances set out in Principle 9 (above).<sup>104</sup>

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<sup>101</sup> UN Basic Principles 9: Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

<sup>102</sup> UN Basic Principles 10: In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

<sup>103</sup> UN Basic Principles 13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

<sup>104</sup> UN Basic Principles 14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9

- f. Provides guidelines on use of force when policing person in custody and detention<sup>105</sup>
- Use of force to be used when strictly necessary for maintenance of security and order or when personal safety is threatened;
  - Law enforcement officers shall not use firearms except in self-defence or defence of others against immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting danger set out in Principle 9.
  - Provisions related to stand Minimum Rules of Treatment of Prisoners apply.
- g. Sets out the obligation to provide medical assistance after use of force
- Requirement that law enforcement officers in situations where force or firearms are used to provide medical assistance to injured/affected persons at earliest possible moment;<sup>106</sup>
- h. Requires police notify the victim's family
- Notify relatives of injury/death<sup>107</sup>
- i. Compels law enforcement officials to report use of force
- Requirement that where death or injury is caused by use of force and

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<sup>105</sup> UN Basic Principles 15: Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened. 16. Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.17. The preceding principles are without prejudice to the rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the Treatment of Prisoners, particularly rules 33, 34 and 54."

<sup>106</sup> UN Basic Principles 5(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

<sup>107</sup> UN Basic Principles 5(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

firearms by law enforcement officers, that seniors be notified promptly<sup>108</sup>

- j. Obligations to establish effective reporting and review procedures
- Obligation on government and law enforcement agencies to establish effective reporting and review procedures for incidents where injury or death is caused by use of force and firearms/ and in compliance with reporting system for use of firearms, and further *“that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances”*.<sup>109</sup> Where death or serious injury or other ‘grave consequence’ results a detailed report be sent to competent authorities responsible for administrative review and judicial control.
  - That persons affected by use of force/ dependents (in case of death) have access to an independent and judicial process.<sup>110</sup>

### **African Commission on Human and Peoples’ Rights - Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines)<sup>111</sup>**

#### **a. Use of force when effecting an arrest**

The Guidelines set out procedural guarantees when effecting an arrest and address circumstances when the lawful use of force and firearms may be just emphasizing principle of proportionality.

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<sup>108</sup> UN Basic Principles, 6: Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

<sup>109</sup> UN Basic Principles, 22: Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11(f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

<sup>110</sup> UN Basic Principles, 23: Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependents accordingly.

<sup>111</sup> Adopted by the African Commission on Human and Peoples’ Rights during its 56th Ordinary Session in Angola, from 21 April to 7 May 2014 in Luanda, Angola



*"The lawful use of force and firearms shall be a **measure of last resort** and limited to circumstances in which it is **strictly necessary** in order to carry out an arrest.*

*If the use of force is absolutely necessary in the circumstances:*

- i. The level of force must be proportionate and always at the most minimal level necessary;*
- ii. Additional restrictions on the use of firearms shall be prescribed by law and require that their use be strictly limited to the arrest of a person presenting an imminent threat of death or serious injury; or to prevent the perpetration of a serious crime involving grave threat to life, and only when less extreme measures are insufficient to make the arrest; and*

*The use of force shall be strictly regulated under national law and in conformity with international standards, including the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials."<sup>112</sup>*

b. Use of force during detention in police custody

*"States should have in place, and make known, laws, policies and standard operating procedures, which accord with Member States' obligations under the African Charter on Human and Peoples' Rights and other international law and standards, to...*

*Limit the use of force against persons in police custody or pre-trial detention to circumstances in which force is strictly necessary for, and proportionate to, the need for maintenance of security and order within the detention facility, or when personal safety is threatened.*

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<sup>112</sup> Luanda Guidelines, 3©.

*Limit the use of firearms for reasons of self-defence or the defence of others against the imminent threat of death or serious injury.*

*Limit the permissible use of restraints, and the type of restraints, to ensure consistency with the presumption of innocence, treatment of detained persons that accords with respect for the inherent dignity of the person.*

*Set out the use of disciplinary measures against persons in police custody or pre-trial detention in law, policy and standard operating procedures, consistent with the inherent dignity of the person, humane treatment, limitations on the use of force.”<sup>113</sup>*

c. Prohibition of torture

Guidelines prohibit torture and other cruel, inhuman or degrading treatment or punishment and other serious human rights violations in police custody and pre-trial detention

*“All persons deprived of their liberty shall have the right to lodge a complaint with a competent, independent and impartial authority with a mandate to conduct prompt and thorough investigations in manner consistent with the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa”.<sup>114</sup>*

*“The right to be free from torture and other cruel, inhuman and degrading treatment and punishment.”<sup>115</sup>*

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<sup>113</sup> Luanda Guidelines, VI Conditions of Detention in Police Custody and Pre-Trial Detention 25. (b)-(e), Procedural and Other Safeguards.

