

# Beyond Section 49

## Control of the use of lethal force

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*Prominent incidents of the misuse of lethal force have contributed to the issue becoming a focus of concern in South Africa during 2011. Proper control of the use of lethal force needs to be prioritised by the South African Police Service and other police agencies in South Africa because of the serious consequences that can result from its use, but also because it is so important to police safety. The legal framework relating to the use of lethal force is the subject of a Bill which is due to come before Parliament. There are various options for amending the law but irrespective of which ones are chosen, the end result is likely to be unsatisfactory. Improvements in the control of the use of lethal force and how professionally it is used by SAPS members will ultimately depend on a reorientation of the SAPS in its approach to managing the use of lethal force by its members. A use of force policy, and a new system for reviewing use of force incidents could form part of such a reorientation, with potential benefits for police and civilian safety and for overall police effectiveness. These changes would require the support of police leadership in order to be implemented effectively.*

The use of lethal force<sup>1</sup> by police gained prominence as a result of a number of incidents in 2011, most notably the killing of Andries Tatane in a demonstration in Meqheleng outside Ficksburg on May 13 2011.<sup>2</sup> Available ICD statistics on killings by police during the last two years (2008/9-2009/10) indicate that 1 092 people were killed as a result of the use of force by police during this period.<sup>3</sup> Leaving aside for the moment the question of what proportion of these shootings might have been unlawful,<sup>4</sup> these statistics indicate that killings by police are at their highest levels since the late 1990s when the ICD was established and began reporting on these figures.

Statistics on killings by police also do not tell the full story. Shooting incident data from three

provinces covering the 1996-1998 period, for instance, indicated that fatal shooting incidents accounted for only 6,5% of all shootings. In a further 17,5% of shooting incidents someone was injured by the police, whilst in the remaining 76% of incidents no one was killed or injured, possibly indicating that police had missed their targets or merely fired warning shots.<sup>5</sup> In the absence of up-to-date data on the use of lethal force by police in South Africa (other than in respect of those fatal incidents reflected in ICD statistics) it seems reasonable to surmise that there are several thousand incidents each year in which police in South Africa discharge their service firearms in the course of their duties.

Considering that there are in the region of 160 000 serving police officials currently in South Africa<sup>6</sup> this may indicate that in any year upwards of 90% of them are not involved in an incident in which a firearm is discharged.<sup>7</sup> Indeed, there may be some who go through their entire careers without ever discharging their firearms other than during training. Even in South Africa, where

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levels of use of lethal force by police are far greater than in most countries that have this kind of data, the use of lethal force may be a relatively rare event in policing. But it is nevertheless a matter of profound concern because so much hinges upon it: the lives and safety of police and members of the public, and more.

In some cases the misuse of force gives rise to public instability. The image and public reputation of a police service may be profoundly shaped by an incident where lethal or other force is used. Because incidents in which lethal force is used may have grave consequences, police organisations need to take the issue of controlling the use of lethal force very seriously. The way in which a police service deals with the issue of lethal force also says much about its approach and attitude to the more general issues of non-lethal force<sup>8</sup> (of which there are far more incidents), and of police conduct and integrity.

Proper attention to lethal force is also necessary because of its importance to the safety of police. During 2009-10, for instance, 101 police officers were killed by assailants in South Africa.<sup>9</sup> Following a spate of such killings in April and May 2011, Bheki Cele, National Commissioner of the South African Police Service, expressed a concern that there was not sufficient attention given to the issue. Police organisations that give proper attention to the question of the use of lethal force by police therefore need to balance at least three overlapping concerns: that police are able to act effectively in the public interest where their intervention is called for; police safety; and the concern that police do not use lethal force unjustifiably or unnecessarily. The common thread that binds these three together is that police should act wherever possible to protect human life.

## THE AMENDMENT TO SECTION 49

Legislation, particularly provisions which expressly set out to regulate when lethal force may or may not be used, is often the central focus of efforts to control the use of lethal force by police. In South Africa, Section 49 of the Criminal Procedure Act, which deals with the use of lethal force for arrest,

is the main legislative provision of this kind. It has in the past been the subject of much controversy and contestation.<sup>10</sup> At the time of writing a Bill was due to come before Parliament, providing for amendments to be made to Section 49. The amendment will potentially expand police powers to use lethal force.

