

# Use of force by law enforcement officials in Namibia



Legal Assistance Centre  
November 2019

<b>1.</b>	<b>Introduction.....</b>	<b>2</b>
<b>2.</b>	<b>Operation Hornkranz and Operation Kalahari Desert .....</b>	<b>3</b>
<b>3.</b>	<b>International guidelines.....</b>	<b>8</b>
3.1	Peel's Nine Principles, 1829 .....	9
3.2	United Nations Code of Conduct for Law Enforcement Officials, 1979.....	10
3.3	Basic Principles on the Use of Force and Firearms for Law Enforcement Officials (BPUFF), 1990 .....	11
3.4	United Nations Standard Minimum Rules for the Treatment of Prisoners ("Nelson Mandela Rules"), 2015 .....	16
3.5	SARPPCO Code of Conduct for Police Officials .....	19
3.6	Practical guidelines .....	21
<b>4.</b>	<b>Current Namibian law.....</b>	<b>29</b>
4.1	Namibian Constitution.....	29
4.2	Namibia's armed forces .....	30
4.3	Police Act 19 of 1990 .....	35
4.3	Criminal Procedure Act 51 of 1977 .....	36
4.5	Defence Act 1 of 2002 .....	43
4.6	Correctional Service Act 9 of 2012 .....	43
4.8	Other statutory authority for use of force .....	45
4.9	Nampol Standing Orders and Operational Manual.....	47
<b>5.</b>	<b>Comparative law.....</b>	<b>50</b>
5.1	South Africa.....	50
5.2	New Zealand.....	58
5.3	Canada .....	65
5.4	European jurisprudence .....	69
5.5	US jurisprudence .....	71
<b>6.</b>	<b>Analysis .....</b>	<b>73</b>
<b>7.</b>	<b>Recommendations .....</b>	<b>75</b>

---

**Acknowledgements:** This report was drafted by **Dianne Hubbard** with input from **Hannah Van Dijke**, **M'Mah Touré**, **Andrew Cooper** and **Yolande Engelbrecht**. Administrative support was provided by **Celine Engelbrecht**. The research was funded by **Hanns Seidel Foundation**. We would like to thank the **Namibian Police** for providing us with a copy of their *Operational Manual*.

---

# 1. Introduction

This paper looks at the legal framework for use of force by law enforcement officials when they are carrying out their duties.

“**Law enforcement officials**” refers to all personnel who exercise police powers, especially the powers of arrest or detention.<sup>1</sup>

“**Use of force**” in the law enforcement context refers to “the amount of effort required by police to compel compliance by an unwilling subject”.<sup>2</sup>

This paper considers in particular **unlawful, excessive or arbitrary use of force**. “Unlawful” use of force means force that violates the principle of legality, because it has an insufficient legal basis or because it is used for a reason that is not a legitimate law enforcement objective. “Excessive” use of force is where the use of force was lawful, but the type and level of force was unnecessary or disproportionate. “Arbitrary” use of force means a use of force characterized by an element of injustice, discrimination, unreasonableness, abuse of power, or exercise of unwarranted discretion.<sup>3</sup>

However, this paper does *not* address **torture**, which is when somebody in an official capacity inflicts mental or physical pain on someone for a specific purpose – such as to extract a confession, to get information or to serve as a punishment in order to spread fear in society.<sup>4</sup>

The study was triggered by the recent increase in reports of abuse of force by the Namibian Police (Nampol) and the Namibian Defence Force (NDF). As of November 2019, the Legal Assistance Centre is handling 32 cases of such incidents, 11 of which are related to Operation Hornkranz or Operation Kalahari Desert.

This paper will look at the key international standards, the guidance provided by current Namibian law, and some comparative law models to consider if Namibian laws on this issue might be improved. It concludes with recommendations for reform to the relevant legislation, but does not propose changes to operational guidance – which would need to be predicated on any future legislative changes.

---

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

<sup>2</sup> This often-quoted definition is usually attributed to the International Association of the Chiefs of Police. See, for example, International Association of the Chiefs of Police, *Police Use of Force in America*, 2001.

<sup>3</sup> Resource book on the use of force and firearms in law enforcement, United Nations Office on Drugs and Crime, 2017 at 2.

<sup>4</sup> See “Torture”, Amnesty International, 2019. The *Convention against Torture* defines “torture” in Article 1(1) as: any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

**African Commission on Human and Peoples' Rights**  
*Noah Kazingachire, John Chitsenga, Elias Chemvura & Batanai Hadzisi*  
*(represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe,*  
Communication 295/04, 18 April to 2 May 2012

“There are several reasons why the use of lethal force by the police, also in the context of arrest, should be viewed as a matter of the utmost gravity, and be based on a solid ethical and legal framework. These include the fundamental nature of the right to life; the irreversible nature of death; the potential of errors of fact and judgement; the effect on the legitimacy of the police and the State; and the trauma suffered by everyone involved when a life is ended through violence.

However, in some cases of urgency, law enforcement officials are given the power by law to use coercive measures and even in exceptional cases to take life-and-death decisions on the spot. [...] It should be kept in mind that law enforcement officials have a legal duty to perform their functions. Not giving the police the proper scope to protect the public and themselves could compromise the safety of the public as well as members of the police force. A system that is seen as too protective of the rights of suspects is unlikely to be effective in practice. The challenge clearly is to find the right balance between overly permissive and overly restrictive. The starting point is that life should not be taken by the State, and any action that seeks to fall in the narrow confines of exceptions to this rule requires strong motivation.”

paragraphs 108-109 (footnotes omitted)

## 2. Operation Hornkranz and Operation Kalahari Desert

Operation Hornkranz was launched by the President in December 2018. It brought together members of the Namibian Police, the Namibian Defence Force, the Namibian Correctional Service and the City Police to fight the increase in crime in Windhoek and other major towns more effectively.<sup>5</sup> In May 2019, Operation Hornkranz was replaced by Operation Kalahari Desert.<sup>6</sup> Its first phase ran from 11 May to 30 June 2019, with a second phase being launched on 12 August 2019.<sup>7</sup> Police indicated that it would run in intervals until December 2019, with another operation being introduced in January 2020. The Inspector-General of Police stated: “Criminals should know that it has started and will never end.”<sup>8</sup>

Many citizens have welcomed the crackdown on crime.<sup>9</sup> Police report that the operations have seen some significant successes. During Operation Hornkranz, illicit drugs worth over N\$2.6 million were confiscated, and 599 suspects were arrested for various crimes in one month alone.<sup>10</sup> In the first phase of Operation Kalahari, police reported that 1 996 suspects were arrested, with 752 of these being arrests for serious crimes including murder, attempted murder, rape, assault GBH, dealing in drugs, possession of wild animal products, housebreaking and theft. In addition, 1 711 dangerous weapons were confiscated, including 49 firearms, as well as illicit drugs with a

<sup>5</sup> Eliakim N Silvanus, “The importance of operation Hornkranz“, *Windhoek Observer*, 11 January 2019.

<sup>6</sup> Ruth Kamwi, “Operation Kalahari Desert kicks off“, *The Namibian*, 14 May 2019; Arlana Shikongo & Ruth Kamwi, “New police operation to raise tempo“, *The Namibian*, 15 May 2019.

<sup>7</sup> Maria Amakali, “Phase 2 of Operation Kalahari to resume Monday“, *New Era*, 7 August 2019.

<sup>8</sup> Ruth Kamwi, “Operation Kalahari Desert kicks off“, *The Namibian*, 14 May 2019.

<sup>9</sup> See, for example, Arlana Shikongo, “Geingob defends ‘Operation Kalahari’“, *The Namibian*, 14 October 2019.

<sup>10</sup> “Operation Kalahari Desert replaces Hornkranz“, *The Patriot*, 10 May 2019.

combined street value of N\$683 072. Police also reported recovery of 284 stolen livestock.<sup>11</sup> It was reported further that 136 illegal immigrants were deported from Katima Mulilo to Zambia during two weeks of Operation Kalahari, with some of these persons having been involved in illegal activities such as drug smuggling.<sup>12</sup>

These figures, while they sound impressive, are not very revealing without some point of comparison in the form of similar statistics during periods of normal policing. Police did note a comparative decrease in crime reports, from 8 787 in March 2019, before Operation Kalahari began, to 8 186 in April 2019 and 7 349 in June 2019.<sup>13</sup>

Both operations have been heavily criticized due to reports of abuse by the relevant armed forces.

Some high-profile allegations concerning Operation Hornkranz include the following:

- A 37-year-old man alleged that he was severely beaten by NDF members in Katutura (Windhoek) on New Year's Eve 2018 after he was stopped while driving along the road and pulled out of his vehicle. He reported that he lost consciousness after made to walk with his injuries, yet was denied medical care.<sup>14</sup>
- A 31-year-old woman alleged that she was severely beaten by NDF members in a bar in Katutura. She suffered a fractured skull and lost consciousness.<sup>15</sup> [Nampol reports that they determined that this was a domestic violence incident rather than a law enforcement matter.]
- A 30-year-old man claimed that he was assaulted in Windhoek by an NDF member and a Nampol member while he was walking on the street.<sup>16</sup>
- An officer attached to the VIP protection unit alleged that he was assaulted by NDF members, resulting in a bruised face and cut lip.<sup>17</sup>
- Two men claimed that they were assaulted by NDF members at a club, being slapped and beaten with a sjambok.<sup>18</sup>
- Another man claimed that he was assaulted by NDF members while loading chairs after a graduation party.<sup>19</sup>
- Another man claimed that he was slapped at a club by a police volunteer from Men and Women's Network, during an incident where his cousin was chased by NDF members after he videotaped them.<sup>20</sup>

---

<sup>11</sup> Maria Amakali, "[Phase 2 of Operation Kalahari to resume Monday](#)", *New Era*, 7 August 2019.

<sup>12</sup> "[Namibia deports 136 Zambian illegal immigrants](#)", *Xinhua*, 28 August 2019.

<sup>13</sup> "[Second phase of Operation Kalahari Desert to commence on Monday](#)", *Lela Mobile Online*, 6 August 2019; "[Second phase of Operation Kalahari Desert to commence on Monday](#)", *Namibian Broadcasting Corporation*, 8 August 2019.

<sup>14</sup> Ndanki Kahjurika, "[Residents claim army abuse](#)", *The Namibian*, 1 January 2019; Jana Mari Smith, "[Hornkranz triggers N\\$1m lawsuit](#)", *The Namibian Sun*, 3 July 2019.

<sup>15</sup> Ndanki Kahiurika, "[Soldiers run amok... savage woman in Katutura](#)", *The Namibian*, 24 April 2019.

<sup>16</sup> Tangeni Amupadhi, "[Civilian assaulted in broad daylight... as army investigates assault claims](#)", *The Namibian*, 3 May 2019; "[Operation Kalahari Desert claims another 'victim'](#)", *The Namibian*, 31 May 2019. This assault actually appears to have occurred during Operation Hornkranz.

<sup>17</sup> Tangeni Amupadhi, "[Civilian assaulted in broad daylight... as army investigates assault claims](#)", *The Namibian*, 3 May 2019.

<sup>18</sup> Ibid. A "sjambok" is a long, stiff whip.

<sup>19</sup> Ibid.

<sup>20</sup> Id. Some of these incidents are also cited in Ruth Kamwi, "['Fearful' citizens skip march to NDF](#)", *The Namibian*, 6 May 2019.

Some members of the public reportedly planned a protest march to NDF headquarters in May 2019, intended to be a show of solidarity with alleged victims of NDF beatings, but failed to go ahead out of fear of a confrontation.<sup>21</sup>

Police also faced some aggression. For example, an incident was reported where off-duty police officers and soldiers were operating shebeens that refused to close at the stipulated time, leading to a confrontation with an operational team.<sup>22</sup> On another occasion, journalists observed several members of the public engaging in arguments and physical fights with police when stopped for traffic violations.<sup>23</sup>

Operation Kalahari Desert (often referred to simply as “Operation Kalahari”) also led to controversy following the fatal shooting of a taxi driver in Windhoek by an NDF member. Press reports indicate that the Zimbabwean driver was killed while attempting to make a U-turn when he saw a temporary police road block. The soldier responsible for the shooting was arrested.<sup>24</sup>

Another fatality resulted from Operation Kalahari when a 32-year-old man was shot by an NDF member in Katutura, allegedly because he was recording a video of Operation Kalahari forces as they raided a home in the area. He died from his injuries later the same day. The soldier who fired the shot was arrested on a charge of murder.<sup>25</sup>

On 17 September 2019, the Minister of Defence made the following statement in the National Assembly:

While the patrol team was in the process of searching, a male person was allegedly detected in the street nearby, busy video recording the cordon and search activities with his mobile phone... The illegal video recording was reported to the patrol commander ... who then instructed two NDF and one Nampol member to instruct and make sure that the person who was recording deleted the recorded information from his phone, as he was not authorised to record a video of the patrol actions and the motive for the recording was not known ... recording a video of NDF and Nampol members in action is prohibited because it is very dangerous ... So, members of the public are cautioned to refrain from taking videos of security forces members in operations.

However, there is in fact no law forbidding such filming.<sup>26</sup>

In addition, police in the Erongo Region were reportedly investigating a shooting incident in which a 21-year-old man was shot in Walvis Bay’s Kuisebmund suburb during Operation Kalahari after he ignored three warning shots.<sup>27</sup> No further information on this case could be located.

---

<sup>21</sup> Ruth Kamwi, “‘Fearful’ citizens skip march to NDF“, *The Namibian*, 6 May 2019.

<sup>22</sup> “Operation Kalahari Desert replaces Hornkranz“, *The Patriot*, 10 May 2019.

<sup>23</sup> Ndanki Kahjurika, “Residents claim army abuse“, *The Namibian*, 1 January 2019.

<sup>24</sup> “Operation Kalahari claims first death“, *The Namibian Sun*, 13 June 2019; Ruth Kamwi, “Soldier arrested over killing of taxi driver“, *The Namibian*, 13 June 2019; Ndanki Kahiurika & Ruth Kamwi, “Nightmare on Monica Street“, *The Namibian*, 14 June 2019.

<sup>25</sup> Arlana Shikongo, “Geingob defends ‘Operation Kalahari’“, *The Namibian*, 14 October 2019; Nomhle Kangootui & Ndanki Kahiurika, “Operation Kalahari Desert strikes again“, *The Namibian*, 6 September 2019; Terttu Newaka & Ndanki Kahiurika, “Soldier denied bail on murder charge“, *The Namibian*, 10 September 2019.

<sup>26</sup> “No law prohibits bystanders from video recording police or military on operation in public spaces“, Namibia Fact Check, 9 October 2019.

<sup>27</sup> “Man shot during Operation Kalahari Desert patrol“, *Namibian Broadcasting Corporation*, 18 August 2019.

Two brothers from Rehoboth, respectively aged 20 and 25, claim that they were severely beaten by local police officers during an “Operation Kalahari Desert” patrol. They claim that they were confronted and searched by police while waiting for a lift outside a bar. They allege that the police searched them for illegal items but found nothing, then put them into the police bakkie, drove them to a dark spot and assaulted them even though they offered no resistance. The two victims have opened cases of assault with intent to do grievous bodily harm.<sup>28</sup>

It should also be noted that at least one incident of violence against a member of the armed forces was reported during Operation Kalahari, where an NDF member was “headbutted” in Windhoek by a civilian, causing him to lose consciousness.<sup>29</sup> He was taken to hospital,<sup>30</sup> and it was later reported that he had to undergo surgery.<sup>31</sup>

Concerns about the excessive use of force during these special operations have been cited in press statements by various organisations, including the Legal Assistance Centre,<sup>32</sup> the Society of Advocates<sup>33</sup> and the Namibian Law Association,<sup>34</sup> and have drawn critical comments from Namibia’s Ombudsman and various opposition leaders.<sup>35</sup> A petition calling on the government to stop Operation Kalahari, organized by “Concerned Namibians Everywhere” through the international group “change.org”, had almost 10 000 signatures as of November 2019.<sup>36</sup>

In response to criticisms about incidents during the first phase of Operation Kalahari Desert, Nampol announced that all officers taking part in the second phase would undergo three days of intensive induction training<sup>37</sup>

The task of readying law enforcement personnel to use force appropriately by providing appropriate legal rules and training is important but not easy:

Law enforcement officials face a large variety of situations in their daily work, each requiring a different response, based on the overall situation and circumstances, the threat assessment, skills, equipment, etc. Thus, there is little room for ready-made answers in law enforcement and there is an inherent necessity for personal discretion on the part of the law enforcement official in deciding on the appropriate response in a given situation. However, it goes without saying that there needs to be a clear legal framework governing the work of law enforcement officials within which such discretion can be exercised – in particular when it comes to the use of force. The use of force must only be resorted to with the utmost respect for the law and with due consideration for the serious impact it can have on a

---

<sup>28</sup> Luqman Cloete, “[Rehoboth youth claim police brutality](#)”, *The Namibian*, 29 May 2019.

<sup>29</sup> Ndanki Kahiurika, “[Civilian attacks Operation Kalahari soldier](#)”, *The Namibian*, 23 September 2019.

<sup>30</sup> Ibid.

<sup>31</sup> Ndanki Kahiurika, “[Operation Kalahari soldier to undergo surgery](#)”, *The Namibian*, 24 September 2019.

<sup>32</sup> “[Statement on Unlawful NDF and Police Assaults](#)”, Legal Assistance Centre, 29 April 2019.

<sup>33</sup> Arlana Shikongo, “[Geingob defends ‘Operation Kalahari’](#)”, *The Namibian*, 14 October 2019.

<sup>34</sup> Tangeni Amupadhi, “[Civilian assaulted in broad daylight... as army investigates assault claims](#)”, *The Namibian*, 3 May 2019.