<sup>114</sup> Luanda Guidelines 22.(a) V. Procedures for serious violations of human rights in police custody and pre-trial detention.

<sup>115</sup> Luanda Guidelines 4. Rights of arrested person, Luanda Guidelines

*"No detained person while being questioned shall be subject to torture or other ill-treatment, such as violence, threats, intimidation or methods of questioning which impair his or her capacity of decision or his or her judgment."*<sup>116</sup>

d. Accountability

*"States should have in place, and make known, laws, policies and standard operating procedures to set enforceable standards of conduct for police officers, prison officials and other law enforcement or judicial officers that are consistent with internationally recognised standards of conduct for law enforcement personnel and other law enforcement officials responsible for the care or supervision of persons who are in conflict with the law and deprived of their liberty.*

*Non-compliance with the rules on arrest and custody should be a disciplinary offence, subject to disciplinary and, where appropriate, criminal procedures, that accord with international law and standards on procedural fairness."*<sup>117</sup>

e. Remedies

*"All persons who are victims of illegal or arbitrary arrest and detention, or torture and ill treatment during police custody or pre-trial detention have the right to seek and obtain effective remedies for the violation of their rights. This right extends to immediate family or dependents of the direct victim."*<sup>118</sup>

f. Independent oversight and investigation of police abuse

The Guidelines require states to ensure prompt investigation by independent and impartial bodies.

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<sup>116</sup> Luanda Guidelines, 9(c) Questioning and Confessions.

<sup>117</sup> Luanda Guidelines, VII Accountability and Remedies, 36. (a) and (b) Standards of individual conduct for officials.

<sup>118</sup> Luanda Guidelines 38. Remedies.

*"States shall establish mechanisms, including within existing independent oversight and monitoring mechanisms, for the prompt, impartial and independent inquiry of disappearances, extra-judicial executions, deaths in custody, torture and other cruel, inhuman or degrading treatment or punishment, and other serious violations of the human rights".<sup>119</sup>*

*"If there are reasonable grounds to believe that an act of torture and other cruel, inhuman or degrading treatment or punishment, or another serious human rights violation has taken place, States shall ensure prompt investigation by independent and impartial authorities."<sup>120</sup>*

#### g. Children

*"The principle of the best interests of the child shall be paramount in any decision making and action taken in relation to child suspects and detainees."<sup>121</sup>*

*"Contact between law enforcement agencies and child suspects shall be managed in such a way as to respect the legal status of the child and promote his or her wellbeing, ensure the child's privacy, and avoid harm to him or her."<sup>122</sup>*

### **General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) (adopted November 2015)**

States, inter alia that

*(27) The primary duty of law enforcement officials – meaning any actor officially tasked with exercising a law enforcement function, including police, gendarmerie,*

<sup>119</sup> Luanda Guidelines, 43. Inquiries.

<sup>120</sup> Luanda Guidelines, 22. (b) V. Torture and other cruel, inhuman or degrading treatment or punishment and other serious human rights violations in police custody and pretrial detention, Procedures for serious violations of human rights in police custody and pre-trial detention.

<sup>121</sup> Luanda Guidelines, 31 (a)(i).

<sup>122</sup> Luanda Guidelines, 31 (h) Conduct of Officials.

*military or private security personnel – is to protect the safety of the public. The State must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including but not limited to the provision of appropriate equipment and training as well as, wherever possible, careful planning of individual operations. States must adopt a clear legislative framework for the use of force by law-enforcement and other actors that complies with international standards, including the principles of necessity and proportionality. Force may be used in law enforcement only in order to stop an imminent threat. The intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary).*

### **Southern African Regional Police Chiefs Cooperation Organisation**

The Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO) Code of Conduct for Police Officials adopted at its 6th Annual General Meeting 2001 (Mauritius) sets out the commitments to human rights and ethical standards by its members and recognises ethical standards and human rights norms.