The South African legal framework relating to the control of the use of lethal force by police has also recently been revised in another respect: Legislation providing for a reorientation of the Independent Complaints Directorate into the Independent Police Investigative Directorate (IPID) provides for an expansion of the ICD mandatory responsibilities relating to the use of lethal force. When the Act comes into effect this will mean not only that the IPID must investigate deaths as a result of police action – as was the case with the ICD – but also that it must investigate all complaints relating to the discharge of firearms by police (see the interview with ICD director, Francois Beukman, in this edition of SACQ).<sup>11</sup>

It seems that there is a reasonable argument for amending Section 49, due to the difficulty of interpreting it in its current form. In addition to providing that police (and members of the public) may use lethal force to protect themselves or other people who face an immediate threat of death or grievous bodily harm, it also provides for the use of lethal force to prevent the flight of a person who presents a ‘future danger of such harm’. Whilst this principle may make sense from a moral perspective (because it seeks to prevent future harm), the difficulty is that it is possible to give widely differing interpretations to it in practice.<sup>12</sup>

The problem is that, if one accepts that Section 49 needs to be more clearly articulated and that the principles it is based on should be more concrete, there are not many options available. The one option would be to entirely remove the legal provision for lethal force to be used for arrest from South African law. This would mean that lethal force is only allowed in situations where it is immediately necessary to defend oneself or another person (as is permitted anyway in terms of common law principles). The implication of this

would be that there would be an unlimited 'right to flee,' even by people who are believed to have been involved in the most violent crimes. One of the defining features of the law on the use of lethal force for arrest is that lethal force may only be used for arrest if there are no other reasonable means available for securing the arrest of the fleeing person. In situations where police are not able to do so by vehicle or foot pursuit there might be no way of apprehending someone, especially where there is no clear information about his identity. If the use of lethal force is restricted to defence situations this will weaken the state's power to arrest perpetrators of even the most serious violent crimes.

Adopting such an approach would put South Africa in a unique position, particularly compared with societies that face comparable levels of violent crime, and where it is generally accepted that police should have some power to use lethal force for arrest. Canada doesn't qualify as a high violence society in the same way that South Africa does but the Canadian Criminal Code, to take just one example, does authorise the use of lethal force against a fleeing suspect. Though the principle embodied in Canadian law is a 'future danger' principle similar to that in current South African law, this nevertheless demonstrates that even in Canada it is regarded as necessary for police to have powers to use lethal force in situations that go beyond defence or 'imminent threat' situations.

International human rights law on the subject is somewhat ambiguous. Though the commentary to the UN code of conduct for law enforcement officials appears to recommend that lethal force be restricted to situations of defence,<sup>13</sup> the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials endorses the use of firearms by law enforcement officials for arrest.<sup>14</sup>

Apart from the option of restricting the use of lethal force to defence situations, the other main alternative appears to be the principle that is embodied in the Bill currently before parliament. This allows an arrestor to use lethal force if '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'.<sup>15</sup> Here the justification for the use of lethal force, in a situation where it appears that it will not be possible to apprehend a person by other means, is related to the crime that the person is alleged to have committed rather than the likelihood that they may commit such a crime in the future. The original source for this principle was a 1985 judgment of the US Supreme Court.<sup>16</sup> It has subsequently received approval from the Supreme Court of Appeal<sup>17</sup> and Constitutional Court,<sup>18</sup> thereby becoming part of South African law. Though it has endorsement from such high authority, in reality it seems to provide greater leeway to the police, and indeed to any member of the public, to use lethal force than does the current Section 49.<sup>19</sup>

In a situation such as we have in South Africa, where there are already very high levels of the use of lethal force by police, it appears undesirable to expand these police powers. But if it is necessary for police in South Africa to have access to some powers to use lethal force for arrest and for the law to articulate these powers in concrete terms, the law may have to be based on this principle.