<sup>35</sup> Nomhle Kangoouti & Ndanki Kahiurika, “[Operation Kalahari Desert strikes again](#)”, *The Namibian*, 6 September 2019; “[Remove soldiers](#)”, *Namibian Sun*, 23 September 2019; Ndanki Kahiurika & Ruth Kamwi, “[Nightmare on Monica Street](#)”, *The Namibian*, 14 June 2019; “[Geingob says high crime rate necessitated Operation Kalahari’s launch](#)”, *Namibian Broadcasting Corporation*, 17 June 2019.

<sup>36</sup> “[Stop Operation Kalahari Desert and SWAPO HQ Renovation](#)”, change.org, last accessed 30 November 2019.

<sup>37</sup> “[Second phase of Operation Kalahari Desert to commence on Monday](#)”, *Lela Mobile Online*, 6 August 2019; “[Second phase of Operation Kalahari Desert to commence on Monday](#)”, *Namibian Broadcasting Corporation*, 8 August 2019.

range of human rights: the right to life, to physical and mental integrity, to human dignity, to privacy, and to freedom of movement – to name just the ones most frequently affected.<sup>38</sup>

It is important to emphasise that the concern about excessive use of force in connection with law enforcement is not confined to the recent crackdowns on crime. It was reported that 118 shooting incidents involving police officers were investigated by Nampol's Internal Investigative Unit between 2010 and mid-2016, with all of these resulting in criminal charges – 34 charges of murder and 84 charges of attempted murder.<sup>39</sup> This points to an endemic problem.

**PRESS STATEMENT ISSUED BY THE SOCIETY OF ADVOCATES OF NAMIBIA ON  
THE REPORTED ALLEGED KILLING OF A MEMBER OF THE PUBLIC BY A MEMBER OF  
THE NAMIBIAN DEFENSE FORCE ENGAGED IN OPERATION "KALAHARI DESERT"**

**PRESS RELEASE | 3 OCTOBER 2019**

1. The Society of Advocates of Namibia has noted, with deep concern, yet another report in the local news media alleging that a civilian had been shot dead by a member of the Namibian Defence Force engaged in operation "Kalahari Desert".
2. The Republic of Namibia is established as a sovereign, peaceful and safe democratic State founded upon the principles of democracy, the rule of law and justice for all. The security forces exist and function in this context.
3. Article 118 of the Namibian Constitution [now Article 115] established the Namibian Defence Force to defend the territory and national interests of Namibia. Article 115 [now Article 118] of the Constitution established the Police Force to secure the internal security of Namibia and to maintain law and order. These discrete functions sanctioned by the Namibian Constitution emphasise that the general objectives of the two forces differ. For this reason, generally soldiers should not be engaged in performing policing duties. This is particularly so, where they use excessive force, including engaging in wrongful shootings, constituting a direct violation by members of the security forces of the human rights of citizens enshrined in our Bill of Rights.
4. The Society of Advocates of Namibia accepts that it cannot rely implicitly on unverified facts published in the media. However, it has come to the attention of the Society in the past months of other similar incidents where allegations have been made that members of the security forces have used excessive force, including the shooting of civilians, whilst conducting crime prevention operations in the country. It is appreciated that the security forces generally have a very difficult time in countering increased criminal conduct, and that the citizens of this country would generally support effective measures being taken by the security forces to combat crime in order to make their neighbourhoods safer. However, this does not detract from the duty of the Society of Advocates of Namibia, in upholding the important values contained in the Namibian Constitution, to speak out against human rights abuses where they occur.
5. It is the Society of Advocates of Namibia's view that the official response of the Honourable Minister of Defence does not inspire confidence that the Namibian Defence Force has learnt its lessons from this past conduct. The Society also disagrees with the Honourable Minister's statement that the taking of videos of the Namibian Defence Force members is prohibited. The Society can find no basis in law for this statement.
6. The Society of Advocates of Namibia therefore publically calls upon the Honourable Minister of Defence and the Honourable Minister of Safety and Security to take all steps necessary to ensure that members of the Forces are properly trained, particularly where soldiers are engaged in policing activities. The desired objective is to conduct lawful crime prevention operations with the minimum use of force permitted by law, and that such members are generally sensitized to the sanctity of life.

Adv. AW Corbett, SC  
President, Society of Advocates of Namibia  
3 October 2019

<sup>38</sup> "Use of force: Guidelines for implementation of the UN basic principles on the use of force and firearms by law enforcement officials", Amnesty International, 2015 at 17.

<sup>39</sup> "The Law on Police Use of Force Worldwide: Namibia", 2019. This database on policing law collects academic documents and analyses how domestic legal regimes around the world regulate the use of force by the police and other law enforcement agencies. The website is managed by the Human Rights Centre of the University of Pretoria. "About us", 2019. The statistics quoted here are attributed to the head of the Internal Investigative Unit, Commissioner Christoph Nakanyala, in July 2016.

### 3. International guidelines

The various international standards on the use of force can all be understood in terms of six main themes:

- (1) **Legality:** The power to use force needs to be based in domestic legislation, and to be applied to serve a legitimate objective established by law.
- (2) **Necessity:** Necessity has three components: *qualitative* (the use of force is not avoidable); *quantitative* (the amount of force does not exceed what is required); and *temporal* (force is used only to avert an immediate threat). In other words, force should be used only if it is not possible to achieve the legitimate objective in any other way; the level of force used should be the minimum that can accomplish the objective; and the use of force must stop as soon as the objective is achieved or is no longer achievable.
- (3) **Prevention:** Once the use of force is being considered, it may be too late to rescue the situation. In order to save lives, all possible measures should be taken “upstream” to avert situations where force needs to be considered.
- (4) **Proportionality:** There must be a balance between the benefits of the use of force and the possible consequences that could ensue. No life should be put at risk unless it is for the purpose of saving or protecting another life.
- (5) **Non-discrimination:** Law enforcement officials have a duty to respect the human rights of all persons, without discrimination. This includes *direct discrimination*, when a person is treated less favourably because of a protected characteristic such as ethnicity or sexual orientation, and *indirect discrimination*, where an apparently neutral provision or practice puts a person with a particular characteristic at a heightened disadvantage.
- (6) **Accountability:** Law enforcement agencies must be held accountable for their compliance with the legal framework – including superiors who supervise or command other law enforcement officials, or are responsible for the planning and preparation of law enforcement operations, as well as the agency as a whole. Accountability also requires –
  - having proper policies and procedures in place on the use of force and firearms, including provision for supervision and controls;
  - continual review to prevent repetition of mistakes or undesirable results;
  - adequate training which is continually evaluated as to its effectiveness;
  - a clear chain of command;
  - a system that holds each official within the law enforcement agency accountable for any failures to fulfil the responsibilities of his or her post.<sup>40</sup>

---

<sup>40</sup> *Resource book on the use of force and firearms in law enforcement*, United Nations Office on Drugs and Crime, 2017 at 16-20; “[Use of force: Guidelines for implementation of the UN basic principles on the use of force and firearms by law enforcement officials](#)”, Amnesty International, 2015 at 20; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014 at paras 55-ff.

It is also generally acknowledged that there is a need for specific guidance on policing **demonstrations** and on the use of force on **persons in custody or detention**.<sup>41</sup>

### 3.1 Peel's Nine Principles, 1829

A good starting point for the discussion is the guidelines often referred to as “Sir Robert Peel’s Nine Principles of Policing”. In 1829, Sir Robert Peel established the first full-time, professional police force in England. He is widely considered to be the “founder of modern policing”. It is not entirely certain if he did indeed formulate the principles personally, but they are generally attributed to him and have become a cornerstone of policing in the UK and the USA.<sup>42</sup> These principles are still regularly quoted, lectured on and written about, and they remain highly relevant to current law enforcement practice.<sup>43</sup>

#### Peel's Nine Principles

**PRINCIPLE 1:** The basic mission for which the police exist is to prevent crime and disorder.

**PRINCIPLE 2:** The ability of the police to perform their duties is dependent upon public approval of police actions.

**PRINCIPLE 3:** Police must secure the willing cooperation of the public in voluntary observance of the law to be able to secure and maintain the respect of the public.

**PRINCIPLE 4:** The degree of cooperation of the public that can be secured diminishes proportionately to the necessity of the use of physical force.

**PRINCIPLE 5:** Police seek and preserve public favour not by catering to the public opinion but by constantly demonstrating absolute impartial service to the law.

**PRINCIPLE 6:** Police use physical force to the extent necessary to secure observance of the law or to restore order only when the exercise of persuasion, advice and warning is found to be insufficient.

**PRINCIPLE 7:** Police, at all times, should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police; the police being the only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.

**PRINCIPLE 8:** Police should always direct their action strictly towards their functions and never appear to usurp the powers of the judiciary.

**PRINCIPLE 9:** The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it.

<sup>41</sup> See, for example, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014 at paras 75-76.

<sup>42</sup> John Dempsey & Linda Forst, *An Introduction to Policing*, 5<sup>th</sup> edition, Australia: Delmar Cengage Learning, 2009 at 8. The principles appear in slightly different versions in different sources. The version quoted in the box appears in many sources and is one of the most succinct. For a critical discussion of these principles, see Ian Loader, “*In Search of Civic Policing: Recasting the ‘Peelian’ Principles*”, 10(3) *Criminal Law and Philosophy* 2014.

<sup>43</sup> See, for example, “*Sir Robert Peel’s Policing Principles*”, Law Enforcement Action Partnership (an international nonprofit organization of criminal justice professionals), undated.

### 3.2 United Nations Code of Conduct for Law Enforcement Officials, 1979

The United Nations Code of Conduct for Law Enforcement Official was adopted by the UN General Assembly in 1979.<sup>44</sup>

Article 2 states that law enforcement officials must “respect and protect human dignity and maintain and uphold the human rights of all persons” in the performance of their duties.

Article 3 states that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. The commentary to Article 3 emphasises that the use of force should be exceptional, necessary and proportional, and that the use of firearms should be an extreme measure to counter armed resistance or other situations when lives are at stake:

- (a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that 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.
- (b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.
- (c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

#### UN Code of Conduct for Law Enforcement Officials (1979)

**Article 1:** Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

**Article 2:** In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

**Article 3:** Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

**Article 4:** Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

---

<sup>44</sup> [Code of Conduct for Law Enforcement Officials](#), 1979.

**Article 5:** 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 to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

**Article 6:** Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

**Article 7:** Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts.

**Article 8:** Law enforcement officials shall respect the law and the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of them. 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 power.

### 3.3 Basic Principles on the Use of Force and Firearms for Law Enforcement Officials (BPUFF), 1990

The *Basic Principles on the Use of Force and Firearms for Law Enforcement Officials (BPUFF)*<sup>45</sup> were adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990.<sup>46</sup> The United Nations General Assembly welcomed these principles and suggested that States should “take them into account within the framework of their national legislation and practice”.<sup>47</sup> Although the principles are not legally binding, they are considered authoritative.<sup>48</sup>

The *BPUFF* sets standards for the lawfulness of use of force by law enforcement personnel, as well as principles regarding accountability and review. The principles it includes apply at all times – even in exceptional circumstances such as times of political instability or other public emergencies.<sup>49</sup>

The first principle is that governments and law enforcement agencies should implement rules and regulations about the use of firearms.<sup>50</sup>

Secondly, they should equip law enforcement officials with a range of weapons for different situations, including non-lethal incapacitating weapons and self-defence measures (such as shields, helmets and bullet-proof vests) to decrease the need for the use of weapons.<sup>51</sup>

---

<sup>45</sup> *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (“BPUFF”)*, 1990.

<sup>46</sup> *Ibid*, subtitle.

<sup>47</sup> UN General Assembly, *Human rights in the administration of justice*, A/RES/45/166, 18 December 1990, at para 4.

<sup>48</sup> International and national courts have relied upon them. See, for example, African Commission on Human and Peoples’ Rights, *Kazingachire et al v Zimbabwe*, Communication 295/04, 12 October 2013 at para 110.

<sup>49</sup> *BPUFF*, Principle 8.

<sup>50</sup> *Id*, Principle 1.

<sup>51</sup> *Id*, Principles 2-3.

The key principles on the use of force are that law enforcement officials should always use non-violent means of carrying out their duty as far as possible, resorting to force and firearms only as a last resort.<sup>52</sup> If the use of force and firearms is unavoidable, law enforcement officials must:

- (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (b) Minimize damage and injury, and respect and preserve human life;
- (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
- (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.<sup>53</sup>

Instances of arbitrary or abusive use of force and firearms by law enforcement officials should be punishable as a criminal offence.<sup>54</sup>

There are additional rules about the use of firearms. Law enforcement officials should use firearms only (a) in self-defence or defence of others against the imminent threat of death or serious injury, (b) to prevent the perpetration of a particularly serious crime involving grave threat to life, (c) to arrest a person presenting such a danger and resisting their authority, or to prevent the escape of such a person – and in any of these cases, only when less extreme means are insufficient. Intentional lethal use of firearms may only be made when “strictly unavoidable in order to protect life”.<sup>55</sup> In any of these circumstances, law enforcement officials shall identify themselves as such and give a clear warning of their intention to use firearms, with sufficient time for the warning to be observed – unless this 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”.

The *BPUFF* contains specific rules for policing persons in custody or detention. Force should be used only if “strictly necessary for the maintenance of security and order within the institution”, or when someone’s personal safety is threatened. Firearms should be used only 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 who presents the danger of committing a particularly serious crime involving grave threat to life.<sup>56</sup>

---

<sup>52</sup> Id, Principle 4. This echoes Article 3 of the UN Code of Conduct for Law Enforcement Officials.

<sup>53</sup> Id, Principle 5.

<sup>54</sup> Id, Principle 7.

<sup>55</sup> Id, Principle 9.

<sup>56</sup> Id, Principle 7.

**Basic Principles on the Use of Force and Firearms**  
**by Law Enforcement Officials**  
*[Preamble omitted]*

**General provisions**

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.
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, bullet-proof 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.
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.
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;
  - (b) Minimize damage and injury, and respect and preserve human life;
  - (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
  - (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.
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.
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.

**Special provisions**

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.

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.

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.

### **Policing unlawful assemblies**

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

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.

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.

### **Policing persons in custody or detention**

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.

### **Qualifications, training and counselling**

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.

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.

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.

21. Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used.

### **Reporting and review procedures**

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.

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 dependants accordingly.

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.

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 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.

### 3.4 United Nations Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”), 2015

The original version of the *United Nations Standard Minimum Rules for the Treatment of Prisoners* was adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the UN Economic and Social Council in 1957.<sup>57</sup> The revised version, known as the “*Nelson Mandela Rules*”, was unanimously adopted by UN General Assembly in 2015.<sup>58</sup>

These rules cover a wide range of topics related to prisoners, including elaboration of the use of force with regard to prisoners. Staff members working inside places of detention who are in direct contact with prisoners should not – except in special circumstances – carry firearms, and they should not use force except in self-defence, attempted escape, or resistance to a lawful order.<sup>59</sup>

Instruments of restraint that are inherently degrading or painful can never be used.<sup>60</sup> Other instruments of restraint are allowed only as a precaution against escape during a transfer and by order of the prison director, in order to prevent prisoners from injuring themselves or others or damaging property.<sup>61</sup> Means of restraint must never be used on women detainees during labour or childbirth, or immediately afterwards.<sup>62</sup>

These standard rules are supplemented by special sets of rules on juveniles and women, both of which also speak to the use of force.

The *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (“*Havana Rules*”), 1990 were similarly adopted by the UN General Assembly to provide special principles for the treatment of juvenile prisoners.<sup>63</sup> With regard to the use of force on juveniles, these rules completely prohibit firearms in any facility where juveniles are detained.<sup>64</sup> They also specify that the use of force against juveniles to prevent injury to themselves or other or serious destruction of property must be authorized by order of the director of the administration.<sup>65</sup>

The *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (“*Bangkok Rules*”), 2010 were similarly adopted by the UN General Assembly

---

<sup>57</sup> UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 2015, adopted by UN General Assembly Resolution of 15 December 2015, A/RES/70/175, 2 January 2016, Preamble.

<sup>58</sup> “UN, international experts urge countries to apply ‘Nelson Mandela Rules’ in prisons”, *UN News*, 18 July 2016.

<sup>59</sup> UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 2015, adopted by UN General Assembly Resolution of 15 December 2015, A/RES/70/175, 2 January 2016, rule 82.

<sup>60</sup> Id, rule 47(1). Some examples are thumbcuffs, body-worn electric shock belts or prolonged use of other means of restraint such as handcuffs. “Use of force: Guidelines for implementation of the UN basic principles on the use of force and firearms by law enforcement officials”, Amnesty International, 2015 at 168-169.

<sup>61</sup> Nelson Mandela Rules, rule 47(2)

<sup>62</sup> Id, rule 48(2). See also *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (“*Bangkok Rules*”), 2010, rule 24.

<sup>63</sup> *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (“*Havana Rules*”), 1990, adopted by UN General Assembly Resolution of 14 December 1990, A/RES/45/113, 2 April 1991.

<sup>64</sup> Id, rule 65.

<sup>65</sup> Id, rule 64.

to provide for the specific needs of women prisoners.<sup>66</sup> These rules require prison staff to safeguard women prisoners against gender-specific forms of abuse – including gender-based physical violence and sexual harassment.<sup>67</sup> This is important, because women prisoners are at particularly high risk of sexual assault and humiliation in prison, from both prison staff and other prisoners. This can include improper touching during searches, and being watched when dressing, showering or using the toilet.<sup>68</sup> Women are also sometimes required to provide sexual services before they are accorded their most basic human rights, such as access to food and essential services.<sup>69</sup>

### **United Nations Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”), 2015**

\*\*\*

#### **Rule 47**

1. The use of chains, irons or other instruments of restraint which are inherently degrading or painful shall be prohibited.
2. Other instruments of restraint shall only be used when authorized by law and in the following circumstances:
  - (a) As a precaution against escape during a transfer, provided that they are removed when the prisoner appears before a judicial or administrative authority;
  - (b) By order of the prison director, if other methods of control fail, in order to prevent a prisoner from injuring himself or herself or others or from damaging property; in such instances, the director shall immediately alert the physician or other qualified health-care professionals and report to the higher administrative authority.