Commitment to the rule of law: -

*"Police shall respect and uphold the rule of law and the present Code of conduct"<sup>123</sup>*

Use of force: -

*"Police officials may only use force when strictly necessary and to the extent required for the performance of their duties adhering to national legislation and practices".<sup>124</sup>*

Prohibition of torture: -

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<sup>123</sup> Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO) Code of Conduct for Police Officials, 2001, (SARPCCO Code of Conduct) Article 7.

<sup>124</sup> SARPCCO Conduct for Police Officials, Article 3.

*"No police official, under any circumstances, shall inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment to any person."<sup>125</sup>*

### **United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)<sup>126</sup>**

The Standard Minimum Rules for the Treatment of Prisoners are applicable to all categories of prisoners including 'untried' under institutions of custody including police cells.

*"(1) Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution."*

*"(2) Prison officers shall be given special physical training to enable them to restrain aggressive prisoners."<sup>127</sup>*

## **Domestic Legislation**

International instruments require state parties to put in place appropriate mechanisms to protect and promote rights. In addition, the Constitution of the Republic of South Africa, as the supreme law, reflects the protections contained in key international instruments discussed above.

### **Constitution of the Republic of South Africa**

#### **i. Supremacy of the Constitution**

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<sup>125</sup> SARPPCO Code of Conduct for Police Officials, Article 4.

<sup>126</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, as revised and adopted by the United Nations General Assembly on 17 December 2015. (UN Standard Minimum Rules).

<sup>127</sup> UN Standard Minimum Rules, Rule 82, (1) and (2)

The Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme law of the Republic of South Africa, and all law or conduct inconsistent with it are invalid and all obligations imposed by the Constitution must be fulfilled.<sup>128</sup> The Bill of Rights applies to all law and binds all organs of state.<sup>129</sup> Furthermore, the Constitution compels the State to “*respect, protect, promote and fulfil the rights in the Bill of Rights*”.<sup>130</sup> The Bill of Rights applies to all law, legislature, executive, judiciary and organs of state.<sup>131</sup>

Chapter 2 of the Constitution sets out the rights of persons to:

- Life, the most fundamental human right: -

*“11. Everyone has the right to life..”<sup>132</sup>;*

- Freedom and security of the person: -

*“12. (1) Everyone has the right to freedom and security of the person, which includes the right-...*

*(c) to be free from all forms of violence from either public or private sources;*

*(d) not to be tortured in any way; and*

*(e) not to be treated or punished in a cruel, inhuman or degrading way”<sup>133</sup>*

## ii. Limitation of rights

The rights enshrined in the Constitution, can only be limited in terms of a law of general application (section 36) or as provided for in terms of a state of emergency (as provided

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<sup>128</sup> Constitution of the Republic of South Africa (Constitution), s2 1996

<sup>129</sup> Constitution, s8.

<sup>130</sup> Constitution, s7(2).

<sup>131</sup> Constitution, s8(1).

<sup>132</sup> Constitution, s11.

<sup>133</sup> Constitution, s12.

<sup>133</sup> Constitution, s13.

for in section 37 which sets out Table of Non-Derogable Rights, including, the right to life; human dignity; freedom and security of the person (s 12(1)(d), and (e); rights of Children (section 28(d) to be protected from maltreatment, neglect, abuse or degradation)).

*"36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

*(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.<sup>134</sup>*

All legislation, which authorises the use of force, which limits rights, contained in Chapter 2, and in particular, the rights to life, freedom from violence and torture, must comply with requirements of Section 36.

### iii. Security Forces

The Constitution places an additional burden on the security forces:

*"The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic."<sup>135</sup>*

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<sup>134</sup> Constitution, s36.

<sup>135</sup> Constitution, s199(5).



The Constitution requires that:

- The security services (including the police) must "act, teach and require" their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

<sup>136</sup>

- No member of a security service may obey a manifestly illegal order.<sup>137</sup>

### South African Police Services Act

The South African Police Services Act No 68 of 1995 (SAPS Act) sets out the powers of the South African Police Service and its members. Police officials are required to obey any order or instruction from a superior or a person 'who is competent to do so' except that they should not obey orders that are 'manifestly unlawful'.<sup>138</sup> Police officials are subject to the Constitution and must exercise their powers with due regard to the rights of persons provided for in the Bill of Rights.<sup>139</sup> Furthermore, police officials may only use force when authorised by law.<sup>140</sup>

The provision specifies that where a law authorises a police official to use force, minimum force must be used, which is reasonable in the circumstances.