Nevertheless, there may be scope for tightening up certain aspects of the legal framework, for instance establishing a higher standard of belief. It may be argued that the standard of 'reasonable belief' or 'reasonable suspicion' is not high enough, considering the gravity of the possible consequences of the use of lethal force. It would follow that police should only be allowed to use lethal force for arrest if they are very certain that the suspect has indeed committed a crime of serious violence. In addition, the power to use lethal force for arrest should be limited to police, and the civilian power to use lethal force restricted to defence situations.

## **POLICE INTERNAL POLICIES ON THE USE OF LETHAL FORCE**

The implication is that, whether it is amended or not, Section 49 is likely to be unsatisfactory as a legal provision in some or other way. It should also

be borne in mind that the number of killings by police in South Africa has escalated dramatically in recent years, notwithstanding the provisions of the current Section 49. This highlights the limitations of an approach to the control of the use of lethal force that relies on legislation. One set of reasons for this has to do with the enormous power which police have to obstruct the operations of the criminal justice process against them. Much policing is shielded from outside scrutiny, and police officers, like everyone else, enjoy the right to remain silent. Typically, in cases of brutality, their colleagues close ranks with them. An investigation into a case of police brutality often only has some chance of success in the rare cases where there are independent civilian witnesses who are not intimidated by the prospect of giving evidence against the police. In cases of killings the SAPS is required to notify the ICD (IPID), but in practice they use their discretion as to when exactly to do this.

The police also know how to manipulate evidence. In situations where unarmed people have been killed it is not unheard of for police to plant weapons or otherwise tamper with the scene, and then claim that they were acting in self defence. Also, prosecutors generally work quite closely with police members and, related to this issue, may soft-peddle cases against them. The fact that we have an ICD/IPID in South Africa is clearly some kind of counter-weight to the problem of police violence. But relying on enforcement of Section 49 by the ICD/IPID, with its limited human and financial resources, offers little chance that the problem will be addressed in an effective way.

Another set of reasons for the ineffectiveness of Section 49 has to do with the fact that the law, whatever the legal standards may be, represents a minimum threshold for acceptable conduct. Police organisations that rely on the law as the sole instrument for evaluating whether use of force is appropriate, are in effect neglecting a range of possibilities as to how police officers could best engage with situations where force may have to be used. In many of these situations there is a wide gap between approaches that might be

regarded as skillful or professional, and those that are unlawful.<sup>20</sup> Police officers often act with good intentions, but because of a lack of understanding, skill or experience they unnecessarily use force, cause harm or expose themselves to danger, rather than dealing with the situation in another way. A police organisation that takes the control of the use of force seriously should not only ensure that members use force lawfully, but should also try to optimise the ability of its members to use force professionally and avoid such 'unnecessary' uses of force.

Police organisations in South Africa should therefore look beyond Section 49 for other measures that can assist them to engage in a more purposeful manner with how their members use force. One option here would be for the SAPS and metropolitan police services to adopt internal policies that give greater direction to their members around the standards to uphold in using lethal force. This has been the approach taken by many police departments in countries such as the United States and Australia. Such policies supplement the standards set out in legislation, enabling police agencies to better support their members in understanding the standards that are expected of them when using lethal force. Issues that may be addressed in such policies include

- **Warning shots:** Many professional police agencies forbid the use of warning shots on the basis of the danger these pose to members of the public. A 2009 statement by President Zuma<sup>21</sup> indicated that there was confusion at the highest level of government about whether or not it was necessary or appropriate for these to be used by police in South Africa.
- **Verbal warnings:** In situations where police are legally justified in using lethal force against a fleeing suspect they should, where possible, give verbal warnings prior to the use of lethal force.
- **The safety of bystanders:** It needs to be emphasised to police that their interest in preventing dangerous suspects from fleeing does not take precedence over the need to protect innocent members of the public from harm. A lethal force policy would emphasise

to police that they should not discharge their firearms when doing so might unnecessarily endanger innocent people.