#### **Rule 48**

1. When the imposition of instruments of restraint is authorized in accordance with paragraph 2 of rule 47, the following principles shall apply:
  - (a) Instruments of restraint are to be imposed only when no lesser form of control would be effective to address the risks posed by unrestricted movement;
  - (b) The method of restraint shall be the least intrusive method that is necessary and reasonably available to control the prisoner’s movement, based on the level and nature of the risks posed;
  - (c) Instruments of restraint shall be imposed only for the time period required, and they are to be removed as soon as possible after the risks posed by unrestricted movement are no longer present.

---

<sup>66</sup> [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(“Bangkok Rules”\)](#), 2010, adopted by UN General Assembly Resolution of 21 December 2010, A/RES/65/229, 16 March 2011.

<sup>67</sup> *Id.*, rule 31.

<sup>68</sup> [UN Bangkok Rules on women offenders and prisoners: Short guide](#), Penal Reform International, 2013 at 9.

<sup>69</sup> [Commentary to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders](#), Commentary to Rule 31. (The Commentary is not part of the Bangkok Rules. It was prepared by the United Nations Office on Drugs and Crime (UNODC) and approved in 2009 by the “Open-ended intergovernmental expert group meeting to develop supplementary rules specific to the treatment of women in detention and in custodial and non-custodial settings”.)

2. Instruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth.

\*\*\*

## **Rule 82**

1. Prison staff 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. Prison staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the prison director.

2. Prison staff shall be given special physical training to enable them to restrain aggressive prisoners.

3. Except in special circumstances, prison staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, prison staff should in no circumstances be provided with arms unless they have been trained in their use.

## **United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“Havana Rules”), 1990**

### **K. Limitations of physical restraint and the use of force**

63. Recourse to instruments of restraint and to force for any purpose should be prohibited, except as set forth in rule 64 below.

64. Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time. By order of the director of the administration, such instruments might be resorted to in order to prevent the juvenile from inflicting self-injury, injuries to others or serious destruction of property. In such instances, the director should at once consult medical and other relevant personnel and report to the higher administrative authority.

65. The carrying and use of weapons by personnel should be prohibited in any facility where juveniles are detained.

## **United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (“Bangkok Rules”), 2010**

### **Rule 24**

Instruments of restraint shall never be used on women during labour, during birth and immediately after birth.

### **Rule 31**

Clear policies and regulations on the conduct of prison staff aimed at providing maximum protection for women prisoners from any gender-based physical or verbal violence, abuse and sexual harassment shall be developed and implemented.

### 3.5 SARPPCO Code of Conduct for Police Officials

In 2001, the Southern African Regional Police Chiefs Co-operation Organisation (SARPPCO)<sup>70</sup> adopted a *Code of Conduct for Police Officials*, which sets out minimum standards.<sup>71</sup> As in the case of many other international codes and standards, the starting point is the principle that police officials must “respect and protect human dignity and maintain and uphold all human rights for all persons”.<sup>72</sup> The key principle on the use of force is Article 3, which largely reflects Article 3 of the *UN Code of Conduct for Law Enforcement Officials* as well as the *Basic Principles on the Use of Force and Firearms*, allowing the use of force only “when strictly necessary and to the extent required” for the performance of police duties. The application of the SARPPCO Code is more limited, however, as it *applies only to police officials* (who are not defined in the Code), and not to other law enforcement personnel such as military and security forces.<sup>73</sup>

#### SARPPCO Code of Conduct for Police Officials

##### ARTICLE 3 – 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.

The **African Policing Civilian Oversight Forum (APCOF)** has developed indicators to assist in monitoring the implementation of the *SARPPCO Code of Conduct*.<sup>74</sup> The indicators for monitoring the necessity of the use of force are the following:

- Legislation, policy and practice support the principles of proportionate minimum use of force;
- Police are trained in the principles of minimum use of force;
- Non-lethal weapons are available;
- Strict control is exercised over the use, storage and distribution of firearms; and
- Public order policing, such as policing of assemblies, complies with principles of minimum force.<sup>75</sup>

The value of the SARPPCO Code of Conduct is that the member states of SARPPCO have agreed to be bound by these principles and to implement them nationally.<sup>76</sup> Since Namibia is a member

<sup>70</sup> SARPPCO was established in 1995 in order to foster better cooperation and mutual assistance between police forces in Southern Africa. It consists of a Council of Police Chiefs and a Permanent Coordinating Committee. Member countries are Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. This regional organisation is supported by the Sub-Regional Bureau of Interpol in Harare, which coordinates its activities and programmes. See “[Police \(SARPPCO\)](#)”, Southern African Development Community website, 2012.

<sup>71</sup> SARPPCO Code of Conduct for Police Officials, 2001.

<sup>72</sup> Id, Article 1.

<sup>73</sup> See “[Use of force: Guidelines for implementation of the UN basic principles on the use of force and firearms by law enforcement officials](#)”, Amnesty International, 2015 at 9.

<sup>74</sup> “[Implementing the Southern African Regional Police Chiefs Cooperation Organisation \(SARPPCO\) Code of Conduct](#)”, APCOF, 2011.

<sup>75</sup> Id at 14.

<sup>76</sup> [Harare Resolution adopting the SARPPCO Code of Conduct for Police Officials](#), Southern African Regional Police Chiefs Co-operation Organisation (SARPPCO), 6<sup>th</sup> Annual General Meeting, 27-31 August 2001, Mauritius, paras 1-2.

state, it is bound to respect these principles. This contrasts with the UN principles discussed above, which are non-binding guidelines. In addition, the Legal Sub-Committee of SARPCCO is assigned to monitor the implementation of the SARPCCO Code of Conduct, including providing advice on national legislation required to fully implement the Code.<sup>77</sup>

In 2011, ten years after the implementation of the SARPCCO Code of Conduct, the **Institute for Security Studies (ISS)**, in collaboration with APCOF, hosted a workshop to discuss the application of the Code of Conduct. The principle remarks regarding Namibia concerned police training and public awareness. It was observed that many ex-combatants were recruited into Nampol after Independence without proper police training, which has had a negative impact on the credibility and professionalism of the police. It was also noted that Namibia's six-month police training seemed inadequate for the acquisition of the requisite police skills. The report also mentions that the SARPCCO Code of Conduct was not well known or used in Namibia, compared to the Namibian Constitution and the Police Act 19 of 1990. Furthermore, members of the public are not aware of their rights and have expressed fear of being victimised or apprehended as criminals when reporting a crime.<sup>78</sup>

In 2012, APCOF conducted an assessment in 10 countries, including Namibia, with the objective of assisting civil society and policing organisations with the implementation of the Code of Conduct. The Namibian portion of the assessment noted that there is some police training in human rights issues, guided by the Police Act, the Criminal Procedure Act, the Operational Manuals and the Namibian Constitution.<sup>79</sup> However, this assessment again pointed to the challenge of integrating ex-combatants into the police services, noting that "whereas they had formerly been trained on military tactics, it appears that they have not always been able to make the transition to a civilian mode of policing, and have required further training".<sup>80</sup>

One positive point noted was the existence of Namibian police regulations stipulating who can use a firearm. It was reported that police officials are trained to use firearms, and that a police official must undergo an evaluation before being authorised to carry a firearm. At that stage, respondents estimated that half of the members of Nampol carried firearms. Firearms are stored at police stations, and police officials must sign them out; detectives are permitted to take their weapons home with them. The assessment also found that non-lethal weapons are made available to police for self-defence.<sup>81</sup> Yet another positive factor was the finding that Nampol offers psychosocial support to those experiencing trauma or stress, either through Nampol social workers or external psychologists.<sup>82</sup>

---

<sup>77</sup> Id, para 3.

<sup>78</sup> Sean Tait, Cheryl Frank, Irene Ndung'u and Timothy Walker, "[Workshop Report: The SARPCCO Code of Conduct- Taking stock and mapping out future action](#)", Institute for Security Studies (ISS), 2011 at 14.

<sup>79</sup> Amanda Dissel and Cheryl Frank, eds, "[Policing and Human Rights: Assessing southern African countries' compliance with the SARPCCO Code of Conduct for Police Officials](#)", APCOF, 2012 at 102-103, 109. At that time, six-month basic training was provided at the Israel Patrick Iyambo Police College and the Ondangwa Police Training Centre.

<sup>80</sup> Id at 103.

<sup>81</sup> Id at 110.

<sup>82</sup> Id at 106. The report could not source information on the number of police making use of such counselling.

However, despite these precautions, the report cited incidents of the excessive use of police force involving both rubber bullets and live ammunition.<sup>83</sup>

### 3.6 Practical guidelines

#### (a) *UNDOC/OHCHR Resource Book*

In 2017, the **United Nations Office on Drugs and Crime (UNDOC)** and the **United Nations High Commissioner for Human rights (OHCHR)** published a *Resource book on the use of force and firearms in law enforcement* which focuses on four issues:

- how to use force in conformity with the applicable international human rights law and standards
- how to reduce the need to resort to force
- how to prevent the abuse of force
- what measures should be taken when unlawful, excessive or arbitrary use of force occurs.<sup>84</sup>

**Components of domestic law:** This *Resource Book* suggests that international human rights obligations should be implemented by domestic laws that cover:

- the general principles governing any use of force (legality, necessity, proportionality and non-discrimination)
- thresholds for the use of lethal force (both potentially lethal and intentionally lethal force)
- rules on accountability (criminal and other forms) and the rights of victims of unlawful, excessive or arbitrary use of force
- control and oversight mechanisms.<sup>85</sup>

**Components of regulations / operational manual:** The next level of guidance should take the form of regulations or operational manuals, which should address the following aspects of the use of force:

- reference to the relevant international and domestic laws and guidelines
- main concepts
- general principles governing the use of force
- instructions for the use of particular instruments of force
- instructions on the care to be provided in the event of an injury
- recording and reporting obligations
- chain of command, operational decision-making at the scene of the operation, and control and oversight procedures
- training requirements
- storage of/access to weapons and other instruments, and related responsibilities
- a feedback mechanism to improve operational procedures.<sup>86</sup>

---

<sup>83</sup> Id at 110.

<sup>84</sup> *Resource book on the use of force and firearms in law enforcement*, United Nations Office on Drugs and Crime, 2017 at 3.

<sup>85</sup> Id at 8.

<sup>86</sup> Id at 9-10.

The *Resource Book* recommends that these operational procedures be made public:

It is good practice to share regulations and SOPs with the public, for example by publishing them on any relevant institutional website. This increases public awareness of agency policies and permits law enforcement officials to demonstrate compliance with their own operational framework.<sup>87</sup>

**Considerations regarding use of force:** The *Resource Book* also takes a very pragmatic look at the circumstances under which various forms of force should be used.

Prevention is the first step; law enforcement officials should be trained in solving conflicts without the use of any type of force. However, if there is a need to resort to force, they should be equipped with a range of options to enable them to opt for the most minimal alternative which is necessary. Many of the possible responses do not involve any instruments at all. The *Resource Book* stresses that the list of options it surveys is not comprehensive, as new techniques and instruments are developed on a regular basis:<sup>88</sup>

**Not using instruments:**

- Open-hand techniques, such as a raised open hand or pushing someone back with the palm of the hand
- Pressure point techniques
- Body impact (pushing)
- Hard empty hand techniques, such as holding someone's arm behind the back
- Closed hand techniques (fists)

**Using instruments:**

- Sticks, batons, truncheons
- Use of shields to push people back
- Handcuffs and other restraints
- Chemical irritants, such as "pepper" or OC spray and tear gas
- Water cannon
- Dogs and other animals
- Electroshock weapons, including stun guns, batons and "tasers"
- Kinetic impact weapons, such as baton rounds or rubber bullets, bean bags
- Firearms.<sup>89</sup>

The consideration of what use of force is appropriate to a particular situation is often referred to as the "scale" or "continuum" of force. However, this does *not* mean that law enforcement officials proceed along the scale step-by-step, which would not be realistic in real-life situations. Although a graduated approach to force may be possible in some situations, there will be instances where law enforcement officers must rely on their training and their own assessments to make a quick decision on what response is required.<sup>90</sup>

---

<sup>87</sup> Id at 10.

<sup>88</sup> Id at 65-66.

<sup>89</sup> Ibid.

<sup>90</sup> Id at 65.

### USE-OF-FORCE “CONTINUUM”

The scale of force, or continuum of force, should not be understood to imply that law enforcement officials should be going up and down step-by-step depending on the resistance encountered. Indeed, in reality law enforcement officials will not (and should not) try every means at their disposal one by one but will, based on their assessment, in line with the legal framework and the policies in use, choose what they believe to be the most appropriate response to a given situation.

Rather, the “scale” concept entails that law enforcement officials should be able to choose between different instruments and types of force allowing them to escalate and de-escalate depending on the situation. This requires for them to be equipped with and trained in the use of various different instruments and techniques of force, so that they are aware of the potential impact of the different instruments and can make an informed decision as to when to choose what instrument.<sup>91</sup>

The scale of force, or continuum of force, should not be understood to imply that law enforcement officials should be going up and down step-by-step depending on the resistance encountered. Indeed, in reality law enforcement officials will not (and should not) try every means at their disposal one by one but will, based on their assessment, in line with the legal framework and the policies in use, choose what they believe to be the most appropriate response to a given situation.

Rather, the “scale” concept entails that law enforcement officials should be able to choose between different instruments and types of force allowing them to escalate and de-escalate depending on the situation. This requires for them to be equipped with and trained in the use of various different instruments and techniques of force, so that they are aware of the potential impact of the different instruments and can make an informed decision as to when to choose what instrument.<sup>92</sup>

In assessing whether a given type and level of force is consistent with the principles of legality, necessity and proportionality, the following **factors** are relevant:

- The policing objective to be achieved
- The threat to the law enforcement official(s) or third persons
- The type of (expected) resistance
- The conduct of the subject being confronted
- The time available to make a decision
- The level of self-protection
- The availability of other resources including the possibility to call for back-up
- The area and the presence of uninvolved bystanders
- The instructions or information received by the law enforcement official
- The skills of the law enforcement official
- The seriousness of the offence that was or is likely to be committed.<sup>93</sup>

There are also **tactical considerations** that should be taken into account:

- Is the area geographically or functionally suitable for employing the intended force?
- What will be the impact on the cooperativeness of the alleged suspect if confronted with force now?

---

<sup>91</sup> Id at 65, footnote omitted.

<sup>92</sup> Id at 65, footnote omitted.

<sup>93</sup> Id at 69.

- What will be the impact on the cooperativeness of the community if confronted with force now?
- Will the presence of more – or fewer – or different types of officers (such as staff with good negotiating skills, from a specific ethnic group, that speak the language, that know the community, of a higher rank, etc.) help in minimizing or avoiding the use of force?
- What instruments should or should not be displayed in order to seek to calm the situation?<sup>94</sup>

The recommendations also note that law enforcement officials should not always make use of all the force that they could lawfully use – since a situation may sometimes de-escalate on its own, without law enforcement intervention that could actually exacerbate escalating tensions. **Disengagement** may sometimes be the best option, at least temporarily, if this does not conflict with the duty to protect the public.<sup>95</sup>

The *Resource Book* suggests that any regulations or operational procedures on the use of force should specify **circumstances when use of force is totally prohibited**:

- To punish or retaliate
- Against individuals who only verbally confront them unless the vocalization impedes a legitimate law enforcement function or contains specific threats to harm the officers or others
- On handcuffed or otherwise restrained subjects, except in exceptional circumstances when the subject's actions must be immediately stopped to prevent injury, escape, or destruction of property...
- To stop a subject from swallowing a substance, such as a plastic bag containing a controlled substance or other evidence
- To extract a substance or item from inside the body of a suspect without a warrant.<sup>96</sup>

Furthermore, force should never be used to obtain information, admissions or confessions of guilt<sup>97</sup> – which would constitute torture.

The *Resource Book* summarises the recommended decision-making process by law enforcement officials as follows:

- Assess the situation.
- Decide whether force is required or whether there is another means to achieving the objective.
- Decide what maximum use of force is permissible.
- Decide what minimum use of force could achieve the objective.
- Apply the force if no other feasible option is available.
- Re-assess the situation and decide to apply force again or scale up or down.<sup>98</sup>

At the same time, it notes that, in situations of self-defence, law enforcement officials are allowed to use anything that is at hand, as long as it is proportionate, mindful that they will have to account for their reaction afterwards.<sup>99</sup>

---

<sup>94</sup> Ibid.

<sup>95</sup> Id at 69-70.

<sup>96</sup> Id at 70, excerpt from Seattle Police Department Manual.

<sup>97</sup> Id at 71.

<sup>98</sup> Id at 79.

<sup>99</sup> Id at 78, note 164.

The *Resource Book* also provides detailed guidance for the use of specific instruments and for specific policing situations – as well as issues relating to command and control and accountability mechanisms.

