



African Policing Civilian Oversight Forum

Submission to the Panel of Experts

Public Order Policing in South Africa

Prepared by the African Policing Civilian Oversight Forum

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1. Overview

The African Policing Civilian Oversight Forum (APCOF) welcomes this opportunity to submit information to the Panel of Experts on Public Order Policing. This submission is divided into four parts, in accordance with the type of information requested by the Panel:

Part 1: Overview

Part 2: Description of [APCOF](#)'s work and interest in policing in South Africa

Part 3: Two issues, and commensurate recommendations, that APCOF considers important for improving the professionalism and accountability of the South African Police Service, in general, and in relation to Public Order Policing:

Recommendation 1 - APCOF recommends that the Panel of Experts motivate for the harmonisation by Parliament of the various use of force provisions in South African law into one consolidated law. That consolidated law must be drafted in compliance with

international and regional standards on the use of force by law enforcement officials, and the Constitution of South Africa. APCOF strongly motivates that its model law on the use of force by law enforcement officials be used as a guide to inform the Panel of Experts on the minimum required to ensure that the legislative framework for the use of force in South Africa is consistent with the Constitution, and with international and regional law.

APCOF further recommends that this, or any other reform to the use of force by law enforcement officials in South Africa, be enacted in **law** as opposed to reform only to policy, regulation, standing orders or national instructions. This is a basic requirement of the principle of legality, which underpins international and regional law on the use of force.

Recommendation 2 APCOF recommends that the Panel of Experts motivate for the alignment of South Africa's legislative, policy and administrative framework for the policing of gatherings with the African Commission on Human and Peoples' Rights [Guidelines on the Policing of Assemblies by Law Enforcement Officials](#) (2017).

Part 4: List of recommended publications

2. Description of APCOF's work and interest in policing in South Africa

APCOF was established in 2004 as a coalition of police oversight bodies and practitioners, and was registered in 2006 as a not-for-profit company under South African Company Law. In 2012, APCOF was re-registered as a Trust.

APCOF undertakes a range of activities aimed at strengthening police oversight and accountability in South Africa, amongst many others. This includes efforts to support civilian oversight institutions such as the Independent Police Investigative Directorate (IPID) and the Civilian Secretariat for Police, civil society, and the South African Police Service (SAPS) to promote the agenda of a democratic and accountable police service in South Africa. APCOF has also maintained an interest in ensuring that the institutions responsible for the provision of private security also act within the bounds of the law, and are equally held accountable for their actions.

Recent developments in South Africa in the area of policing, most notably the tragic events in Marikana in August 2012, have raised critical questions about a range of fundamental issues on policing include the effectiveness of policing policy, policing leadership and current oversight infrastructure. APCOF's ongoing work in South Africa seeks to contribute knowledge (through undertaking [research](#)), and advocating for change through its network and partnerships. APCOF engages in a range of initiatives at the continental and national levels, with full information available at its [website](#). Current APCOF projects specific to South Africa include:

- Strengthening the current legal provisions on the use of force by SAPS by focusing on compliance with the rule of law, the Constitution and international law, through advocacy, research and legal reform.
- Addressing the structural and functional challenges of IPID within the broader rubric of challenges in ensuring effective accountability for rights violations allegedly committed by police.
- Supporting the establishment of independent police custody visits in South Africa: this three year project will support the establishment of a regularized system for independent police custody visits in South Africa.
- Promoting the implementation of the African Commission on Human and Peoples' Rights Guidelines (ACHPR) on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) and the Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa (Policing Assemblies Guidelines).
- Supporting an advanced training course on police oversight and accountability with the Centre for Human Rights at the University of Pretoria.

3. List of Issues and Recommendations

a. Revised and consolidated use of force law for South Africa

APCOF recommends that the Panel of Experts motivate for the harmonisation by Parliament of the various use of force provisions in South African law into one

consolidated law. That consolidated law must be drafted in compliance with international and regional standards on the use of force by law enforcement officials, and the Constitution of South Africa.

APCOF further recommends that this, or any other reform to the use of force by law enforcement officials in South Africa, be enacted in law as opposed to reform only to policy, regulation, standing orders or national instructions. This is a basic requirement of the principle of legality, which underpins international and regional law on the use of force.

South Africa has an obligation to ensure that its national laws comply with international provisions on the use of force, and to protect all people in the Republic from abuses by officials arising from the inappropriate or excessive use of force. However, the current legislative, policy and regulatory framework for the use of force by law enforcement officials in South Africa requires urgent reform as it does not comply with international and regional law.