- **The use of lethal force against moving vehicles:** A number of police agencies in the US generally discourage the use of lethal force against a moving vehicle or the inhabitants thereof. This is partly because 'gunfire is generally ineffective as a means of bringing a vehicle to a halt'.<sup>22</sup> If the driver of a moving vehicle is killed, the vehicle potentially poses major dangers to other members of the public.
- **The dual expectations that off-duty police carry firearms and intervene in crimes in progress:** A high proportion of killings of police take place in situations where they are off duty.<sup>23</sup> As the SAPS annual report emphasises, 'when police officers are off duty they are at their most vulnerable, as operational police support mechanisms are not available'.<sup>24</sup> For these reasons many professional police agencies advise their members against interventions in crimes in progress in these kinds of situations, motivating that they should see their obligation in such situations to call in support, if possible.

Over and above these more 'technical' questions, a use of lethal force policy should foreground values relating to the use of lethal force, particularly the need to give pre-eminence to the protection of human life. This implies prioritising the safety of police and members of the public, and firmly discouraging unjustified and unnecessary uses of lethal force. For instance, the deadly force policy of the NYPD states that:

The New York Police Department recognises the value of all human life and is committed to respecting the dignity of every individual. The primary duty of all members of the service is to preserve human life. The most serious act in which a police officer can engage is the use of deadly force. The power to carry and use firearms in the course of public service is an awesome responsibility. Respect for human life requires that, in all cases, firearms be used as a last resort, and then only to protect life.

Uniformed members of the service should use only the minimal amount of force necessary to protect human life. ... Above all, the safety of the public and ... members of the service must be the overriding concern whenever the use of firearms is considered.<sup>25</sup>

Even if Section 49 is amended along the lines provided in the Bill currently before Parliament it will still be appropriate to emphasise to police that the motivation for the use of lethal force is essentially to protect life. *Tennessee v Garner*, the judgement of the US Supreme Court from which the principle contained in the Bill is derived, states that the core motivation for the use of lethal force is the threat of 'serious physical harm, either to the officer or to others'<sup>26</sup> posed by the suspect. In effect, the fact that the suspect is believed to have 'committed a crime involving the infliction or threatened infliction of serious bodily harm' serves to justify the use of lethal force to prevent his flight, because, the court implies, this may indicate that he might harm more people in the same way in the future. The implied justification for the use of lethal force in these circumstances is to protect people against the potential for harm of this kind.

A use of force policy is therefore an internal directive to police members from the police service to which they belong, which supplements the standards set out in legislation. In the case of the SAPS, the policing agency in South Africa most extensively involved in the use of lethal force, such a policy would be supplementary to their Code of Conduct. While the Code of Conduct says that SAPS members should uphold human rights, it does not directly address issues relating to the use of lethal force or the protection of life.

The potential value of such policies however depends crucially on whether they are implemented with full leadership backing, and as part of a commitment on the part of leadership to improved standards within the police in relation to the use of lethal force. It is widely recognised that the adoption of various policies is not in itself a recipe for improved standards. Policies

may be adopted by police organisations largely for ‘presentational’ purposes – to comply with international legal instruments or so that police and government leaders can create the right impression in international forums – but without genuine leadership commitment to the goals espoused by the policy.<sup>27</sup> Despite the adoption by the SAPS in 1998 of a Prevention of Torture Policy, the police continue to be linked to torture.<sup>28</sup> It would therefore appear that a policy can only be expected to be of value if it is taken seriously by leadership. This might require a reorientation of the current leadership in terms of how they understand their role in guiding members in relation to the use of lethal force.

## **THE NEED FOR A NEW APPROACH WITHIN THE SAPS**

Since the transition to democracy one of the principal changes that has taken place in controlling the use of force has been the creation of the ICD, with its mandate to investigate deaths as a result of police action (pending amendments to the legal framework in this regard are referred to above). In addition, Section 49 of the Criminal Procedure Act was amended by Parliament in 1998 with the intention of preventing the unjustified use of lethal force by police. Within the SAPS there has also been a substantial shift towards incorporating human rights standards into the training curriculum. There has also been a reorientation of the SAPS in terms of its approach to the policing of demonstrations; though unfortunately it has not been able to sustain the improvements made in this regard and the quality of public order policing units appears to have deteriorated over recent years.<sup>29</sup>