#### RESPECT FOR THE RIGHTS OF LAW ENFORCEMENT OFFICIALS

“While law enforcement officials are duty bearers with an obligation to protect the human rights of others, they are rights holders as well and States have a responsibility to respect and protect their rights too. This means for example that States have a responsibility to ensure that their law enforcement officials work under adequate conditions (including in terms of salaries, rest and vacation, family protection); are well trained and equipped, including with self-protective equipment; that operations are well-planned; and receive appropriate instructions, in order to avoid placing officials in unnecessary danger. Moreover, there is a need to have an effective chain of command that allows for clearly defined and delineated responsibilities and adequate control and oversight mechanisms. Creating an environment in which law enforcement officials are aware of their rights and see their rights and concerns respected is an important factor in ensuring they carry out their work with confidence and with the commitment to protect the rights of others”.<sup>100</sup>

#### (b) *Amnesty International Use of Force Guidelines*

In 2015, **Amnesty International** published *Use of Force: Guidelines for implementation of the basic principles on the use of force and firearms by law enforcement officials*.<sup>101</sup> The purpose of these *Guidelines* is to elaborate on *BPUFF* and to ensure that due regard is given to the rule of law and human rights in the exercise of force.<sup>102</sup>

Like the *Resource Book*, the *Guidelines* stress the importance of a comprehensive legal and operational framework to provide a firm legal ground for the appropriate use of force.<sup>103</sup> The *Guidelines* identify three minimum components of domestic legislation:

- (1) Establishing and regulating the general power to resort to the use of force and the purpose and circumstances which warrant force.
- (2) Establishing and regulating the power to resort to the use of lethal force, in particular firearms, and ensuring utmost respect for the right to life.
- (3) Ensuring full and effective accountability for any law enforcement action that involved the use of force.<sup>104</sup>

The *Guidelines* helpfully provide both positive and negative examples of wording on various points from legislation and operational documents from different regions of the world. The need for sufficient specificity is noted:

---

<sup>100</sup> Id at 15.

<sup>101</sup> “*Use of force: Guidelines for implementation of the UN basic principles on the use of force and firearms by law enforcement officials*“, Amnesty International, 2015.

<sup>102</sup> Id at 10.

<sup>103</sup> Id at 43.

<sup>104</sup> Ibid.

Legislation that is limited to general formulations such as “may use reasonable force” or “may use all means necessary” would be insufficient. Such formulations allow the individual law enforcement official an extremely large amount of personal discretion, which in the end makes it almost impossible to hold him or her accountable for the (un)lawfulness of the force used. [...]

In some countries, domestic courts have tried to specify the meaning of such broad formulations or have even declared certain laws unconstitutional. While such interpretations by the judiciary offer some sort of repair mechanism for broad or vague legislation, it is, however, strongly recommended to provide a legal framework that is sufficiently precise not to require such corrections – which in any case will only be implemented when the harm is already done. [...] <sup>105</sup>

Interestingly, Namibia’s Correctional Services Act is cited as one example of an insufficient formulation. <sup>106</sup>

### **Guidelines for implementation of the basic principles on the use of force and firearms by law enforcement officials**

**GUIDELINE NO. 1:** The power of the police to resort to the use of force and firearms must be regulated by law.

**GUIDELINE NO. 2:** The “protect-life”-principle must be enshrined in law, i.e. any force that involves a high likelihood of lethal consequences, in particular use of firearms, may only be used for protecting against a threat of death or serious injury.

**GUIDELINE NO. 3:** Domestic legislation must ensure full and transparent accountability of law enforcement officials for the use of force and firearms.

**GUIDELINE NO. 4:** The command leadership of law enforcement agencies must create an operational framework that contains instructions for various kinds of situations that law enforcement officials may face during their work, including decision making criteria and the conditions for the use of force.

**GUIDELINE NO. 5:** Law enforcement agencies must provide an operational framework that provides clear instructions on when and how to use a firearm.

**GUIDELINE NO. 6:** Law enforcement agencies should have a range of less lethal equipment at their disposal that allows for a differentiated use of force in full respect of the principles of necessity and proportionality, and ensures that harm and injury are kept to the minimum.

**GUIDELINE NO. 7:** The overall approach to policing of assemblies should be guided by the concept of facilitation of the assembly and should not from the outset be shaped by the anticipation of violence and use of force.

**GUIDELINE NO. 8:** The fact that a person is deprived of freedom does not give authorities any greater power to resort to the use of force: the use of force and firearms in detention facilities is subject to exactly the same rules, particularly the principles of necessity and proportionality, which apply in any other law enforcement context.

**GUIDELINE NO. 9:** Law enforcement agencies must ensure that their personnel are able to meet the high professional standards established in the Basic Principles.

<sup>105</sup> Id at 47-48 (footnote omitted). South Africa is mentioned as an example where the courts have attempted to explicate the concept “reasonably necessary”. At note 25.

<sup>106</sup> Id at 47, note 24.

### (c) *International Association of Chiefs of Police Consensus Policy*

The **International Association of Chiefs of Police** published a *National Consensus Policy and Discussion Paper on Use of Force* in October 2017 which is aimed specifically at law enforcement agencies in the United States.<sup>107</sup> The purpose is to provide guidelines on best practices as a resource for law enforcement agencies to draw on in formulating their own policies.<sup>108</sup>

The *Consensus Policy* cautions against excessively long or complex directives on the use of force:

Law enforcement agencies must provide officers with clear and concise policies that establish well-defined guidelines on the use of force. It is essential that officers have a complete understanding of agency policy on this critical issue, regularly reinforced through training. Therefore, a use-of-force policy should be concise and reflect clear constitutional guidance to adequately guide officer decision making. Policies that are overly detailed and complex are difficult for officers to remember and implement and, as such, they create a paradox. While they give officers more detailed guidance, they can also complicate the ability of officers to make decisions in critical situations when quick action and discretion are imperative to successful resolutions.<sup>109</sup>

The *Consensus Policy* divides force into “**deadly force**”( is defined as “any use of force that creates a substantial risk of causing death or serious bodily injury”) and “**less-lethal force**” (defined as “any use of force other than that which is considered deadly force that involves physical effort to control, restrain, or overcome the resistance of another”). The difference is not defined by the type of instruments used, because many instruments have the potential to cause death under certain circumstances.<sup>110</sup>

#### **International Association of Chiefs of Police *Consensus Policy***

##### **A. General Provisions**

1. Use of physical force should be discontinued when resistance ceases or when the incident is under control.
2. Physical force shall not be used against individuals in restraints, except as objectively reasonable to prevent their escape or prevent imminent bodily injury to the individual, the officer, or another person. In these situations, only the minimal amount of force necessary to control the situation shall be used.
3. Once the scene is safe and as soon as practical, an officer shall provide appropriate medical care consistent with his or her training to any individual who has visible injuries, complains of being injured, or requests medical attention. This may include providing first aid, requesting emergency medical services, and/or arranging for transportation to an emergency medical facility.

<sup>107</sup> *National Consensus Policy and Discussion Paper on Use of Force*, International Association of Chiefs of Police, October 2017.

<sup>108</sup> Id at 5.

<sup>109</sup> Id at 6.

<sup>110</sup> Id at 10-11.

4. An officer has a duty to intervene to prevent or stop the use of excessive force by another officer when it is safe and reasonable to do so.
5. All uses of force shall be documented and investigated pursuant to this agency's policies.

#### **B. De-escalation<sup>111</sup>**

1. An officer shall use de-escalation techniques and other alternatives to higher levels of force consistent with his or her training whenever possible and appropriate before resorting to force and to reduce the need for force.
2. Whenever possible and when such delay will not compromise the safety of the officer or another and will not result in the destruction of evidence, escape of a suspect, or commission of a crime, an officer shall allow an individual time and opportunity to submit to verbal commands before force is used.

#### **C. Use of Less-Lethal Force**

When de-escalation techniques are not effective or appropriate, an officer may consider the use of less-lethal force to control a non-compliant or actively resistant individual. An officer is authorized to use agency-approved, less-lethal force techniques and issued equipment –

1. to protect the officer or others from immediate physical harm,
2. to restrain or subdue an individual who is actively resisting or evading arrest, or
3. to bring an unlawful situation safely and effectively under control.

#### **D. Use of Deadly Force**

1. An officer is authorized to use deadly force when it is objectively reasonable under the totality of the circumstances. Use of deadly force is justified when one or both of the following apply:
  - a. to protect the officer or others from what is reasonably believed to be an immediate threat of death or serious bodily injury
  - b. to prevent the escape of a fleeing subject when the officer has probable cause to believe that the person has committed, or intends to commit a felony<sup>112</sup> involving serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to the officer or another if the subject is not immediately apprehended.
2. Where feasible, the officer shall identify himself or herself as a law enforcement officer and warn of his or her intent to use deadly force.
3. Deadly Force Restrictions
  - a. Deadly force should not be used against persons whose actions are a threat only to themselves or property.
  - b. Warning shots are inherently dangerous. Therefore, a warning shot must have a defined target and shall not be fired unless -

---

<sup>111</sup> Defined as “taking action or communicating verbally or non-verbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary”. De-escalation may include the use techniques such as command presence, advisements, warnings, verbal persuasion, and tactical repositioning. Id at 2.

<sup>112</sup> The United States divides crimes into two classes: felony and misdemeanors. Felonies are more serious crimes than misdemeanors.

- (1) the use of deadly force is justified;
  - (2) the warning shot will not pose a substantial risk of injury or death to the officer or others; and
  - (3) the officer reasonably believes that the warning shot will reduce the possibility that deadly force will have to be used.
- c. Firearms shall not be discharged at a moving vehicle unless -
    - (1) a person in the vehicle is threatening the officer or another person with deadly force by means other than the vehicle; or (2) the vehicle is operated in a manner deliberately intended to strike an officer or another person, and all other reasonable means of defence have been exhausted (or are not present or practical), which includes moving out of the path of the vehicle.
  - d. Firearms shall not be discharged from a moving vehicle except in exigent circumstances.<sup>113</sup> In these situations, an officer must have an articulable reason for this use of deadly force.
  - e. Choke holds<sup>114</sup> are prohibited unless deadly force is authorized.

#### **E. Training**

1. All officers shall receive training, at least annually, on this agency's use of force policy and related legal updates.
2. In addition, training shall be provided on a regular and periodic basis and designed to
  - a. provide techniques for the use of and reinforce the importance of de-escalation;
  - b. simulate actual shooting situations and conditions; and
  - c. enhance officers' discretion and judgment in using less-lethal and deadly force in accordance with this policy.
3. All use-of-force training shall be documented.

## **4. Current Namibian law**

### **4.1 Namibian Constitution**

The rights most central to the topic under discussion are the constitutional guarantees for the right to life,<sup>115</sup> liberty,<sup>116</sup> dignity<sup>117</sup> and equality under the law,<sup>118</sup> and its protection against torture and cruel, inhuman or degrading treatment or punishment,<sup>119</sup> as well as arbitrary arrest or detention.<sup>120</sup>

These constitutional rights are reinforced by the similar rights in the regional and international treaties which Namibia has joined. The right to life is particularly fundamental to the issue under

<sup>113</sup> Defined as "circumstances that would cause a reasonable person to believe that a particular action is necessary to prevent physical harm to an individual, the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating legitimate law enforcement efforts". Id at 2-3.

<sup>114</sup> Defined as "a physical manoeuvre that restricts an individual's ability to breathe for the purposes of incapacitation". Id at 3.

<sup>115</sup> Namibian Constitution, Article 6.

<sup>116</sup> Id, Article 7.

<sup>117</sup> Id, Article 8.

<sup>118</sup> Id, Article 10.

<sup>119</sup> Id, Article 8(2)(b).

<sup>120</sup> Id, Article 11.

discussion, as the African Commission on Human and Peoples' Rights has pointed out (see box below).

### **Excessive and wrongful force as a violation of the right to life**

"The right to life constitutes a norm of customary international law and is one of the central rights recognized in international human rights treaties. Article 4 of the African Charter provides that:

'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

Article 3 of the Universal Declaration of Human Rights states that 'everyone has the right to life, liberty and security of person,' while article 6(1) of the International Covenant on Civil and Political Rights states that 'every human being has the inherent right to life, [which] shall be protected by law, and [that] no one shall be arbitrarily deprived of his life.'

In *Forum of Conscience v Sierra Leone*, the African Commission held that 'the right to life is the fulcrum of all other rights. It is the fountain through which all other rights flow and any violation of this right without due process amounts to arbitrary deprivation of life.' The right to life is therefore the foundational, or bedrock human right.

International human rights law therefore requires the Respondent State to both respect and ensure the right to life. [...]"

*The Commission ruled that use of excessive and wrongful force by law enforcement agents in Zimbabwe violated the right to life in Article 4 of the African Charter on Human and People's Rights.*

*Noah Kazingachire, John Chitsenga, Elias Chemvura & Batanai Hadzisi  
(represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe,*  
Communication 295/04, African Commission on Human and Peoples' Rights,  
18 April to 2 May 2012, paragraphs 137-139 (footnotes omitted)

## **4.2 Namibia's armed forces**

**Namibian Constitution:** The Namibian Constitution establishes the Namibian Defence Force,<sup>121</sup> the Namibian Police Force,<sup>122</sup> and the Namibian Correctional Service.<sup>123</sup> The head of each of these services is appointed by the President on the recommendation of the Security Commission, which consists of:

- the Chairperson of the Public Service Commission
- the Chief of the Defence Force
- the Inspector-General of Police
- the Head of the Intelligence Service
- the Commissioner-General of Correctional Service and
- two members of the National Assembly, appointed by the President on the recommendation of the National Assembly.<sup>124</sup>

<sup>121</sup> Id, Article 115.

<sup>122</sup> Id, Article 118.

<sup>123</sup> Id, Article 121.

<sup>124</sup> Id, Article 114. This Commission is also tasked to "advise the President on any matter on which the President may require its advice". Id, Article 114(1)(b).

The Constitution charges the heads of each of these three armed forces to “make provision for a balanced structuring” of the force<sup>125</sup> – which is a method of ensuring that these armed forces reflect the diversity of the Namibian population and engendering acceptance of their authority, particularly in the wake of Namibia’s apartheid past.<sup>126</sup> The head of each armed force is also given a responsibility to cause charges of indiscipline among members of the force to be investigated and prosecuted, and to ensure the efficient administration of the force in question.<sup>127</sup>

Within the Constitutional framework, each armed force has dedicated legislation setting forth its powers and duties:

- **Police Act 19 of 1990**
- **Correctional Service Act 9 of 2012**
- **Defence Act 1 of 2002.**

An important additional source of authority is the **Criminal Procedure Act 51 of 1977**, which addresses the use of force in criminal matters. Many of its provisions apply broadly to “**peace officers**”, who are defined to include any police official and correctional officer (amongst others).<sup>128</sup> Members of Municipal Police Forces who hold certain ranks are also peace officers,<sup>129</sup> but there is no designation of NDF members as peace officers.

The provisions on arrest also apply to private persons who are authorised to effect arrests on their own, or to assist the police with making arrests, in some circumstances.<sup>130</sup>

Other laws address police powers and the permissible use of force in respect of very specific issues.<sup>131</sup>

---

<sup>125</sup> Id, Articles 116(2), 119(2), 122(2).

<sup>126</sup> Id, Article 22(2); see also Article 91(b).

<sup>127</sup> Id, Articles 116(2), 119(2), 122(2).

<sup>128</sup> Criminal Procedure Act 51 of 1977, s. 1 (definition of “peace officer”):

“peace officer” includes any magistrate, justice, police official, correctional officer as defined in section 1 of the Correctional Service Act, 2012 (Act No. 9 of 2012), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1), any person who is a peace officer under that section.

It has been held that this list is exhaustive, with the word “includes” being equivalent to “means” in this definition. *R v Debele* 1956 (4) SA 570 (A). However, the Minister is empowered to declare other persons to be peace officers for specific purposes by notice in the *Government Gazette*, pursuant to section 334 of the Criminal Procedure Act 51 of 1977.

<sup>129</sup> Members of a Municipal Police Service holding ranks of Police Chief, Deputy Police Chief, Senior Superintendent, Superintendent, Assistant Superintendent, Sergeant, Constable and Cadet Constable are “peace officers” for the purposes of making arrests with and without warrants and searching arrested persons, amongst other things. Government Notice 74 of 2003 (*Government Gazette* 2946). It has been noted that this list essentially covers all city police officers. Clever Mapaure et al, *The Law of Pre-Trial Criminal Procedure in Namibia*, Windhoek: University of Namibia Press, 2014 at 175.

<sup>130</sup> Criminal Procedure Act 51 of 1977, ss. 42, 47.

<sup>131</sup> See section 4.8 of this paper.

**Namibian Police Force:** The functions of the Namibian Police Force are –

- (a) the preservation of the internal security of Namibia;
- (b) the maintenance of law and order;
- (c) the investigation of any offence or alleged offence;
- (d) the prevention of crime; and
- (e) the protection of life and property.<sup>132</sup>

The power and duties relevant to the use of force in the exercise of these functions will be detailed below.

**Namibian Defence Force:** Members of the Defence Force may be employed –

- in defence of Namibia;
- in the prevention or suppression of terrorism;
- in the prevention or suppression of internal disorder in Namibia;
- in the preservation of life, health or property;
- in the maintenance of essential services; or
- on such other service as may be determined by the President.<sup>133</sup>

The Defence Act and its regulations are difficult to interpret with respect to the powers of NDF members engaged in policing. The Act says that Defence Force members who are employed in carrying out any of the listed objectives may “be used on those police functions mentioned in section 13 of the Police Act, as may be prescribed”.<sup>134</sup> It goes on to say that members of the Namibian Defence Force who are exercising such police functions have “*all such powers and duties as are by law conferred or imposed on a member of the Police Force*”.<sup>135</sup>

## Namibian Police

### Vision:

“Excellent policing for a safe Namibia”

### Mission:

“To deliver quality law enforcement services to the public, as laid down in the Police Act, with due consideration for the fundamental human rights and freedoms, compromising in upholding the tenets of law and order, safety and security of all persons.”