In APCOF's view, the Gatherings Act and the Criminal Procedure Act, falls short of compliance with applicable international law insofar as they permit the use of lethal force against persons who pose a threat only to property. This is contrary to international standards which limit the use of firearms to instances where there is a grave threat of serious injury, and only where use is strictly unavoidable in order to protect life.¹

Further, APCOF is concerned that section 49 of the Criminal Procedure Act, as amended in 2012 to ensure alignment with Constitutional Court decision in *Walters*,² still falls short of relevant international law. In particular, it fails to state the circumstances that would justify the use of lethal force. Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials requires that the use of lethal force must be in respect of a danger that is **imminent** – that is, the danger must be immediate at the time a firearm is used to avert danger. However, the current construction of section 49(2)(b) allows the use of force simply because there is a suspicion of the commission of

¹ The provision of South African law is contrary to Principles 9 and 12-14, of the [UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#), and Guideline 21, [Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa](#).

² *The Minister of Safety and Security in re The State v Walters* (2002) SACR 105 (CC) para 54(h).

a crime involving the infliction of the threatened infliction of serious bodily harm at some time in the past. The section does not provide that the threat posed by the person sought for arrest must still be present at the time that the person making an arrest uses lethal force. APCOF's concern is that this provision allows for unjustifiable use of force in that, at the time the law enforcement official uses the lethal force, the suspect may no longer pose the same threat as posed at the time of the commission of the alleged offence. Additionally, section 49(2) does not require the arresting officer using potentially lethal force to have regard to the risk of his or her conduct for innocent third parties.

APCOF is also concerned that the range of domestic legislation dealing with the use of force by law enforcement officials is dispersed within context specific legislation. Those relevant to SAPS include sections 13(3)(b) of the Police Services Act, section 9(2) of the Regulation of Gatherings Act, which provides for instances wherein police may use force during gatherings, and section 49 of the Criminal Procedure Act. In addition, the Correctional Services Act provides for the use of force by correctional officials. The varied provisions, dispersed across different legislative instruments, also fail to establish general rules that are applicable to the use of potentially lethal force in *any* situation.

Given the piecemeal way in which South African law regulates the use of force, and the lack of alignment between those provisions and relevant international and regional law standards, it is unsurprising that the Marikana Commission of Inquiry was critical of the use of force by SAPS. The Commission found that 'the principle that only the minimum amount of force reasonable in the circumstances should be used was not complied with.'³ However, the Marikana massacre is but one high-profile example of excessive use of force by police officials in a gatherings context, with concerns raised by multiple stakeholders, including civil society, the media, academia and the South African Human Rights Commission about the proportionality of responses by SAPS to both peaceful and non-peaceful protests.

³ Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Markiana, in the North West Province, p 588, para 10.

The constitutional, as well as international and domestic human rights framework, for the use of force is clear.⁴ The Constitution of South Africa provides SAPS with a mandate to uphold the law, as well as to protect the lives of all persons (section 205). The use of excessive and lethal force by police officials is a violation of the Constitutional rights to life (section 11), dignity (section 10) and security of the person (section 12). The Constitutional Court has held that South Africa has the duty to protect life, and that taking a life is only justifiable in extreme circumstances.⁵

In exercising this mandate, police officials are duty bound to act within the confines of the Constitution, national legislation, and be cognizant of other applicable human rights law and standards. International and regional standards on the use of force are underpinned by four principles, which are not adequately reflected in South Africa's current legal framework for the use of force:

- **Legality:** the use of force must be sanctioned by **domestic law**, which must comply with international standards. Situations where force may be used must be expressly identified and applicable laws must make provision for disciplinary and criminal sanction.
- **Precaution:** feasible steps must be taken in planning, preparing and conducting policing operations to avoid the use of force. Appropriate command and control measures must be in place.
- **Proportionality:** the force used by law enforcement officials to protect themselves must be proportionate to the threat at all times.
- **Necessity:** the use of force is only acceptable where it is necessary to attain a clear and legitimate objective. To be permissible, the use of force must be strictly

⁴ The international and regional framework governing the use of force by law enforcement officials include, Articles 1 and 3 of the [Universal Declaration of Human Rights](#), Article 6.1 of the [International Covenant on Civil and Political Rights](#), Article 4 of the [African Charter on Human and Peoples' Rights](#), Principles 9, 12, 13, 14, 15 and 16 of the [UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#), Rules 54 and 82 of the [UN Standard Minimum Rules on the Treatment of Prisoners](#), Articles 1, 3 and 8 of the [UN Code of Conduct for Law Enforcement Officials](#), Guidelines 3(c) and 25(b), [Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa](#), Guideline 21, [Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa](#).

⁵ [S v Makwanyane](#) 1995 (3) SA 391 (CC) at para 222.

unavoidable. Firearms may only be used where there is a grave threat of death or serious injury, and never for the sole purpose of defending property. The 'protect life' principle applies to any use of force.