While it would be a mistake to deny that these have been significant changes, there is nevertheless a sense that SAPS systems for managing the use of force by police members remain unchanged. This applies in particular to the core internal process for controlling the use of lethal force by SAPS members. This is based on an apartheid-era standing order (Standing Order 251), which requires incidents where a firearm is discharged to be reported and

investigated by a member of officer rank. Considering the uneven standards of management within the SAPS,<sup>30</sup> adherence to the provisions of the standing order is likely to be uneven. But even where it is properly enforced it has limited impact. This is not simply to do with the fact that the investigation is carried out by an SAPS member, and therefore lacking in independence, but has much to do with the inadequacies, outlined above, of an approach to managing the use of force that only engages with the use of force after the fact and is purely concerned with whether police have violated the law or not.

SAPS neglect of the issue is reflected in the fact that the SAPS has no internal information on the levels of the use of lethal force by its members. There is therefore a need for a wholesale reorientation of the SAPS in terms of its approach to dealing with the use of lethal force. This requires not only proper monitoring of the use of lethal force by the SAPS, but also making a concern with the professional use of force part of the process of day to day police management. Police managers need to be able to engage with police members about questions of professionalism in approaching and dealing with the myriad situations in which there is the potential for the use of lethal or other force. It is customary for all kinds of organisations to deal with issues of professional standards through processes such as performance monitoring and mentoring. In just the same way, police organisations need to be able to engage with their members about the standards which they uphold in using lethal and other force. Such engagement should be developmental in orientation and extend into the day to day management processes of the police organisation, rather than being restricted to the training academy, the shooting range and the aftermath of shooting incidents.

But, as a leading US writer on policing, the late Carl Klockars, emphasises, this requires management systems that make it possible to ‘discover and discuss the use of force freed from the threat or fear of punishment’.<sup>31</sup> A lethal force policy could provide the basis for such a system.

Such a policy should make it clear that it is not intended to replace existing laws, but to support police in adhering to these laws and upholding the highest standards in their use of lethal force. Violations of the policy would not provide the basis for a criminal charge, though deliberate violations would lead to disciplinary measures. Implementation of the policy would require that uses of lethal force not only be investigated in terms of whether police officers have violated the law or not. Alongside, but separate from, these investigations should be processes of review which focus on building the understanding of police about the type of judgments that will enable them to deal with potential use of force situations most professionally. Police should be encouraged to adhere to the policy because of the values it is based on and the benefits of doing so for the reputation of the police, rather than primarily because of the risk of discipline.

## THE POLITICAL MOTIVATION TO IMPROVE CONTROL OF THE USE OF LETHAL FORCE

Occasionally, as a result of prominent incidents like the death of Andries Tatane, the issue of the use of lethal force becomes a leading media and even political issue. But most of the time questions of the use of lethal force are a political non-issue and there is even some sense that the use of excessive force is tacitly encouraged at a political level. Public sentiment too is often tolerant of excessive force by police, as reflected in a 2009 survey by TNS Research Surveys which found that 54% of interviewees supported a 'shoot to kill' policy.<sup>32</sup>

The reasons for these permissive public attitudes are related to public anxieties about crime. With a few notable exceptions, those who are at the receiving end of the use of lethal force are, generally, marginalised young men.<sup>33</sup> Due to the fact that most of the perpetrators of serious violent crime are also from this demographic group it is assumed by many members of the public that those who are injured or killed by police using lethal force are 'criminals', and there is little sympathy for them.

While it is undoubtedly true that many of the victims of police use of lethal force are violent criminals it is also likely that there are many victims who, while they are marginalised young men, are wrongly identified as being suspects by the police and in fact are not guilty of any, or at least any serious, crimes.<sup>34</sup> However, the concerns of this constituency have little political weight and are unlikely to have much political importance attached to them in the face of broad public sentiment, which tends to be uncritical of excessive force.

Policing that is oppressive however not only undermines the potential for cooperation from members of this group, but reinforces their sense of alienation and hostility to the law. In so far as police are guided by official or public sentiment which encourages them to do their work in a manner that is oppressive and violates human rights, this may prove to be counterproductive. Whatever public sentiment may be, it is possible that police will take the issue more seriously if they can be persuaded that the most effective type of policing is that which is based on earning the respect of those whom they deal with.