### Values:

The Namibian Police Force upholds and maintains, with a firm commitment, by following the Values listed below:

- To deliver quality services.
- To uphold the principles of the rule of law, national commitment and unwavering patriotism.
- To respect the supreme law of the Republic of Namibia.
- To be accountable to the nation and the community we are serving.

Namibian Police Force website, “[Vision & Mission](#)”, undated.

Note that the vision differs in the 2014 *Nampol Operational Manual*, where it is listed as being “to protect and serve all people in Namibia”.

*Nampol Operational Manual*,

Chapter 2, 22 May 2014,

E. VISION,

MISSION AND VALUES OF THE NAMIBIAN POLICE FORCE, E.1.

<sup>132</sup> Police Act 19 of 1990, s.13.

<sup>133</sup> Defence Act 1 of 2002, s. 5(2)(a).

<sup>134</sup> Id, s. 5(2)(b).

<sup>135</sup> Id, s. 5(4): “A member who is employed on police functions [...] (a) has all such powers and duties as are by law conferred or imposed on a member of the Police Force; (b) is, in respect of acts done or omitted to be done by that member, liable to the same extent as that member would have been liable in like circumstances if that member were a member of the Police Force; and (c) has the benefit of all the indemnities to which a member of the Police Force would in like circumstances be entitled.”

However, this must be read in conjunction with the regulations concerning the exercise of police functions by members of the Defence Force.<sup>136</sup> In terms of regulation 200, NDF members are authorised to perform police functions which include (a) the preservation of the internal security of Namibia; (b) the maintenance of law and order; and (c) the prevention of crime – but only in so far as this “is necessary for or is connected with the service concerned for which the Defence Force or that portion or member thereof is being used”.<sup>137</sup>

Regulation 201 provides that the Chief of the Defence Force may assign NDF members to assist Nampol members “in the execution of those functions of the Namibian Police which relate to the maintenance of law and order and the prevention of crime under paragraphs (b) and (d) of section 13 of the Police Act”. This must be done in terms of an agreement concluded upon a written request from the Inspector-General of the Police to the Chief of the Defence Force, and made with the concurrence of the two responsible Ministers. The agreement must specify (i) the maximum number of NDF members who may be assigned to police duties, (ii) the period of such an assignment (which may not exceed a continuous period of 28 days without the prior approval of the two relevant Ministers); (iii) the geographical area or areas in which the assignment has effect; and (iv) the nature of the assignment.<sup>138</sup>

Regulation 203 then provides that NDF members “who are used in connection with any police function mentioned in regulation 200 or 201, must, in the performance of that function *have such powers and duties as are conferred or imposed upon members of the Namibian Police Force [...] in terms of the provisions of*” –

- *the Police Act 19 of 1990: section 14(4) and (5);*
- *the Criminal Procedure Act 51 of 1977: sections 21, 22, 23(a), 25, 27, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 44 and 47.*<sup>139</sup>

These provisions relate to arrests; searches of persons, premises and vehicles; and the seizure of evidence found during a search. This seems to narrow the statement in the Act regarding the

## Namibian Defence Force

### Vision:

“The Namibian Defence Force envisions developing and maintaining a small, highly mobile and professional force which excels in services through discipline, vigorous training, possession of modern armament and is ready to defend and guarantee the security of the motherland. Moreover, this force should actively contribute to the promotion and maintenance of international peace and security.”

### Mission:

“The primary mission of the Namibian Defence Force as enshrined in the Constitution, Chapter 15, Article 115 is to defend the territorial integrity and national interests of Namibia. Its secondary roles include assisting civil power and local authorities in domestic support operations when required, as well as to undertake SADC, AU and UN Peace Support Missions.”

Namibian Defence Force website, “[Vision/Mission](#)”, undated.

<sup>136</sup> General Regulations relating to the Namibian Defence Force are contained in Government Notice 189 of 2010 (*Government Gazette* 4547). Part XXV of these regulations deals with the performance of police functions by NDF members.

<sup>137</sup> Id, reg 200.

<sup>138</sup> Id, reg 201.

<sup>139</sup> Id, reg 204 (emphasis added).

powers and duties of NDF members when carrying out policing functions. However, since NDF is empowered to conduct searches, seizures and arrests in respect of police functions, the key provisions discussed in this paper would apply to them.

When NDF members are assigned to assist the police, they act under the command and control of Nampol.<sup>140</sup>

**Namibian Correctional Service:** Members of the Namibian Correctional Service generally have *the same powers as police* when exercising their functions as correctional officers.<sup>141</sup>

**City Police:** The Namibian Constitution makes no mention of municipal police services. Local authority councils are authorised to establish municipal forces by the Police Act, which gives the Minister of Safety and Security authority to make regulations about the powers and functions of members of such forces. The Minister is also tasked with *prescribing which provisions of the Police Act will apply to a municipal police service*, and may apply some provisions with modifications.<sup>142</sup>

Municipal Police Service Regulations were published in 2002 and have been amended several times.<sup>143</sup> These regulations give municipal forces the power to engage in traffic policing, crime prevention and enforcement of municipal bylaws.<sup>144</sup> The regulations also authorise joint operations between Nampol and municipal forces.<sup>145</sup>

### Namibian Correctional Service

#### Mandate:

“To provide safe, secure and humane custody of offenders; rehabilitate and re-integrate them into community.”

#### Vision:

“To be Africa’s leader in the provision of correctional services”

#### Mission:

“To provide exceptional correctional services that empower offenders to effectively reintegrate into society as law-abiding citizens.”

#### Motto

“Excellence through service”

#### Core Values

- *Discipline:* Ability to do what is right even when one does not feel like doing it.
- *Respect:* Respect for fundamental human rights and equality before the law.
- *Innovation:* Foster continuous improvement through research and evidence-based practices.
- *Fairness:* Consistent equal and fair treatment.
- *Transparency:* Foster openness and accountability for all actions and decisions.
- *Teamwork:* Cultivate a spirit of cohesiveness amongst correctional staff.
- *Professionalism:* Provide reliable and quality service, with dignity, honesty and integrity.

Namibian Correctional Service website, “[Our Mission, Vision, Motto & Core Values](#)”, undated.

<sup>140</sup> Id, reg 203.

<sup>141</sup> Correctional Service Act 9 of 2012, s. 33: “Subject to the provisions of this Act, every correctional officer must, by virtue of his or her office as a correctional officer, exercise the same powers, authority, protection and privileges as a member of the police, and may use all lawful means in his or her power to detain in safe custody the offenders under his or her charge and to secure the recapture of any offender who has escaped from lawful custody.”

<sup>142</sup> Police Act 19 of 1990, s. 43C.

<sup>143</sup> Municipal Police Services Regulations, Government Notice 184 of 2002 (*Government Gazette* 2833), as amended.

<sup>144</sup> Id, reg 4.

<sup>145</sup> Id, reg 9.

*These regulations list the provisions of the Police Act 19 of 1990, the Criminal Procedure Act 51 of 1977 and the Stock Theft Act 12 of 1990 which are applicable to municipal police forces.<sup>146</sup> The following are relevant to this discussion:*

- *Police Act 19 of 1990: sections 10; 14(1), (2), (4), (5) and (6); 15; 16; 26; 27; 32; 33; 36; 38; 39; 42 but excluding subsection (1)(c), (t) and (x);*
- *the Criminal Procedure Act 51 of 1977: sections 21, 22, 26, 27, 37, and 72 (for the purposes contemplated in section 55).<sup>147</sup>*

### Windhoek City Police Service

#### **Vision:**

“To make Windhoek the Safest City in Africa”

#### **Values:**

“Integrity. Commitment. Accountability.”

Windhoek City Police website, “[About Us](#)”, 2019.

The issues covered by these provisions include (amongst other things) police action in emergencies, general powers and duties (with the exclusion of testifying in court about police cases), right of entry in case of fire, traffic barriers and cordons, certain searches and seizures and the taking of fingerprints. They do *not* appear to include powers of arrest.

The Police Act also specifies that the Inspector-General must determine the minimum standards of training that the members of a municipal police service shall undergo.<sup>148</sup>

The only municipal police service to be established to date is the Windhoek City Police Service,<sup>149</sup> colloquially known as the “City Police”.

## 4.3 Police Act 19 of 1990

The Police Act contains minimal guidance on the use of force. It contains only one provision which speaks to this generally, section 14(10):

*Any member may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of an offender or suspected offender or persons unlawfully at large.<sup>150</sup>*

This provision does not appear to be applicable to NDF members when they are carrying out police functions, or to the City Police; it is not listed explicitly as being amongst their powers.<sup>151</sup>

The regulations issued under the Police Act temper this general authorisation in two regards, by including in the definition of “misconduct” (a) the use of ““unnecessary force or violence” or other “ill-treatment” against a person in custody, and (b) discriminatory treatment.

<sup>146</sup> Id, reg 7 read with Annexure A and reg 10 read with Annexure B.

<sup>147</sup> Ibid.

<sup>148</sup> Police Act 19 of 1990, s. 43C(4).

<sup>149</sup> See the Windhoek Municipal Police Service Regulations issued by the Council of the Municipality of Windhoek, General Notice 32 of 2013 (*Government Gazette* 5137).

<sup>150</sup> Police Act 19 of 1990, s. 14(10).

<sup>151</sup> It is not amongst the provisions listed in Regulation 203 of the General Regulations relating to the Namibian Defence Force or in Annexure B of the Municipal Police Services Regulations.

15. A member shall be guilty of misconduct if he or she...  
[...]  
uses unnecessary force or violence against a prisoner or other person in custody, or otherwise ill-treats him or her;  
[...]  
while on duty, on the grounds of another person's colour, race, nationality or ethnic or national origin, wilfully discriminates against such person or treats such person improperly.  
[...].<sup>152</sup>

The regulations provide a procedure for public complaints, which can be delivered to any member of Nampol, by anyone who believes that police misconduct has taken place.<sup>153</sup>

Section 15 of the Police Act additionally gives police a right to break into premises in the case of fire.<sup>154</sup>

### 4.3 Criminal Procedure Act 51 of 1977

The key provisions relevant to this discussion concern the power to use force in respect of searches and arrests. Because these powers relate to police functions specifically delegated to NDF members and City Police, the provisions presumably apply to all armed forces personnel when carrying out these police functions.

#### *(a) Searches*

Where police are carrying out a lawful search of any person or premises, section 27 of the Criminal Procedure Act authorizes them to use "such force as may be reasonably necessary" to overcome resistance to the search, including breaking into the relevant premises by force.

#### **Resistance against entry or search**

27. (1) A police official who may lawfully search any person or any premises or who may enter any premises under section 26 [Entering of premises for purposes of obtaining evidence], 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.<sup>155</sup>

The lawful steps to gain entry to premises for the purposes of a search can be summarized as follows:

---

<sup>152</sup> General Regulations issued under the Police Act, Government Notice 167 of 1994 (as amended), reg 15(h)(ii) and (ah).

<sup>153</sup> Id, reg 16.

<sup>154</sup> Police Act 19 of 1990, s. 15.

<sup>155</sup> Criminal Procedure Act 51 of 1977, s. 27.

- the member should announce that he or she is a member of the Namibian Police in possession of a search warrant (to be omitted if no search warrant) and request entry so that a search can be carried out;
- only if there is no response after a reasonable interval or it is obvious that the occupiers of the premises have no intention of complying with the request can force be used to enter the premises;
- a request to enter does not have to be made if the member believes on reasonable grounds that the article(s) that he or she is looking for will be destroyed or got rid of if he or she first requests entry. Entry can be gained by force in this case, although the use of force should be restricted to the amount strictly necessary.<sup>156</sup>

## **(b) Arrests**

The starting point in respect of arrests is section 39(1) of the Act, which covers arrests both with and without a warrant and states that “unless the person to be arrested submits to custody”, an arrest is effected “by actually touching his body or, if the circumstances so require, by forcibly confining his body”.<sup>157</sup>

Additionally, section 48 of the Act authorises any person who is empowered to make a lawful arrest to break open premises for this purpose. Where the person making the arrest “knows or reasonably suspects” that the person being sought is at any premises, he or she must first demand entry and explain the reason – if entry is refused, then it is permissible to “break open, enter and search” the premises “for the purpose of effecting the arrest”.<sup>158</sup>

The key provision is section 49 of the Criminal Procedure Act 51 of 1977, which addresses the use of force in effecting an arrest. It applies to both the arresting officer, and to anyone who is authorised to assist with the arrest.

The first paragraph of section 49 considers the use of force generally when the person being arrested resists arrest or flees, while the second paragraph determines the circumstances under which lethal force is justified.<sup>159</sup>

### **Use of force in effecting arrest**

**49. (1)** If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person –

- (a) resists the attempt and cannot be arrested without the use of force; or
- (b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees,

the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

(2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent

<sup>156</sup> Legal Assistance Centre, *Namibian Police Human Rights Manual*, 1999 at 116-117.

<sup>157</sup> Criminal Procedure Act 51 of 1977, s. 39(1).

<sup>158</sup> Id, s. 48.

<sup>159</sup> “It contemplates two situations where force may be used: (a) to overcome resistance to arrest by the suspect and (b) to prevent the suspect from fleeing. Subsection 49(1) governs the use of such force in principle while subsection (2) deals specifically with what it terms ‘justifiable homicide’.” *Ex Parte Minister of Safety and Security and Security and others: in Re S v Walters and Another* 2002 (4) SA 613 (CC) at para 2.

him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.<sup>160</sup>

**Non-lethal force** is authorised whenever it is “reasonably necessary” to overcome resistance to arrest or to prevent flight. There are two criteria for the justifiable use of **lethal force**: (1) the arrest must be for one of the crimes listed in Schedule 1 (reproduced here), and it must be impossible to effect the arrest or prevent flight by any other means. Disturbingly, the crimes listed for this purpose are a strange mixture and are by no means all violent crimes – the list includes counterfeiting, fraud, forgery, receiving stolen goods, sodomy, bestiality and *any* criminal offence which can be punished by imprisonment for more than six months without the option of a fine. There is no obvious reason why this list of offences has been chosen to justify the use of lethal force, since many of them would be highly unlikely to involve imminent danger to any person or property.<sup>161</sup>

It should be noted that the authorisation of the use of force in section 49 applies to **private persons who are assisting the police**. It refers to persons authorized under the Act to arrest or to assist in arresting suspects. Section 42 of the Act authorizes “any private person” to arrest any other person without a warrant if an offence is committed in his or her presence, if he or she reasonably believes that this person has committed an offence, or if he or she witnesses another person “engaged in an affray”. Where arrest is authorized, so is pursuit – and “any other private person to whom the purpose of the pursuit has been made known, may join and assist therein”. This power of arrest by private persons also applies to a private person who owns, occupies or is in charge of property where any person is found committing any offence, or any person they authorize to act on their behalf (such as a security guard).<sup>162</sup> In addition, section 47 of the Act, exhibiting some gender bias,

#### Schedule 1

Treason.  
Sedition.  
Murder.  
Culpable homicide.  
Rape.  
Indecent assault.  
Sodomy.  
Bestiality.  
Robbery.  
Assault, when a dangerous wound is inflicted.  
Arson.  
Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.  
Theft, whether under the common law or a statutory provision.  
Receiving stolen property knowing it to have been stolen.  
Fraud.  
Forgery or uttering a forged document knowing it to have been forged.  
Offences relating to the coinage.  
Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.  
Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.  
Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

<sup>160</sup> Criminal Procedure Act 51 of 1977, s. 47.

<sup>161</sup> It should be noted that non-consensual sodomy was encompassed under the crime of sodomy before the Combating of Rape Act 8 of 2000 expanded the definition of “rape” to include non-consensual sodomy. The crime of sodomy was probably applied most frequently to non-consensual sodomy prior to the enactment of that statute, but would now be relevant almost exclusively to consensual sodomy.

<sup>162</sup> Id, s. 42. Section 49(2) was applied to an arrest by a private person under the authority of this section in *S v Coetzee* 1993 NR 313 (HC), where a person suspected of attempted rape was being taken to the police station by the victim’s

requires any “male inhabitant” between the ages of 16 and 60 to assist in arresting or detaining a person who has been arrested “when called upon by any police official to do so”.<sup>163</sup> These provisions seem particularly relevant to the role of members of Namibia’s burgeoning neighbourhood watches. However, in South Africa, the dangers of extending the provision on justifiable use of force to private persons has been noted, with the Constitutional Court observing:

Police officers can reasonably be assumed to have been trained in the use of firearms and to have at least a rudimentary understanding of the legal requirements for conducting an arrest. They are also subject to the supervision and discipline of their superiors. None of these safeguards applies to the ordinary civilian, who is nevertheless also given the right to use force [...].<sup>164</sup>

It should also be noted that both South African and Namibian jurisprudence have held that **the statutory justifications for the use of force in effecting arrest do not apply to harms suffered by innocent bystanders**, but only to the persons who were being arrested.<sup>165</sup>

One other factor to keep in mind is that **section 49 is additional to the common-law right of “private defence”, which covers the right to act in self-defence or to protect the life, safety or property of someone else:**<sup>166</sup>

A person acts in private defence, and [his or] her act is therefore lawful, if [he or] she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon [his or] her or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack.<sup>167</sup>

To invoke this defence, Namibian case law has noted that it must be proved that (a) the attack is directed against the attacker; (b) the defensive act is necessary to protect the interest threatened; (c) there is a reasonable and proportional relationship between the attack and the defensive act; and (d) the person being attacked is aware of the fact that he or she is acting in private defence.<sup>168</sup>

---

father. The suspect jumped off the back of the bakkie and fled, whereupon the victim’s father fired warning shots which unintentionally killed the suspect. The victim’s father was charged with murder, but acquitted on the basis that a Schedule 1 offence was involved, entitling him to fire shots at the deceased to prevent him from escaping.