#### *"Members*

*13. (1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.*

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<sup>136</sup> Constitution, s199(5).

<sup>137</sup> Constitution, s199(6).

<sup>138</sup> South African Police Service Act, 58 of 1995 (SAPS Act) 47(1):

<sup>139</sup> South African Police Service Act, 58 of 1995 (SAPS Act) 13(1): Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official."

<sup>140</sup> SAPS Act: S 13(1).

*(2) Where a member becomes aware that a prescribed offence has been committed, he or she shall inform his or her commanding officer thereof as soon as possible.*

*(3) (a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.*

*(b) Where a member who performs an official duty is **authorised by law to use force**, he or she may **use only the minimum force, which is reasonable in the circumstances**.*

The provision is clear in its authority that the use of force is subject to the rule of law. Various pieces of legislation clarify the circumstances under which, and nature of force, which may be used. These are discussed below.

## **The Criminal Procedure Act**

The Criminal Procedure Act, 51 of 1977 (CPA) sets out the circumstances in which the right to freedom and security of the person may be limited and the degree of force that may be reasonable and necessary.

There are three provisions in the CPA which specifically refer to the use of force by a police official: firstly, in the context of executing a search (section 27) and secondly, in the context of effecting an arrest (sections 39 and 49).

### **Section 49: use of force when effecting an arrest**

*(1) For the purposes of this section-*

*(a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect;*

*(b) 'suspect' means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and*

*(c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.*

*(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-*

*(a) the suspect poses a threat of serious violence to the arrestor or any other person; or*

*(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later. [S. 49 substituted by s. 7 of Act 122 of 1998 and by s. 1 of Act 9 of 2012.]”*

### **Section 27 - use of force during entry or search**

The CPA further specifies that police officials may use force as may be reasonable necessary to overcome resistance when effecting a search or gaining entry to premises.

#### *“27 Resistance against entry or search*

*(1) A police official who may lawfully search any person or any premises or who may enter any premises under section 26, may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises: Provided*

*that such police official shall first audibly demand admission to the premises and notify the purpose for which he seeks to enter such premises.*

*(2) The proviso to subsection (1) shall not apply where the police official concerned is on reasonable grounds of the opinion that any article which is the subject of the search may be destroyed or disposed of if the provisions of the said proviso are first complied with."*

## **Dangerous Weapons Act**

The Dangerous Weapons Act No 15 of 2013 defines 'dangerous weapon' as

"any object, other than a firearm, capable of causing death or inflicting serious bodily harm, if it were used for an unlawful purpose."

The Dangerous Weapons Act provides clarity as to factors that determine whether a person intends to use the object as a dangerous weapon for an unlawful purpose. These factors are relevant to assessing the reasonableness of suspicions of the police official when making a determination of the suspect's behaviour or intentions.

"3 Prohibition of possession of dangerous weapons

(1) Any person who is in possession of any dangerous weapon under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

(2) In determining whether a person intends to use the object as a dangerous weapon for an unlawful purpose, all relevant factors, including but not limited to, the following must be taken into account:

(a) the place and time where the person is found;

- (b) the behaviour of the person, including the making of any threat or the display of intimidatory behaviour;
- (c) the manner in which the object is carried or displayed;
- (d) whether the possession of the object was within the context of drug dealing, gang association or any organised crime or any other criminal activity; or
- (e) any other relevant factors, including any explanation the person may wish to provide for his or her possession of the object: Provided that this paragraph shall not be interpreted as an obligation on the person to explain his or her possession of the object.

### Firearms Control Act

The Firearms Control Act of 2000 as amended and subsidiary legislation provide a regulatory framework containing procedural and structural safeguards including ownership, trading, licensing and regulation, and safekeeping. The Act further defines a 'firearm'.<sup>141</sup>

### Constitutional Court Jurisprudence

The courts and in particular, the Constitutional Court has adjudicated on the issue of the use of force as set out in section 49 of the Criminal Procedure Act 51 of 1977. The provision sets out the legal justification for use of force when effecting an arrest. It seeks to define the circumstances in which force can be used and defines 'deadly force'.