Police services that take pride in the fact that they adhere to high standards may potentially be more effective in securing respect, and as a result cooperation, particularly from those constituencies who are most often at the receiving end of police attention.<sup>35</sup> Better control of the use of lethal force, and force in general, is one vehicle for achieving such high standards – and internal policies that provide guidance to members on the use of lethal force, a way to achieve such control.

In addition to winning greater public respect for the police, the successful implementation of these policies has a number of other potential benefits. These include:

- Greater clarity at a leadership level regarding questions relating to the use of lethal force will enable commanders and supervisors to more authoritatively provide direction to members on the use of lethal force.

- Greater control over the use of force by police leads to reduced civil liability on the part of government.
- Greater police identification with the need to observe high principles and compliance with legislation leads to improved *esprit de corps* and morale.

As Geller and Toch argue, 'the best results in upgrading the use-of-force decision making and tactical skill of most officers very likely will be obtained through positive incentives rather than through punishment. These incentives include the appeal of officer safety, crime- and disorder-control effectiveness, and building rapport with community members who can help prevent crime.'<sup>36</sup> A use of force policy supported by a new approach to reviewing use of force incidents could assist the SAPS in moving towards an overall improvement of its standards in using lethal force, potentially with multiple benefits, not only for the safety of police and civilians, but for policing in South Africa.



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## NOTES

1. In this article the term lethal force is used mostly to refer to shootings by police, though the term more broadly refers to 'force reasonably capable of causing death or great bodily harm' (William Geller and Michael Scott, *Deadly Force: What We Know*, Washington, D.C.: Police Executive Research Forum, 1992, 23).
2. See also the shooting of Jeanette Odendaal on 26 April 2011 (Franny Rabkin, *Outrage over new case of police shooting*, *Business Day*, 28 April 2011, 3).
3. The total number of deaths as a result of police action reported in the 2008-9 year was 612, of which 44 were in vehicle accidents and the remaining 568 involved use of force by police. For the 2009-10 year the total number of deaths as a result of police action was 566 of which 42 were in vehicle accidents and 524 as a result of the use of force. During 2008-9, four deaths and during 2009-10, ten deaths were at the hands of municipal police services with the balance being caused by members of the SAPS. (Figures are from ICD annual reports available at <http://www.icd.gov.za>).
4. Questions regarding the prevalence of unlawful shootings by police are discussed in David Bruce, *An acceptable price to pay – the use of lethal force by police in South Africa*, Cape Town: Open Society Foundation, 2010, 25-30, [http://www.osf.org.za/File\\_Uploads/](http://www.osf.org.za/File_Uploads/)