<sup>163</sup> Id, s. 47. Failure to assist when called upon to do so is a crime punishable by a fine of up to N\$100 or imprisonment for up to three months.

<sup>164</sup> *Ex Parte Minister of Safety and Security and Security and others: in Re S v Walters and Another* 2002 (4) SA 613 (CC) at para 32.

<sup>165</sup> See, for example, *S v Ndamwoongela* 2018 (2) NR 422 (HC); *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) SA 355 (A); *Malahe and Others v Minister of Safety and Security and Others* 1999 (1) SA 528 (SCA).

<sup>166</sup> See *S v Swanepoel* 1985 (1) SA 576 (A); *Ex Parte Minister of Safety and Security and Security and others: in Re S v Walters and Another* 2002 (4) SA 613 (CC) at para 33. “The term private defence is normally used in preference to self-defence on the basis that it is wide enough to encompass the defence of a third party and that of property.” *S v AS* 2009 (1) NR 118 (HC) at para 15.

<sup>167</sup> C Snyman, *Criminal Law*, 6<sup>th</sup> edition, Durban: Butterworth’s, 2015 at 102. The Namibian Supreme Court has observed that the requirements of private defence can be summarised as follows:

- (a) The attack: To give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent.
- (b) The defence must be directed against the attacker and necessary to avert the attack and the means used must be necessary in the circumstances.

*S v Jonkers* 2006 (2) NR 432 (SC) at 444, quoting with approval *S v Naftali* 1992 NR 299 (HC) at 303.

<sup>168</sup> *S v Hituamata* (CC 09/2015) [2017] NAHCMD 45 (24 February 2017) at para 33.

South African case law describes the relevant factors for considering where the use of lethal force is justified by private defence as including the imminence of the danger; how threatening the danger is to life and limb; the nature of the instrument, if any, the attacker is using in waging the unlawful attack; the proximity of the attacker and the persons attacked; the mobility of the attacker and the speed of his or her movement; and how easy or difficult it would be to apply force to a less vulnerable part of the body.<sup>169</sup> There must be a real and imminent risk of death or serious injury from the perspective of a reasonable person in the same situation, and the force used must be proportionate to the threat to be justified as private defence.<sup>170</sup>

There are instances where law enforcement officers have invoked private defence to justify their use of force.<sup>171</sup> However, section 49 goes *beyond* the principle of private defence by authorising the use of deadly force *for the sole purpose of effecting an arrest*.<sup>172</sup>

Generally, **the justification for authorising the use of force to effect arrest** has been articulated as follows:

A State has a systemic interest in insuring that suspects are brought to justice through a trial and possible punishments. If suspects were able to flee successfully from arrest on a more or less regular basis, the threat of punishment would be weakened and the efficiency of the criminal justice system as a deterrent to crime undermined.<sup>173</sup>

It has been noted by the South African courts in this respect that: “A failure by the State to preserve the effectiveness of the criminal justice system will end in lawlessness and a loss of the legitimacy of the State itself.”<sup>174</sup>

The **countervailing concern** is that the State has a duty to protect the rights of all its citizens, including fleeing suspects. A person fleeing from the police has usually not yet been convicted of a crime, meaning that the presumption of innocence must be respected – but even a convicted criminal who is fleeing does not lose the protection of the Constitution.<sup>175</sup> Statutory authority for the use of force must seek to strike a balance between the interests of the State and the rights of the person who is resisting arrest.<sup>176</sup>

**Case law on section 49:** South African interpretations of section 49 prior to independence constitute binding precedent in Namibia. Section 49 has been qualified somewhat by case law.

---

<sup>169</sup> *Ntamo v Minister v Safety and Security* 2001 (1) SA 830 (Tk) at para 33.

<sup>170</sup> *Minister of Law and Order v Milne* SA 1998 (1) SA 289 (W).

<sup>171</sup> See, for example, the unsuccessful attempt to establish this defence on the facts in *Minister of Law and Order v Milne* SA 1998 (1) SA 289 (W) and in *Ntamo v Minister of Safety & Security* 2001 (1) SA 830 (Tk), confirmed on appeal 2003 (1) SA 547 (SCA).

<sup>172</sup> See “[Submission on Judicial Matters Amendment Bill \[B95 -97\]](#)” [South Africa], Human Rights Committee, undated (as it appears on the website of the Parliamentary Monitoring Group).

<sup>173</sup> *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at para 12, quoting Floyd R Finch Jr, “Deadly Force to Arrest: Triggering Constitutional Review”, 11 *Harvard Civil Rights – Civil Liberties Law Review* 361 (1976) at 372.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Id* at para 13.

<sup>176</sup> *Id* at para 14.

Cases on section 49 (and its predecessors<sup>177</sup>) have held that force, and particularly lethal force, cannot be justified unless there is no other way to effect the arrest.<sup>178</sup> Other means which might be employed include oral warnings, warning shots fired into the air or into the ground, or attempts to stop the suspect with non-lethal shots.<sup>179</sup>

The person attempting the arrest must also consider whether a fleeing suspect can be arrested at a later stage. For example, if the suspect can be identified and traced, then the use of force to make an immediate arrest is probably not justifiable.<sup>180</sup> The idea of “escape” must be interpreted as evading justice altogether, not just getting away for the moment.<sup>181</sup>

Furthermore, the 1978 case of *Matlou v Makhubedu* held that there must be proportionality between the degree of force used and the seriousness of the crime of which the victim is suspected.<sup>182</sup> This case also interpreted the reference to justifiably “killing” a suspect in section 49(2) to include justification for “intentionally wounding” a suspect.<sup>183</sup>

Additionally, it was held in the 1983 *Macu* case that the use of force against a person fleeing arrest is justifiable only if it is clear to the person attempting to flee that an attempt to make an arrest is underway, and the purpose of the flight is to avoid arrest.<sup>184</sup>

The 1986 case of *S v Barnard*<sup>185</sup> summarized the state of the law in respect of justifiable homicide under section 49(2):

- (a) the arrestor must have reasonably suspected the deceased of committing a Schedule 1 offence;
- (b) the person fleeing must have been on the verge of being arrested;
- (c) the person fleeing must have been aware that the arrestor’s intention was to make an arrest;
- (d) the person fleeing must have had the intention to foil the attempted arrest by fleeing;
- (e) there must have been no other way, in the circumstances, of preventing the person in question from fleeing, aside from the use of lethal force.<sup>186</sup>

---

<sup>177</sup> The immediate predecessor in South Africa was section 37 of the Criminal Procedure Act 56 of 1955:

- (1) Whenever any person authorized under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any offence mentioned in the First Schedule, attempts to arrest any such person and such person flees or resists and cannot be arrested and prevented from escaping by other means than by killing the person so fleeing or resisting, such killing shall be deemed in law justifiable homicide.
- (2) Nothing in this section shall authorise the killing of a person who is not accused or suspected of having committed an offence mentioned in the First Schedule.

<sup>178</sup> *R v Labuschagne* 1960 (1) SA 632 (A).

<sup>179</sup> *Matlou v Makhubedu* 1978 (1) SA 946 (A).

<sup>180</sup> *Mazeka v Minister of Justice* 1956 (1) SA 312 (A); *Jooste NO v Minister of Police and Another* 1975 (1) SA 349 (E) at 353B.

<sup>181</sup> *R v Metelerkamp* 1959 (4) SA 102 (E) at 112: “Escaping does not mean escaping or getting away for one yard or two yards or just out of a man’s clutches. You must bear everything in mind and consider what the prospects are of the fugitive escaping from justice or of being brought to justice.”

<sup>182</sup> *Matlou v Makhubedu* 1978 (1) SA 946 (A).

<sup>183</sup> *Ibid.*

<sup>184</sup> *Macu v Du Toit* 1983 (4) SA 629 (A).

<sup>185</sup> *S v Barnard* 1986 (3) SA 1 (A).

<sup>186</sup> *Id.*, based on headnote and translation in Michael Spisto and Fran Wright, “(Justifiable) Homicide Whilst Effecting an Arrest: When is This Lawful- A Comparison between the South African and New Zealand Systems of Law”, 7 *Waikato Law Review* 147 (1999), text preceding note 26.

The Namibian courts have not commented on section 49 generally, or interpreted section 49(1), although there is some Namibian jurisprudence on section 49(2).

In the 1992 case of *S v William*, the High Court considered what is necessary to bring a person within the ambit of section 49(2). In that case, an NDF member fired shots at a group of four people, including a 10-year-old boy, who fled after he spotted them digging a hole. He testified that he thought that they were either involved in stealing or possibly planting a land mine, with his suspicions that they were engaged in illegal activity being confirmed when they ran away. He fired four shots, killing one adult and wounding the boy. (It was later confirmed that the hole actually contained a dead goat.) The Court found that his use of lethal force could not be justified by section 49(2) of the Criminal Procedure Act because (a) it was not proved that he reasonably suspected the persons of committing a Schedule 1 offence on the basis of the fact that they were simply digging a hole; (2) the Court was not satisfied that the intention of firing the shots was to effect an arrest, but more probably to stop them from fleeing in order to question them about their activities; and (3) the Court was not satisfied that the only means of preventing the flight of the deceased was by killing him, as opposed to using a carefully fired warning shot.<sup>187</sup> The Court stated: “The killing of another person to effect an arrest should be a last resort and only done after every other possible means has been exhausted.”<sup>188</sup>

The Court did not find it necessary to consider the constitutionality of section 49 in light of its holding that the provision could not be invoked on the facts of the case before it. However, it noted that, if it had been necessary to canvass this question, it would have given very serious consideration to the question of whether section 49(2) conflicts with the constitutional protection for the sanctity of life. **The Court recommended that the Law Reform Commission should be asked to consider whether s 49(2) should be amended or repealed to make it consistent with the Namibian Constitution**<sup>189</sup> – but this recommendation was not taken up.

Several other Namibian cases have considered the applicability of section 49(2) to specific fact situations, but without providing any new interpretations of the meaning of the provision or considering its constitutionality.<sup>190</sup> However, by way of example, the “justifiable homicide” defence provided by section 49(2) was successfully invoked in the following case:

- The killing of a fleeing suspect by a private citizen was justified in a case where the deceased was reasonably believed to have attempted to rape the daughter of the accused, but jumped off the back of a bakkie while being taken to the police station by the father of the victim. The father fired two warning shots, which proved fatal, but the Court found that his intent had not been to hit the deceased but only to halt his flight, and that his actions had been reasonable in the circumstances.<sup>191</sup>

---

<sup>187</sup> *S v William* 1992 NR 268 (HC).

<sup>188</sup> *Id* at 272.

<sup>189</sup> *Ibid*.

<sup>190</sup> *S v Coetzee* 1993 NR 313 (HC); *S v Mwinga & Others* 1995 NR 166 (SC); *S v Johannes* 2009 (2) NR 579 (HC); *S v Ndamwoongela* 2018 (2) NR 422 (HC).

<sup>191</sup> *S v Coetzee* 1993 NR 313 (HC).

In contrast, the Namibian courts have found that the killing of a fleeing suspect was *not* justifiable to effect an arrest in the following case:

- The arrestor fired two shots, a few seconds apart, at the head of a suspect who was fleeing by foot while the suspect was in close proximity to the arrestor (5 meters), without firing a warning shot.<sup>192</sup>

## 4.5 Defence Act 1 of 2002

The Defence Act contains no directives on the permissible use of force in respect of policing functions. This is unsurprising, seeing that policing functions carried out by NDF members take place subject to other legislation.

However, section 42 of the Military Discipline Code annexed to the Defence Act makes it an offence to use “unnecessary force” against any person in custody, or to otherwise ill-treat a person in custody. The maximum punishment is imprisonment for two years.<sup>193</sup>

Yet the degree of force that is considered unnecessary – or on the other hand, permissible – is not described in the Defence Act or the Code. There is also no mention of excessive force in any other context.

## 4.6 Correctional Service Act 9 of 2012

As already noted above, a correctional officer has “the same powers, authority, protection and privileges” as a member of Nampol and in addition “may use all lawful means in his or her power to detain in safe custody the offenders under his or her charge and to secure the recapture of any offender who has escaped from lawful custody”.<sup>194</sup>

In addition, the Correctional Service Act contains independent authority for the use of force or weapons by correctional officers, providing more detailed guidance than the legal provisions aimed primarily at police (particularly regarding the use of weapons). These are the basic rules:

- **Use of force against an offender:** A correctional officer “may use such force against an offender as is reasonably necessary to ensure compliance with lawful orders or to maintain discipline in the correctional facility”.<sup>195</sup>
- **Use of a weapon against an offender:** A correctional officer may use a weapon against an offender in the following circumstances:

---

<sup>192</sup> *S v Johannes* 2009 (2) NR 579 (HC).

<sup>193</sup> Defence Act 1 of 2002, Schedule 1: Military Discipline Code, section 42(c).

<sup>194</sup> Correctional Service Act 9 of 2012, s. 33: “Subject to the provisions of this Act, every correctional officer must, by virtue of his or her office as a correctional officer, exercise the same powers, authority, protection and privileges as a member of the police, and may use all lawful means in his or her power to detain in safe custody the offenders under his or her charge and to secure the recapture of any offender who has escaped from lawful custody.”

<sup>195</sup> *Id.*, s. 35(1).

- The offender is escaping or attempting to escape from lawful custody.
  - The offender is engaged in forcing, breaking open or scaling a correctional facility door, wall, fence, gate, or other part of the facility, attempting to force or break open any of these barriers.
  - The offender is using, or threatening to use, violence against a correctional officer, another offender or any other person.
  - The offender is engaged in violently disorderly behaviour.<sup>196</sup>
- **Use of a weapon against any person:** A correctional officer may use a weapon against any person in a similar set of circumstances:
    - The person is assisting an offender in escaping.
    - The person is engaged in forcing, breaking open or scaling a correctional facility door, wall, fence, gate, or other part of the facility, attempting to force or break open any of these barriers.
    - The person is using, or threatening to use, violence against a correctional officer, an offender or any other person.<sup>197</sup>
- **Limitation on use of weapons:** A correctional officer must not use a weapon against any offender or other person unless the following conditions are met:
    - The correctional officer must have reasonable grounds to believe that the escape, the forcing or breaking open, or the scaling referred to cannot otherwise be prevented
    - The correctional officer must have given a clear prior warning of intention to use a weapon which went unheeded.
    - In the case of violence or threatened violence, the correctional officer must have reasonable grounds to believe that the person being attacked or threatened is in danger of suffering grievous bodily harm.<sup>198</sup>
- **Principle of minimum force:** Whenever a weapon or force is used, the correctional officer must employ *the minimum force necessary in the circumstances* to accomplish the objective, and must, “as far as reasonably possible, use such weapon or force to disable and not to kill”.<sup>199</sup>

If the rules are followed, a correctional officer who causes injury or death does not commit an offence.<sup>200</sup>

No cases interpreting the provisions on use of force by correctional officers have been located, but one case under the previous Prisons Act 17 of 1998 is relevant to the issue of use of force.

In the case of *Kennedy and Others v Minister of Prisons and Correctional Services*<sup>201</sup> four inmates sued the government for damages, alleging that members of the Namibian Prison Services failed in their duty to protect them against assaults by other prisoners. The injuries were sustained when tensions between two prison gangs erupted in violence. After an argument, four members of one

---

<sup>196</sup> Id. s. 35(2)(a).

<sup>197</sup> Id, s. 35(2)(b).

<sup>198</sup> Id, s. 35(3).

<sup>199</sup> Id, s. 35(4).

<sup>200</sup> Id, s. 35(5).

<sup>201</sup> *Kennedy and Others v Minister of Prisons and Correctional Services* 2008 (2) NR 631 (HC).

of the prison gangs were set upon by numerous members of a rival gang armed with various homemade weapons in the prison courtyard. These four men successively pleaded with warders on the other side of a grated door to open the door and let them out, but they refused. The melee ended only when the men collapsed and were left for dead – although all of them actually survived.

The Court found that the warders had a clear duty to protect the safety of the prisoners, and the authority to use reasonably necessary force to this end.<sup>202</sup> However, it is also found that it was not in a position to second-guess the warders' assessment of what was reasonable in the circumstances. There were about 470 prisoners in the courtyard, with some 80 of them being actively involved in the altercation, many of whom were armed. The scene was one of mayhem, with extreme violence being perpetrated by dangerous, armed criminals in a confined area. On the other side of the equation, there were ten prison officers on duty, unarmed save for a single baton, and with no shields, helmets or riot gear of any nature. Entering the fray with only whistles to blow as a means of quelling the situation would have put them at great personal risk as well as possibly affording some of the prisoners with an opportunity to escape, thereby putting the safety of other prison staff and members of the public at risk.<sup>203</sup> Similar considerations apply to their failure to open the door between them and the prisoners to allow those who were under attack to slip through, as the warders might have been overwhelmed and taken hostage by prisoners as part of a planned escape.<sup>204</sup> The Court was unable to find that the warders' failure to do more was unlawful in the circumstances.<sup>205</sup>

This case, although it concerns allegations about the failure to use force rather than the use of excessive force, illustrates the difficulty of trying to second-guess the reasonableness of decisions made in the heat of the moment in dangerous situations – while also highlighting how the difficulties regarding appropriate courses of action in such situations can be exacerbated by the lack of appropriate equipment.

## 4.8 Other statutory authority for use of force

There are other statutes which make reference to the use of force by various law enforcement officials. The list below is not comprehensive, but it provides some examples of other statutory authorisations for official use of force.

Authority to use force in connection with searches similar to that provided in terms of the Criminal Procedure Act appears in other laws, including the following:

- **Anti-Corruption Act 8 of 2003**, section 25(6) and (7): An authorised officer or a police officer who accompanies and assists an authorised officer “may overcome resistance to the entry and search by using such force as is reasonably required”, after audibly demanding entry and announcing the purpose of the entry, unless immediate entry is necessary to preserve evidence;

---

<sup>202</sup> Id at paras 16-17.