However, APCOF has serious concerns about the application of current use of force laws in South Africa in relation to Constitutional and international law framework.

APCOF and its partners have developed a model law on the use of force by law enforcement officials, informed by the law and principles outlined above. This model law is based on the opinion of senior legal counsel. The law addresses general principles applicable to all cases of the use of force, as well as specific principles relevant to particular contexts. APCOF strongly motivates that the Panel of Experts use this model law as a benchmark for the legal framework required to ensure that legislation for the use of force in South Africa is consistent with the Constitution, and with international and regional law. The model law is attached as **Annexure 1** and the opinion of senior counsel as **Annexure 2**.

Consistent with the principle of legality, it is also necessary that any reform of the use of force in South Africa be achieved by way of legislation, enacted by the Parliament. To reduce reform initiatives to changes in policy and regulation means that while alignment with Constitutional and international law may be initially achieved, changes that subsequently weaken the framework are easier to apply to regulation and policy than to legislation. Just as significantly, the importance of regulating the use of force requires the weight of a legislative instrument, given the potential for the use of force by law enforcement officials in South Africa to infringe on Constitutionally protected rights such as life, dignity and security of the person. Consolidating the necessary amendments to the use of force in one legislative instrument governing the use of force for all law enforcement officials in South Africa will also promote consistency in the application of the use of force, and eliminate any varying standards on the basis of situation or context.

b. Alignment with the Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa

APCOF recommends that the Panel of Experts review South Africa's legislative, policy and administrative framework for the management of gatherings and assemblies by the South African Police Service against the African Commission on Human and Peoples' Rights Guidelines on the Policing of Assemblies for Law Enforcement Officials in Africa, and make recommendations to address any gaps or inconsistencies in the South African framework.

In particular, APCOF recommends that the Panel of Experts give particular note to the following issues:

- Guideline 4 – the regulatory framework governing the policing of assemblies, and in particular, that the South African Police Service have in place, make available, and promote in the public domain, enforceable standards of conduct for law enforcement officials.
- Guideline 6 – information, communication and facilitation mechanisms which allow for and facilitate the involvement of third parties in dialogue and mediation with assembly organizers, even where the protest takes place outside the ambit of the Regulation of Gatherings Act.
- Guideline 7 – comprehensive training for police officers in understanding participant behavior, minimizing conflict, and de-escalating tension, with training for Public Order Policing units benchmarked against best practice and include training in crowd behavior and the psychology of crowds.
- Guideline 8 – accountability mechanisms in place to provide an adequate, effective and prompt remedy to persons who experience human rights violations in the context of public order policing.

- Guideline 9 – that the operation of section 12(1)(a) of the *Regulation of Gatherings Act* is not interpreted or applied to require permission prior to the exercise of rights by persons and groups under section 17 of the Constitution of South Africa.
- Guideline 14 – the deployment of police officials to gatherings operations must include the overt and visible identification of officials.
- Guideline 21 – the legal framework for the use of force in South Africa should align with the standards established by Guideline 21, which is a reflection of the international and regional normative framework on the use of force by law enforcement officials. APCOF's recommendations in relation to the use of force are set out in detail in **Recommendation 1**.
- Guideline 22 – in relation to debriefing and review, any use of force by law enforcement officials during gatherings should be subject to an automatic and prompt review by a competent and independent authority, and any officials subject to such review not being deployed to assembly operations until the conclusion of the review.

4. Recommended publications

a. Public Order Policing

African Commission on Human and Peoples' Rights, *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*, adopted at its 21st Extraordinary Session, held from 23 February 2017 to 4 March 2017 in Banjul, The Republic of the Gambia, available at http://www.achpr.org/files/instruments/policing-assemblies-in-africa/achpr_guidelines_on_policing_assemblies_eng_fre_por_ara.pdf [accessed 11 September 2017]

African Policing Civilian Oversight Forum, Legal Resources Centre and Institute for Security Studies, *Dialogue on Public Order Policing in South Africa*, 11 – 12 July 2017, Johannesburg, attached as **Appendix 1** to this submission.