- docs/CJI\_Occasional\_Paper\_8.pdf (accessed 24 February 2011).
5. David Bruce and Gabriel O'Malley, *In the Line of Duty? Shooting incidents reports and other indicators of the use and abuse of force by members of the SAPS*, Centre for the Study of Violence and Reconciliation, 2001, 26-27 (Table 12), <http://www.csvr.org.za/docs/policing/inthelineofduty.pdf> (accessed 28 April 2011).
  6. The SAPS website indicates that there are currently 154 898 SAPS members, [http://www.saps.gov.za/\\_dynamicModules/internetsite/buildingBlocks/basePage4/BP444.asp](http://www.saps.gov.za/_dynamicModules/internetsite/buildingBlocks/basePage4/BP444.asp) (accessed 28 April 2011). The total staff complement of South Africa's five additional metropolitan police service members is in the region of 5 000 members (Bruce, *An acceptable price to pay*, 12 (footnote 17)).
  7. In the absence of up-to-date SAPS shooting data this projection is based on the 1996-98 shooting incident data from three provinces. Using this data it would appear possible that there may currently be in the region of 8 000 – 9 000 shooting incidents per year if fatal shooting incidents account for roughly 7% of all shooting incidents. The number of police involved in shooting incidents would be greater than the number of shooting incidents as in many incidents more than one police shooter is involved. The three provinces data for instance indicated that 19% of shooting incidents involved more than one police shooter, including 14% which involved two shooters and 5% which involved more than two. Altogether there were 129 police shooters for every 100 shooting incidents. Bruce and O'Malley, *In the Line of Duty?*, 43 (Table 27). If there were 8 000-9 000 shooting incidents these might therefore have involved somewhere between 10 000 and 12 000 police shooters.
  8. As noted by a reviewer of this article the reverse also applies: If 'police officials are trained and knowledgeable in appropriate and proportionate use of force, and if force (at any degree) is well managed (and punished where abused), it will surely impact on the use of lethal force too'.
  9. South African Police Service, *Annual Report of the South African Police Service, 2009/10*, 92 [http://www.saps.gov.za/saps\\_profile/strategic\\_frame/work/annual\\_report/2009\\_2010/6\\_prg2\\_vispol.pdf](http://www.saps.gov.za/saps_profile/strategic_frame/work/annual_report/2009_2010/6_prg2_vispol.pdf) (accessed 28 April 2011).
  10. See for instance N Haysom 'License to Kill Part II: A Comparative Survey of the Law in the United Kingdom, United States of America and South Africa' *South African Journal of Human Rights*, 4, 1988, 202-222; D Bruce, *Killing and the constitution – arrest and the use of lethal force*, *South African Journal of Human Rights*, 19(3) (2003), 430-454.
  11. Independent Police Investigative Directorate Bill, 15 of 2010, Section 28 1(c).
  12. It may be noted that section 49 is presently formulated in an exceptionally confusing manner and could be made much clearer whilst retaining this future danger principle. In the end the question as to how to interpret this would remain.
  13. Commentary to Article 3 of the Code of Conduct states that 'In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardises the lives of others