<sup>203</sup> Id at para 33.

<sup>204</sup> Id at paras 37-39.

<sup>205</sup> Id at paras 42-54.

- **Prevention of Organised Crime Act 29 of 2004**, section 86(1)(c): A search warrant issued under the Act automatically authorises police executing the warrant “to use such force as is reasonable in the circumstances for the purpose of effecting entry, and for breaking open anything in or on the place to be searched”.

The **Child Care and Protection Act 3 of 2015** contains similar authority for police to use “such force as may be reasonably necessary” to apprehend a child who is absent without authorisation from foster care or a residential child care facility, or to search a premises for that purpose,<sup>206</sup> and for police, a designated social worker or any other person authorised by a children’s commissioner to enter premises and remove a child at risk or an alleged offender who is endangering a child.<sup>207</sup>

The **Liquor Act 6 of 1998** allows a police officer of or above the rank of warrant officer, to order the closure of a licensed premises during a strike, a lock-out, a riot or a tumult, and “may take such action, or have such force used, as such person may deem reasonably necessary for the temporary closing of the premises” pursuant to such an order.<sup>208</sup>

The **Civil Aviation Act 6 of 2016** provides for the use of “reasonable force” or “such force as may be reasonably necessary” by aviation security officers and in-flight security officers to deal with various threats and suspected offences, including in respect of searches, seizures, detentions or arrests taking place in such circumstances.<sup>209</sup>

The **Marine Traffic Act 2 of 1981** gives the Minister the power to order “the employment of such force as may be necessary” when the master of a ship suspected of being engaged in some act that may be prejudicial to the peace, good order or security of Namibia refuses to follow certain directions.<sup>210</sup>

The **Public Gatherings Proclamation, AG 23 of 1989**, which is an apartheid-era holdover, contains some particularly disturbing provisions on the use of force. Police have specific powers under this law to disperse “riotous public gatherings”, which include those where any persons in attendance “advise, encourage, incite, order or in any other manner instigate” violence against persons or properties or “forcible resistance” to government. The law requires a police officer of or above the rank of warrant officer to first call upon the persons attending the gathering to disperse in a loud voice, in Afrikaans or English, within a specified time.<sup>211</sup> If they fail to comply, such a police officer may order the police under his or her command to disperse the gathering and may order the use of force for this purpose, including the use of firearms and certain other weapons – but the degree of force used must not be “greater than is reasonably necessary for dispersing the persons assembled”, and it must be “moderated and proportionate to the circumstances of the case and the object to be attained”.<sup>212</sup> The law goes on to restrict the use of firearms or “other weapons

---

<sup>206</sup> Child Care and Protection Act 3 of 2015, s. 89(4).

<sup>207</sup> *Id.*, s. 135(4).

<sup>208</sup> Liquor Act 6 of 1998, s. 66(2).

<sup>209</sup> Civil Aviation Act 6 of 2016, ss. 131(6), 142(5), 146(3), 147(3)(b) 161, 162, 163(1), 164(1).

<sup>210</sup> Marine Traffic Act 2 of 1981, s. 9(2).

<sup>211</sup> Public Gatherings Proclamation, AG 23 of 1989, s. 5(1).

<sup>212</sup> *Id.*, s. 5(2).

likely to cause serious bodily injury or death” to situations where less dangerous weapons have first been tried, or where persons attending the gathering (a) kill or seriously injure any person or (b) destroy or do serious damage to valuable property (or “show a manifest intention” of doing any of these things).<sup>213</sup> The final caution is that firearms and other dangerous weapons must be used with “all reasonable caution, without recklessness or negligence, and so as to produce no further injury to any person than is reasonably necessary for the attainment of the object aforesaid”.<sup>214</sup>

These are all very specific contexts, but the principles which apply to the use of force in respect of any form of law enforcement should be consistently observed.

## 4.9 Nampol Standing Orders and Operational Manual

The *Nampol Operational Manual* supplements the law on the use of force in connection with arrests, incorporating the principles of necessity and proportionality.

Chapter 2 of the *Operational Manual*, which is entitled “Police Responsibilities”, deals with arrests and the treatment of arrested persons. This part of the *Manual* includes the following *Standing Orders*<sup>215</sup> which are pertinent to section 49 of the Criminal Procedure Act:

C.4. A member shall use only as much force as is necessary to make an arrest or prevent an escape.

C.5. A member shall not discharge a pistol or rifle at a person **except** to protect life or prevent grievous bodily harm.

Furthermore, the *Standing Orders* contain a general caution about the use of firearms:

C.8. Pistol or rifles shall be issued only to members who are **trained, qualified** in the particular class of weapon, **reliable**, have **common sense, sound judgment**, can handle a pistol or rifle and [are] acquainted with the circumstances under which a pistol or rifle may be used.

The *Standing Orders* then reiterate the fact that the use of firearms should be a last resort to deal with immediate threats to life:

C.15. Pistol or rifles shall only be used as a last resort to protect your life or the life of another person(s) in immediate danger.

C.16. Rifles and shotguns shall not be discharged in the public unless necessary and in accordance with the stipulations of J. – Use of Pistol or rifles.

\*\*\*

C.18. The content of this order shall, on a monthly basis, be discussed with all members.

---

<sup>213</sup> Id, s. 6(1).

<sup>214</sup> Id, s. 6(2).

<sup>215</sup> The points labelled “C” all come from the *Nampol Operational Manual*, Chapter 2, 22 May 2014, “C. STANDING ORDERS”.

On the other hand, there are other directives which note that police should be “sufficiently armed for self-preservation or the protection of life and property” when performing duties “under circumstances perilous of life”, and “must not hesitate to make use of their pistol or rifles when necessary”.<sup>216</sup>

The *Operational Manual* recommends that all police should have a thorough knowledge of the circumstances under which pistols or rifles may be used legally, since they will often have to make a judgement call on their own initiative – noting that there is no prescribed list of circumstances which can be followed on this issue.<sup>217</sup>

The *Operational Manual* also contains specific instructions regarding arrests. It notes at the outset that arrest “constitutes one of the most drastic infringements of the rights of an individual” and so must be carried out in strict compliance with the rules in the Constitution, the Criminal Procedure Act and other relevant legislation.<sup>218</sup> It contains the following directive regarding the use of force in respect of an arrest:

**Amount of force which may be used in effecting arrest**

1. As a rule there should be no need for the use of force, and, in every case where it may be necessary, only such force as is absolutely necessary to overcome resistance to the arrest, may be used.
  1. No justification whatsoever exists for unnecessarily beating, kicking or otherwise ill-treating an arrested person and there is no excuse whatsoever for a member to act in this manner.
  2. Any member found guilty of an offence as a result of the use of force while effecting an arrest where the use of such force cannot be justified, must expect to be dealt with severely.
2. Section 49 of the Criminal Procedure Act, 1977, provides for circumstances where the use of force by a member towards a person who is resisting arrest or fleeing from arrest, may be justified.<sup>219</sup>

This Directive is supplemented by the rules on use of firearms:

**J.1. General**

- a. According to law, the use of a pistol or rifle is only justified in the following circumstances:
  1. self defence, in the case of immediate and lethal attack (see discussion on self-defence below);  
or
  2. defence of another person under immediate or lethal attack; or
  3. in circumstances according to Section 49 of the Criminal Procedure Act of 1977 (Act 51 of 1977).
- b. According to Burchell and Hunt, “South African Criminal Law and Procedure”, Volume I (General Principles of Criminal Law), Juta & Co Ltd., 1970, Pages 272-280, in criminal proceedings a defence of “self-defence” (or private defence) will only succeed, if:
  1. the attack was a positive and unlawful act or interference; and
  2. the act of “self-defence” was (amongst others) a defence of life or personal injury; and
  3. the attack had already commenced or was imminent; and
  4. the act of self-defence was directed against the attacker, was necessary to avert the attack and did not use excessive force in reply to the attack.
- c. Before shooting another person in the circumstances as described in J.1.a., the following steps must be followed chronologically:

---

<sup>216</sup> *Nampol Operational Manual*, Chapter 2, 22 May 2014, D. GENERAL, D.4.

<sup>217</sup> Id, D. GENERAL, D.7-D.8.

<sup>218</sup> Id, H. ARREST AND TREATMENT OF ARRESTED PERSON, H.1.a-c.

<sup>219</sup> Id, H. ARREST AND TREATMENT OF ARRESTED PERSON, H.7.b.

1. Establish if it is one of the Schedule 1 Offence as mentioned in J.2.a.1.
2. The offender must be audibly warned to stop from fleeing or resisting the arrest.
3. If the offender is known and could be arrested at a later stage, he must be left to flee.
4. If there are any male bystanders between the age of 16 to 60 years, they must first be requested to help with the arrest.
5. If the offender cannot be arrested and the steps as described were followed, a warning shot should be fired.
6. As a last resort the offender may be shot in the legs.<sup>220</sup>

Interestingly, the illogical list of offences in Schedule 1 of the Criminal Procedure Act is not replicated in the *Operational Manual*, which contains a different list of “Schedule 1” offences which serve as a threshold for the use of deadly force, if other factors are also present.

## **J.2. Accountability of Member**

- a. Although the law is clear that the killing of persons under certain circumstances as justifiable, it must be stressed that the onus still rests upon the member who made use of the pistol or rifle to prove:
  1. That the offender committed the following Schedule I offence:
    1. High Treason
    2. Sedition
    3. Murder
    4. Rape
    5. Robbery
    6. Assault when a dangerous wound is inflicted.
    7. Breaking or entering any premises, whether under the common law or a statutory provision, with the intent to commit an offence as mentioned above.
    8. Escape, where the person has already been arrested for one of the above mentioned offenses.
  2. He/she intended to arrest the offender and was entitled to do so.
  3. The reason for the intended arrest was a reasonable suspicion that the offender had committed a Schedule I offence;
    1. The member has to prove this suspicion, based on the “reasonable man” (objective) test.
  4. In the course of the attempt to arrest, the deceased resisted or fled.
  5. The offender had the knowledge that an attempt to arrest him is made. (i.e. the member must make sure that the offender know why and that an attempt is being made to arrest him);
  6. That there was no other means of arresting him/her or to prevent him/her from fleeing, than to kill him.
- b. Members who hesitate or who are unsure when to use a pistol or rifle, may under no circumstances, except for the protection of his life or another person’s life, make use of a pistol or rifle.
  1. When in doubt, do not fire.

The *Operational Manual* ameliorates some of the weakness of section 49, by limiting the relevant offences and by incorporating some of the case law interpretation – but the competing approaches in the law and the *Operational Manual* could cause confusion.

---

<sup>220</sup> Id, J. USE OF PISTOL OR RIFLES, J.2.

## 5. Comparative law

It has been noted that “copy-and-paste” exercises between countries are inadvisable, since the environment for law enforcement differs substantially from one country to another with regard to the political, legal and administrative set-up, the overall security situation, the size of the country, and relevant economic, logistic and cultural issues.<sup>221</sup>

International law sets certain standards, requiring that the use of force serves a legitimate aim, and is necessary and proportionate. It is, however, up to national jurisdictions to further delineate these requirements, determining what aims qualify as being legitimate, and what thresholds have to be met for the use of force to be considered necessary and proportionate. National jurisdictions have given varying interpretations to these requirements. For example, what can qualify as a legitimate aim has been defined very narrowly in some jurisdictions and broadly in others, while interpretations of the necessity requirement vary from requiring reasonableness to requiring absolute necessity. The examples described here have been chosen to represent different points along the spectrum of approaches.

### 5.1 South Africa

Until 2003, section 49 of the Criminal Procedure Act 51 of 1977 on the use of force in effecting arrests was identical in Namibia and in South Africa.<sup>222</sup> This makes the successive law reforms in South Africa particularly pertinent examples for Namibia.

The South African Parliament re-wrote section 49 in 1998 – but this law was not initially brought into force because of objections from Minister of Safety and Security.<sup>223</sup> Then, in 2002, the South African Constitutional Court declared aspects of section 49 unconstitutional, in a judgement noting that the executive power to determine a date of implementation cannot lawfully be used to veto a law or to block its implementation.<sup>224</sup> The new version of section 49 which Parliament had passed in 1998 was brought into force in the wake of this case, in July 2003.<sup>225</sup> Section 49 was re-written

---

<sup>221</sup> Use of force: Guidelines for implementation of the UN basic principles on the use of force and firearms by law enforcement officials”, Amnesty International, 2015 at 12.

<sup>222</sup> *S v Johannes* 2009 (2) NR 579 (HC) at para 29: “...we have the same Criminal Procedure Act regulating all criminal proceedings, except for certain amendments in South Africa which are not applicable here, as well as certain amendments in Namibia which are not applicable in South Africa...”.

<sup>223</sup> *Ex Parte Minister of Safety and Security and Security and others: in Re S v Walters and Another* 2002 (4) SA 613 (CC) at para 68; see also Traggy Maepa, “How Much Might Is Right?: Application of Section 49 of the Criminal Procedure Act”, Institute for Security Studies, published in *SA Crime Quarterly*, No 1, July 2002; Tharien van der Walt, “The Use of Force in Effecting Arrest in South Africa and the 2010 Bill: A Step in the Right Direction?”, 14 (1) *Potchefstroom Elektroniese Regsblad*, 2011; Andra le Roux-Kemp and Craig S Horne, “An analysis of the wording, interpretation and development of the provisions dealing with the use of lethal force in effecting an arrest in South African criminal procedure”, 3 *South African Journal of Criminal Justice* 266 (2011) at 273.

<sup>224</sup> *Ex Parte Minister of Safety and Security and Security and others: in Re S v Walters and Another* 2002 (4) SA 613 (CC).

<sup>225</sup> Portions of the Judicial Matters Second Amendment Act 122 of 1998 (South Africa) came into force on 1 September 2000, but the provision which substituted section 49 came into force only on 18 July 2003. RSA Proclamation R.54 of 11 July 2003 (*Government Gazette* 25206).

again in 2012,<sup>226</sup> after the release of disturbing statistics on the number of police officers killed in the line of duty as well as the number of persons killed by police force.<sup>227</sup>

The version of section 49 which was passed by Parliament in 1998 differed substantially from the one which was initially proposed. The initial proposal was very similar to the original version (which is the one currently in force in Namibia). The first few proposals incorporated the concept of proportionality, but retained the idea of a schedule of serious crimes for which lethal force would be justified. The first proposed new version of section 49 (reproduced in the box below) was criticised for proposing a proportionality test which was limited to balancing the seriousness of the offence against the degree of force used – as opposed to providing for a consideration of the totality of the circumstances.<sup>228</sup> This was remedied in an alternative proposal (also reproduced in the box below), but this version was so lengthy and complex that it was unlikely to be workable as a guideline for law enforcement in the field.<sup>229</sup>

Both of these proposals retained the idea of scheduled offences which would justify the use of lethal force. The Human Rights Committee criticised this approach, suggesting that the key factor should not be the underlying crime but the existence of a threat to life or bodily integrity which is imminent at the time of the arrest, or which would be a likely result of the offence for which the arrest is being made. It noted the inherent weaknesses in the approach of listing crimes by category – which lumps together, for example, dangerous armed robbery with the snatching of a handbag by a young street child – and thus runs counter to the notion of proportionality.<sup>230</sup> The Human Rights Committee suggested the following wording:

If any person authorised under this Act to arrest or assist in arresting another, attempts to arrest such person and such person –

- (a) resists the attempt; or
- (b) flees;

when it is clear that an attempt to arrest him or her is being made, and cannot be arrested without the use of force, the person so authorised may, in order to prevent the person concerned from escaping from justice, use such force as may be reasonably necessary and proportional in the circumstances

Provided that the use of force which is likely to cause death may only be used where the arresting person reasonably believes that:

- (a) the person concerned is to be arrested for an offence involving the use or threatened use of life threatening violence or serious bodily injury, or
- (b) there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the arresting person or another if the arrest is delayed.<sup>231</sup>

---

<sup>226</sup> Criminal Procedure Amendment Act 9 of 2012, which came into force on 25 September 2012.

<sup>227</sup> See R Botha & J Visser, “Forceful arrests: An overview of section 49 of the Criminal Procedure Act 51 of 1977 and its recent amendments”, 15 (2) *Potchefstroom Elektroniese Regsblad* 2012.

<sup>228</sup> “Submission on Judicial Matters Amendment Bill [B95 -97]” [South Africa], Human Rights Committee, undated (as it appears on the website of the Parliamentary Monitoring Group).

<sup>229</sup> The Portfolio Committee on Justice reported that there were three draft amendments to section 49 on the table – the first one drafted by the Department of Justice, and two alternatives drafted by a SAPS team working together with the Department. “Portfolio Committee on Justice, 16 March 1998, Judicial Matters Amendment Bill [B95-97]: Deliberations” (as it appears on the website of the Parliamentary Monitoring Group). The committee discussed the second alternative draft, and apparently approved the version reproduced here.

<sup>230</sup> “Submission on Judicial Matters Amendment Bill [B95 -97]” [South Africa], Human Rights Committee, undated (as it appears on the website of the Parliamentary Monitoring Group).

<sup>231</sup> Ibid.

The idea of referring to scheduled crimes was in fact abandoned in the end, in favour of balancing the use of lethal force against the risk of harm.

At one stage, a proposal was put forward to include a proviso which stipulated that deadly force may only be used where the person to be arrested “did not, at the time, appear to the person using force, to be under 16 years of age”,<sup>232</sup> but this proposal was also abandoned.