The 1998 Amendment to section 49 sought to align the provision with the new Constitutional dispensation but only came into operation in 2003 after the decisions of two landmark cases ***Govender v Minister of Safety and Security*** 2001 2 SACR 197 (SCA) in which the Supreme Court of Appeal found section 49(1) had to be interpreted restrictively ('read down') to survive constitutional scrutiny, and in 2002 the Constitutional Court in ***S v Walters*** 2002 2 SACR 150 (CC) which declared section 49(2) of the said Act unconstitutional.<sup>142</sup>

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<sup>141</sup> Section 1, Firearms Control Act, 2000 (as amended)

<sup>142</sup> <http://www.constitutionalcourt.org.za/Archimages/605.PDF> accessed 25 September 2014

In 2010 a further amendment to section 49 of the Criminal Procedure Act was tabled to bring the provision in line with the wording of the *Walters* decision. This amendment was enacted in 2012 in terms of the Criminal Procedure Amendment Act 2012 (assented to by President 25 September 2012).

The decision of the Constitutional Court in *Walters*<sup>143</sup> is still of relevance today as the court dealt with the issue of the legally permissible boundaries of the use of force which it noted have to be assessed in light of constitutional norms.<sup>144</sup>

Kriegler J noted...

*"The state is called upon to set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors. Its role in our violent society is rather to demonstrate that we are serious about the human rights the Constitution guarantees for everyone, even suspected criminals. An enactment that authorises police officers in the performance of their public duties to use force where it may not be necessary or reasonably proportionate is therefore both socially undesirable and constitutionally impermissible."*<sup>145</sup>

Kriegler J further clarified when force may be used:

*"You may not shoot a suspect merely because he will otherwise get away. You may not shoot at your suspect unless –*

*(a) you believe; and*

*(b) have reasonable grounds for believing that your suspect either*

*(i) poses an immediate threat of serious bodily harm to you or members of the public, or*

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<sup>143</sup> Whilst *Walters* dealt with the previous provisions of Section 49 and circumstances of the case which raised the question of the inconsistency of then provisions of Section 49, at the time, which legally sanctioned use of force to prevent the flight of a suspect, the court reasoning is still relevant to this discussion.

<sup>150</sup> *Walters* para 45

<sup>145</sup> *Ibid* para 47

*(ii) has committed a crime involving the infliction or threatened infliction of serious bodily harm."* <sup>146</sup>

And further he emphasized the purpose of arrest:

*"In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:*

*(a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.*

*(b) Arrest is not the only means of achieving this purpose, nor always the best.*

*(c) Arrest may never be used to punish a suspect.*

*(d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.*

*(e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.*

*(f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.*

*(g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.*

*(h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.*

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<sup>146</sup> Ibid para 52

*(i) These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person."*<sup>147</sup>

## Other policies on professional use of force

### East African Community Standard Operating Procedure on Use of force<sup>148</sup>

Force should not be applied to the head, and where possible, not to the groin/delicate areas of the body.<sup>149</sup>

Firearms must only be used as a last resort to disable a person who is threatening to, and it is reasonable to believe, that the suspect will in immediate future take the life of a person or cause serious injury to a person AND only if less extreme measures are insufficient to achieve the lawful objectives AND where the lives of innocent person will be endangered if lethal force is not used.<sup>150</sup> Reasonableness must be determined objectively - on the basis of what a reasonable police officer in the same circumstance would judge necessary and on the basis that the lives of innocent persons will be endangered if lethal force is not used.<sup>151</sup>

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<sup>147</sup> Ibid para 54

<sup>148</sup> As contained in the Report of the 3<sup>rd</sup> Meeting of Policing Experts, Working group on Harmonization of Police Standard Operating Procedures. 2012.

<sup>149</sup> EAC SOP 6.4.

<sup>150</sup> EAC SOP (7) (7.1) "Firearms may only be used, as a last resort, to disable a person who is threatening to, and it is reasonable to believe in the best judgment of the Police Officer, that he/she will, in the immediate future:

- take the life of a person
- cause a serious injury to a person

only if less extreme measures are insufficient to achieve the above objectives, and only where the lives of innocent persons will not be endangered if lethal force is used.

<sup>151</sup> EAC SOP (7) (7.1) "This means that:

- a) A reasonable Police Officer in the same circumstances would judge it necessary to use lethal force to contain the immediate situation;
- b) A reasonable Police Officer in the same circumstances would judge that the lives of innocent persons will not be endangered if lethal force is used; and
- c) Any action complies with the Rules of this Standing Operating Procedure."