- and less extreme measures are not sufficient to restrain or apprehend the suspected offender. Code of Conduct for Law Enforcement Officials Adopted by General Assembly resolution 34/169 of 17 December 1979, <http://www2.ohchr.org/english/law/codeofconduct.htm>, (accessed 6 May 2011).
14. Point 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that '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.' <http://www2.ohchr.org/english/law/firearms.htm> (accessed 28 April 2011).
  15. Criminal Procedure Amendment Bill, 39 of 2010.
  16. *Tennessee v Garner* 471 US 1 (1985) 11.
  17. *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA).
  18. *S v Walters* 2002 (4) SA 613 (CC).
  19. Due to the wide leeway which the 'future danger' principle provides for interpretation it is possible to interpret it in a manner which is much narrower than that provided for in the Bill or in a manner similar to that put forward in the Bill. D Bruce, Clarity needed on use of lethal force, *Business Day*, 17 September 2003.
  20. Carl Klockars, A theory of excessive force and its control, in William Geller and Hans Toch (eds) *Police violence*, New Haven: Yale University Press, 1996, 9-11.
  21. Graham Hosken and SAPA, 'Police have no time to fire warning shots', *The Star*, September 30 2009. Also on [www.iol.co.za](http://www.iol.co.za).
  22. Police Assessment Resource Centre, 'The Portland Police Bureau: Officer-involved shootings and in-custody deaths', 2003:191-192, [http://www.parc.info/portland\\_police\\_bureau-publications.shtml](http://www.parc.info/portland_police_bureau-publications.shtml) (accessed 18 May 2011).
  23. For instance in the 2009-10 year of the 101 killings of police, 62 took place off duty and 39 on duty. South African Police Service, Annual Report of the South African Police Service, 2009/10, 92, [http://www.saps.gov.za/saps\\_profile/strategic\\_framework/annual\\_report/2009\\_2010/6\\_prg2\\_vispol.pdf](http://www.saps.gov.za/saps_profile/strategic_framework/annual_report/2009_2010/6_prg2_vispol.pdf) (accessed 28 April 2011).
  24. South African Police Service, Annual Report of the South African Police Service, 2009/10, 92.
  25. Police Assessment Resource Centre, Appendix to The Portland Police Bureau: Officer involved shootings and In-custody deaths – First follow up report', 2005, 65, [http://www.parc.info/client\\_files/Portland/Follow-up/2%20-%20Appendix.pdf](http://www.parc.info/client_files/Portland/Follow-up/2%20-%20Appendix.pdf) (accessed 28 April 2011).
  26. *Tennessee v Garner* 471 US 1 (1985) 11.
  27. See the various sources referenced in Robert Reiner, *The politics of the police*, Brighton: Wheatsheaf Books, 1985, 176; Also Andrew Sanders and Richard Young, *Criminal Justice*, 2nd ed, London: Butterworths, 74.
  28. See for instance ICD statistics dealing with non-fatal police violence for the 1997-2006 in David Bruce, Gareth Newham and Themba Masuku, In service of the people's democracy – an assessment of the South African Police Service, Johannesburg: Centre for the Study of Violence and Reconciliation & Open Society Foundation for South Africa, 2007, 123, as well as subsequent ICD annual reports (available at <http://www.icd.gov.za>).
  29. Bilkis Omar, SAPS' Costly Restructuring – A review of public order policing capacity, Pretoria: Institute for Security Studies, 2007; See also Johan Burger and Bilkis Omar, Can practice make perfect? Security and the 2010 FIFA World Cup, *SA Crime Quarterly* 29, 2009, 9-16.
  30. Bruce, Newham and Masuku, In service of the people's democracy.
  31. Klockars, A theory of excessive force and its control, 19.
  32. Brendan Boyle, Shoot to kill – but dump the posh cars, *Sunday Times*, 20 December 2009, 4.
  33. ICD data on deaths as a result of police action for 2007-08 and 2008-2009 indicated that 89% and 92% of victims respectively were male (ICD 2007-2008 and ICD 2008-2009 annual reports available at <http://www.icd.gov.za>). However the vast majority of the female deaths in these cases take place either in police vehicle accidents and in a sub-category of shootings which includes domestic violence and other killings related to interpersonal arguments involving police. In the sub-categories of deaths which may be seen to generally involve alleged criminal suspects 98% of victims are male. In a 2007 analysis of deaths in three provinces 122 out of 127 (96%) were black, 2 were coloured, 2 Indian and 1 white (Independent Complaints Directorate, An investigation into deaths as a result of police action in KwaZulu-Natal, Eastern Cape and Gauteng, 2007, 31, [http://www.icd.gov.za/documents/report\\_released/research\\_reports/researchreport2007.pdf](http://www.icd.gov.za/documents/report_released/research_reports/researchreport2007.pdf) (accessed 17 May 2011)). Of 84 victims for whom age data were available the 2007 analysis of deaths states that the mean age of victims was 29,5 years and mode 25 years (previous citation, 26). Data on the socio-economic status of victims of the use of lethal force are not available. However it has been consistently documented elsewhere that the victims of police abuse tend to be from more marginalised sectors of the population (Reiner, *The politics of the police*, 175-6; PAJ Waddington, Armed and unarmed policing, in R Mawby (ed), *Policing Across the World – Issues for the Twenty-First Century*. London: Routledge, 1999, 163; Paul Chevigny, *Edge of the Knife: Police Violence in the Americas*, New York: New Press, 1995) and there is little reason to doubt that this is also the case in South Africa.
  34. Bruce, *An acceptable price to pay*, 30.
  35. Jason Sunshine and Tom R. Tyler, The role of procedural justice and legitimacy in shaping public support for the police, *Law & Society Review* 37, 2003, 513-47; Barbara D Warner, The role of attenuated culture in social disorganisation theory, *Criminology* 41, 2003, 73-97 cited in Stewart and Simons, Race, code of the street, and violent delinquency, 574/575. See also Jacinta M Gau and Rod K Brunson,

Procedural justice and order maintenance policing: a study of inner-city young men's perceptions of police legitimacy, *Justice Quarterly* 27 (2) (2010), 255-279, <http://www.informaworld.com/smpp/section?content=a910861513&fulltext=713240928> (accessed 5 April 2011).

36. William Geller and Hans Toch, Understanding and controlling police abuse of force, in Geller and Toch (eds.) *Police violence*, 295.