Amnesty International, *Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Amsterdam, August 2015, available at https://www.amnestyusa.org/files/amnesty_international_guidelines_on_use_of_force-2.pdf [accessed 15 September 2017]

Japhet Biegon, Abdullahi Boru and Delly Mawazo, *Domestic Adherence to Continental and International Norms in the Practice of Policing Assemblies in Africa*, African Policing Civilian Oversight Forum and Danish Institute for Human Rights, Cape Town, South Africa, 2017, available at <http://apcof.org/wp-content/uploads/2017/05/freedom-of-assembly-in-africa-.pdf> [accessed 11 September 2017]

Physicians for Human Rights and International Network of Civil Liberties Organizations, *Lethal in Disguise: The Health Consequences of Crowd-Control Weapons*, March 2016, available at https://s3.amazonaws.com/PHR_Reports/lethal-in-disguise.pdf [accessed 15 September 2017]

United Nations Office on Drugs and Crime, *Resource book on the use of force and firearms in law enforcement*, New York, 2017, available at <http://www.ohchr.org/Documents/ProfessionalInterest/UseOfForceAndFirearms.pdf> [accessed 26 September 2017]

b. South African police performance and accountability

African Commission on Human and Peoples' Rights, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*, adopted at its 55th Ordinary Session, held from 28 April to 12 May 2014 in Luanda, Angola, available at http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf [accessed 11 September 2017]

African Policing Civilian Oversight Forum and South African Human Rights Commission, *Dialogue on Human Rights and Policing, 20 – 21 April 2017, Johannesburg, South Africa*, July 2017, available at <http://apcof.org/wp-content/uploads/police-and-human-rights-dialogue-20-21-april-2017-johannesburg-.pdf> [accessed 11 September 2017].

African Policing Civilian Oversight Forum and South African Human Rights Commission, *Dialogue on Human Rights and Policing, 28 – 29 April 2016, Johannesburg, South Africa*, available at [http://apcof.org/wp-content/uploads/2016/08/Police-and-Human-Rights-Dialogue-Report-
WEB.pdf](http://apcof.org/wp-content/uploads/2016/08/Police-and-Human-Rights-Dialogue-Report-
WEB.pdf) [accessed 11 September 2017]

African Policing Civilian Oversight Forum, *The Luanda Guidelines: Assessments for Ghana, Malawi, South Africa, Tanzania, Uganda*, Cape Town, South Africa, 2017, available at [http://apcof.org/wp-content/uploads/2017/04/apcof-implementation-of-the-luanda-guidelines-
assesmmnts-for-ghana-malawi-south-africa-tanzania-and-uganda-.pdf](http://apcof.org/wp-content/uploads/2017/04/apcof-implementation-of-the-luanda-guidelines-
assesmmnts-for-ghana-malawi-south-africa-tanzania-and-uganda-.pdf) [accessed 11 September 2017]

Andrew Faull, 'The South African Police Service's code of conduct: A critical review', *APCOF Policy Paper*, No. 17, February 2017, available at [http://apcof.org/wp-content/uploads/2017/08/apcof-
brief-17-code-of-conduct-23mar-opt2.pdf](http://apcof.org/wp-content/uploads/2017/08/apcof-
brief-17-code-of-conduct-23mar-opt2.pdf) [accessed 11 September 2017].

Annelize van Wyk, 'Parliamentary oversight of the police in South Africa: Lessons and opportunities', *APCOF Policy Paper*, No. 10, November 2014, available at [http://apcof.org/wp-
content/uploads/2016/05/No-10-Parliamentary-oversight-of-the-police-in-South-Africa -
Lessons-and-opportunities-Annelize-Van-Wyk-.pdf](http://apcof.org/wp-
content/uploads/2016/05/No-10-Parliamentary-oversight-of-the-police-in-South-Africa -
Lessons-and-opportunities-Annelize-Van-Wyk-.pdf) [accessed 11 September 2017]

David Bruce, 'Strengthening the independence of the Independent Police Investigative Directorate', *APCOF Policy Paper*, No. 16, February 2017, available at [http://apcof.org/wp-
content/uploads/2017/03/016-strengthening-the-independence-of-the-independent-police-
investigative-directorate.pdf](http://apcof.org/wp-
content/uploads/2017/03/016-strengthening-the-independence-of-the-independent-police-
investigative-directorate.pdf) [accessed 11 September 2017]

David Bruce, 'Unfinished Business: The architecture of police accountability in South Africa', *APCOF Policy Paper*, No. 2, November 2011, available at [http://apcof.org/wp-
content/uploads/2016/05/No-2-Unfnished-Business-The-architecture-of-Police-Accountability-
in-South-Africa-David-Bruce.pdf](http://apcof.org/wp-
content/uploads/2016/05/No-2-Unfnished-Business-The-architecture-of-Police-Accountability-
in-South-Africa-David-Bruce.pdf) [accessed 11 September 2017]

Louise Edwards and Kelly Stone, 'Implementation of the Luanda Guidelines: Review of arrest, police custody and remand detention in South Africa', *APCOF Policy Paper*, No. 14, December 2016, available at <http://apcof.org/wp-content/uploads/2017/03/014-implementation-of-the->

[luanda-guidelines-review-of-arrest-police-custody-and-remand-detention-in-south-africa-.pdf](#)

[accessed 11 September 2017]