<p style="text-align: center;"><b>SOUTH AFRICA</b>  <b>Proposed replacements for section 49</b>  <i>Neither of these proposals was adopted.</i></p>	
<p><b>initial proposed section 49</b><sup>233</sup>          (proposed in Judicial Matters Amendment Bill [B95 -97])</p> <p><b>Section 49 – Use of force in effecting arrest</b></p> <p>If any person authorised under this Act to arrest or assist in arresting another, attempts to arrest such person and such person -</p> <p>(a) resists the attempt; or</p> <p>(b) flees when it is clear that an attempt to arrest him or her is being made, or resists such attempt and flees, and cannot be arrested without the use of force, the person so authorised may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing:</p> <p>Provided that the force so used must be proportional to the seriousness of the offence which the person to be arrested has committed or is reasonably suspected of having committed:</p> <p>Provided further that the use of force which is likely to cause death will be justified in terms of the provisions of this section, only where the person concerned is to be arrested for an offence referred to in schedule 7.</p>	<p><b>alternative proposed section 49</b><sup>234</sup>          (Portfolio Committee on Justice, 1998)</p> <p><b>Section 49 – Use of force in effecting arrest</b></p> <p>(1) If any person authorized under this Act to arrest or to assist in arresting another attempts to arrest such person and such person -</p> <p>(a) resists the attempt: or</p> <p>(b) flees when it is clear that an attempt to arrest him or her is being made, or resists such attempt and flees, and cannot be arrested without the use of force, the person so authorized may, in order to effect the arrest, use such force which in the circumstances -</p> <p>(i) may be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing; and</p> <p>(ii) must be proportional in relation to the objective sought to be achieved:</p> <p>Provided that the use of force which is likely to cause death will be justified in terms of the provisions of this subsection, only where the person concerned is to be arrested for an offence referred to in Schedule 8.</p> <p>(2) If in any proceedings before a court of law, whether civil or criminal, a person raises the provisions of subsection (1) as a defence, the court shall, in determining whether such defence is valid, take the following factors into account:</p> <p>(a) The prevalence and seriousness of the offence which the person who resisted the arrest or fled (hereinafter referred to as the arrestee) has committed or was reasonably suspected of having committed;</p> <p>(b) whether, in order to effect the arrest, the person concerned used the minimum force which. In the circumstances. Was reasonable and proportional to overcome any resistance against the arrest or to prevent the arrestee from fleeing;</p> <p>(c) whether the nature of the offence which the arrestee committed or was reasonably suspected of having committed -</p>

<sup>232</sup> “Portfolio Committee on Justice, 16 March 1998, Judicial Matters Amendment Bill [B95-97]: Deliberations“ (as it appears on the website of the Parliamentary Monitoring Group).

<sup>233</sup> See “Submission on Judicial Matters Amendment Bill [B95 -97]“ [South Africa], Human Rights Committee, undated (as it appears on the website of the Parliamentary Monitoring Group).

<sup>234</sup> See “Amendments Agreed To Judicial Matters Amendment Bill (B 95-97)“ (website of the Parliamentary Monitoring Group).

	<ul style="list-style-type: none"> <li>(i) involved serious violence which was life threatening; or</li> <li>(ii) was likely to create feelings of fear and insecurity and to induce a sense of shock or outrage in the community where the offence was committed;</li> </ul> <p>(d) whether there was the likelihood that, if the arrestee had not been arrested -</p> <ul style="list-style-type: none"> <li>(i) the shock or outrage of the community might have led to public disorder; or</li> <li>(ii) the sense of peace and security among members of the public would have been undermined or jeopardized;</li> </ul> <p>(e) whether there was the likelihood that the arrestee, if he or she had not been arrested –</p> <ul style="list-style-type: none"> <li>(i) was about to evade justice or to abscond in order to evade justice; or</li> <li>(ii) could have endangered the safety of the public or any particular person or the public interest;</li> </ul> <p>(f) the relation between the ages of the person concerned and the arrestee;</p> <p>(g) the time within which the person concerned had to make a decision regarding the degree of force to be used in effecting the arrest;</p> <p>(h) whether the person concerned was familiar with the identity of the arrestee;</p> <p>(i) the possibility that the arrestee could have been arrested at a later stage;</p> <p>(j) any other factor which in the opinion of the court should be taken into account.</p> <p>(3) The burden of proving any fact which would constitute the defence created by subsection (1) shall be upon the person who raises that defence.</p>
--	--

However, before any legislative changes took place, the original version of section 49 was qualified by the South African courts on constitutional grounds. The 2001 *Govender* case decided by the Supreme Court of Appeal expanded the concept of “proportionality” to include a consideration of the nature and degree of the force used against the threat posed by the fugitive to the safety and security of the police officers, other individuals and society as a whole – in order to satisfy “the constitutional requirements of “reasonableness”.

In the incident which gave rise to this case, four youths stole a car. After the theft was reported, police later spotted the car and gave chase. The driver of the vehicle jumped out of the car and attempted to flee. The police pursued him, warned him to stop, fired a warning shot and again warned him to stop. To prevent his escape, a police officer then aimed a shot at the suspect’s legs. The bullet injured his spine and left him paralysed.

The Court held that section 49(1) must be interpreted to exclude the use of a firearm or similar weapon unless the person attempting to make the arrest has reasonable grounds to believe (1) that the suspect poses an immediate threat of serious bodily harm to the person attempting to make the arrest, or a threat of harm to members of the public; or (2) that the suspect has committed a crime involving the infliction of serious bodily harm, or a threat to this effect.<sup>235</sup> In other words, the

---

<sup>235</sup> *Govender v Minister of Safety & Security* 2001 (4) SA 273 (SCA).

*seriousness of the crime* (as required by the *Matlou* case) is not sufficient since even someone who has committed a very serious crime might not pose an *immediate threat of harm* to anyone.<sup>236</sup>

Then, in the 2002 case of *Ex Parte Minister of Safety and Security and Security and others: in Re S v Walters and Another*, the Constitutional Court considered the constitutionality of section 49.<sup>237</sup> In this case, the owner of a bakery and his son pursued a burglar who had broken into the bakery. The burglar tried to jump over a fence, but was fatally shot by the two civilians.

The Constitutional Court's starting point was that a provision authorising the use of force against persons – and particularly justifying homicide – “inevitably raises constitutional misgivings” in respect of “three elemental rights” – the right to life, the right to dignity and the right to bodily integrity.<sup>238</sup> It agreed with *Govender*'s interpretation of section 49(1), finding it constitutionally sound and sufficient to save that section from invalidation, but found section 49(2) to be unconstitutional.<sup>239</sup>

The intention of the legislature in section 49(2) was to limit the use of lethal force to arrests for serious offences, with the mechanism for this limitation being the list of offences provided in Schedule 1. But, the Court found that “this line of distinction fails in its fundamental objective of achieving realistic proportionality”.<sup>240</sup>

The schedule lists a widely divergent rag-bag of some 20 offences ranging from really serious crimes with an element of violence like treason, public violence, murder, rape and robbery at one end of the spectrum to, at the other end, relatively petty offences like pickpocketing or grabbing the mealie from the fruit-stall. What is more, the schedule includes offences that do not constitute any kind of physical threat, let alone violence. It is difficult to imagine why lethal force should be justified in arresting a fugitive who is suspected of having passed a forged cheque or a homemade banknote or, for that matter, having gratified his sexual urges with an animal.<sup>241</sup>

The Court concluded that this list is “simply too wide and inappropriately focussed to permit a constitutionally defensible line to be drawn for the permissible use of deadly force”.<sup>242</sup>

The Court summarised the permissible approach to the use of force to effect an arrest as follows:

The purpose of an arrest is to take the suspect into custody to be brought before court as soon as possible on a criminal charge. It does not necessarily involve the use of force. On the contrary, the use of any degree of force to effect an arrest is allowed only when force is necessary to overcome resistance (by the suspect and/or anyone else), to an arrest by the person authorised by law to carry out such arrest. And where the use of force is permitted, only the least degree of force necessary to perfect the arrest may be used. Similarly, when the suspect flees, force may be used only where it is necessary and then only the minimum degree of force that will be effective may be used. Arrest is not an objective in itself; it is merely an optional means of bringing a suspected criminal before court.

---

<sup>236</sup> Id at paras 17, 21; see also *Ex Parte Minister of Safety and Security and Security and others: in Re S v Walters and Another* 2002 (4) SA 613 (CC) at para 38 (discussing the *Govender* case).

<sup>237</sup> *Ex Parte Minister of Safety and Security and Security and others: in Re S v Walters and Another* 2002 (4) SA 613 (CC).

<sup>238</sup> Id at para 3.

<sup>239</sup> *Ex Parte Minister of Safety and Security and Security and others: in Re S v Walters and Another* 2002 (4) SA 613 (CC).

<sup>240</sup> Id at para 41.

<sup>241</sup> Ibid.

<sup>242</sup> Id at para 45.

Therefore resistance or flight does not have to be overcome or prevented at all costs. Thus a suspect whose identity and whereabouts are known or who can otherwise be picked up later, can properly be left until then. Even when the suspect is likely to get clean away if not stopped there and then, arrest at every cost is not warranted. The might of the law need not be engaged to bring to book a petty criminal.<sup>243</sup>

The Court then summarised the principles for the use of force in light of its judgment:

- (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 arrestor 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 arrestor 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.
- (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>244</sup>

After the *Walters* case was decided, **the 1998 version of section 49** (replicated in the box below) was brought into force. This version of section 49 made explicit the proportionality requirement introduced by the case law. It was applauded for replacing the “scheduled offence” approach with a reference to serious offences involving the likelihood of violence. It helpfully augmented “private defence” in the criminal justice context by making reference to the prevention of future harm as well as imminent harm.<sup>245</sup> It included three justifications for the use of lethal force:

- that the use of force is immediately necessary in order to protect the arrestor or any other person from imminent or future death or grievous bodily harm;
- that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- that the offence is in progress, is of a “forcible and serious nature” and involves the use of life threatening violence or a strong likelihood of causing grievous bodily harm.<sup>246</sup>

---

<sup>243</sup> Id at para 49.

<sup>244</sup> Id at para 54.

<sup>245</sup> See R Botha & J Visser, “[Forceful arrests: An overview of section 49 of the Criminal Procedure Act 51 of 1977 and its recent amendments](#)”, 15 (2) *Potchefstroom Elektroniese Regsblad* 2012.

<sup>246</sup> Section 49(2), as substituted by the Judicial Matters Second Amendment Act 122 of 1998 (South Africa).

However, some asserted that its approach to the justifiable use of lethal force included requirements that were even stricter than those required by the Constitutional Court.<sup>247</sup> The new provision was also criticised for being complex, confusing and lacking in legal clarity, and on the grounds that it would unduly hamper the police in combating crime.<sup>248</sup> In particular, some commentators expressed concern about the practicality of the “speculative abstraction” required to assess the possibility of future (as opposed to immediate) danger.<sup>249</sup> The formulation was also critiqued for failing to require the arresting persons to take into account whether it would be possible for to arrest the suspect at a later stage, as discussed in some of the case law.<sup>250</sup>

Responding to the criticisms of the 1998 version of section 49, the South African government reformulated the provision again. Its primary objective was to align the provision more closely with the Constitutional Court judgment – seeing that Parliament did not have the benefit of the guidelines furnished by the Court when the 1998 Bill was enacted – and also to clarify the provision by eliminating ambiguities which made the provision difficult to interpret.<sup>251</sup>

The **new version of section 49, enacted in 2012**, adds a definition of the concept of “deadly force”.<sup>252</sup> It includes two justifications for the use of lethal force which are more straightforward than the ones it replaced:

- the suspect poses a threat of serious violence to the arrestor or any other person
- the suspect is reasonably suspected on 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>253</sup>

The amendment also appears to remove the option of justifiable use of deadly force from persons who are assisting with the arrest, limiting this to persons with the power to actually make the arrest.<sup>254</sup> The current version of section 49 also removed references to either “imminent” or “future” danger, now referring simply to a “threat of serious violence to the arrestor or any other person” with no timeframe being specified.<sup>255</sup>

<sup>247</sup> See R Botha & J Visser, “Forceful arrests: An overview of section 49 of the Criminal Procedure Act 51 of 1977 and its recent amendments”, 15 (2) *Potchefstroom Elektroniese Regsblad* 2012.

<sup>248</sup> See, for example, Tharien van der Walt, “The Use of Force in Effecting Arrest in South Africa and the 2010 Bill: A Step in the Right Direction?”, 14 (1) *Potchefstroom Elektroniese Regsblad* 2011; David Bruce, “Killing and the Constitution – arrest and the use of lethal force”, 19 (3) *South African Journal on Human Rights* 2003 at section II-b(iii).

<sup>249</sup> Andra le Roux-Kemp and Craig S Horne, “An analysis of the wording, interpretation and development of the provisions dealing with the use of lethal force in effecting an arrest in South African criminal procedure”, 3 *South African Journal of Criminal Justice* 266 (2011) at 278, citing Bruce and van der Walt.

<sup>250</sup> See, for example, “Submission on Judicial Matters Amendment Bill [B95 -97]” [South Africa], Human Rights Committee, undated (as it appears on the website of the Parliamentary Monitoring Group), at section 6.1. The Committee suggested the following wording: “in order to prevent the arrestee from *escaping from justice*, the arresting person may use such force as may be reasonably necessary in the circumstances” (emphasis added).

<sup>251</sup> “Memorandum on the Objects of the Criminal Procedure Amendment Bill, 2010” appended to the *Criminal Procedure Amendment Bill [B 39–2010]*.

<sup>252</sup> Section 49(1)(c), as substituted by the Criminal Procedure Amendment Act 9 of 2012 (South Africa).

<sup>253</sup> Section 49(2), as substituted by the Criminal Procedure Amendment Act 9 of 2012 (South Africa).

<sup>254</sup> Andra le Roux-Kemp and Craig S Horne, “An analysis of the wording, interpretation and development of the provisions dealing with the use of lethal force in effecting an arrest in South African criminal procedure”, 3 *South African Journal of Criminal Justice* 266 (2011) at 280-281.

<sup>255</sup> Id at 281, citing van der Walt.

However, it has been asserted that the current version of the provision still fails to comply with international standards on the use of firearms for law enforcement, which should be limited to situations involving an imminent threat of death or serious injury, or a proximate and grave threat to life.<sup>256</sup>

Two commentators note that, despite the numerous and far-reaching amendments to section 49, it remains controversial – possibly because it attempts an impossible exercise:

The amended wording of legislation cannot altogether inform the exercise of discretion by a police officer who is faced with a range of dangerous situations on a daily basis. The only viable solution to the controversy surrounding the use of lethal force would be to address the internal mechanisms of the SAPS, such as providing adequate training to police officials.<sup>257</sup>

Nevertheless, although training is crucial, a clear legal standard can surely be a useful starting point.

It should be noted that the provisions on the use of force in South African’s Criminal Procedure Act are supplemented by a provision in the **Police Services Act 68 of 1995**, which says that any force used by police must be “the minimum force which is reasonable in the circumstances”.<sup>258</sup>

<p style="text-align: center;"><b>SOUTH AFRICA</b>  <b>Successive versions of section 49</b>  <i>Both of these versions were adopted by Parliament.</i></p>	
<p style="text-align: center;"><b>1998 version</b><sup>259</sup> (enacted in 2003)</p> <p><b>Section 49 – Use of force in effecting arrest</b></p> <p>(1) For the purposes of this section -</p> <p>(a) “arrestor” means any person authorised under this Act to arrest or to assist in arresting a suspect; and</p> <p>(b) “suspect” means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.</p> <p>(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</p>	<p style="text-align: center;"><b>2012 version</b><sup>260</sup></p> <p><b>Section 49 – Use of force in effecting arrest</b></p> <p>(1) For the purposes of this section -</p> <p>(a) “arrestor” means any person authorised under this Act to arrest or to assist in arresting a suspect;</p> <p>(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</p> <p>(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.</p> <p>(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or</p>

<sup>256</sup> “The Law on Police Use of Force Worldwide: South Africa”, 2019.

<sup>257</sup> Id at 282.

<sup>258</sup> South African Police Service Act 68 of 1995 (South Africa), s. 13(3)(b).

<sup>259</sup> This substitution was made by the Judicial Matters Second Amendment Act 122 of 1998 (South Africa).

<sup>260</sup> This substitution was made by the Criminal Procedure Amendment Act 9 of 2012 (South Africa).

<p>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: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds -</p> <p>(a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;</p> <p>(b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or</p> <p>(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.</p>	<p>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 -</p> <p>(a) the suspect poses a threat of serious violence to the arrestor or any other person; or</p> <p>(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.</p>
--	---

## 5.2 New Zealand

New Zealand is an example of a statute which provides only very general and minimal guidance.

It is relevant to note as background to the discussion that members of the New Zealand Police do not routinely carry firearms, but are typically equipped with a baton, pepper spray, and a device which can give electrical shocks (a “taser”).<sup>261</sup> However, firearms are usually carried in frontline police vehicles, so it has been asserted that the idea of the police as an unarmed force is not really accurate – and that there have been a number of fatal police shootings in recent years.<sup>262</sup>

The Crimes Act sets out the defences that may be used when a police officer or a private citizen uses force in arresting a suspect or preventing his or her escape. The defences specific to this situation are set out in sections 39-41, with sections 40 and 41 allowing the use of force to execute process, effect an arrest or prevent escape only where it is not possible to accomplish these objectives “by reasonable means in a less violent manner”. Section 48 confirms that self-defence or defence of another may also be applicable to these situations, and section 62 provides that anyone who uses excessive force will be legally accountable.<sup>263</sup>

<sup>261</sup> “[The Law on Police Use of Force Worldwide: New Zealand](#)”, 2019. The Police General Instructions, F060 – Carrying of Firearms by Police, as quoted in New Zealand Police, “[Use of Firearms by Police](#)”, 27 September 2007, state:

- (1) The New Zealand Police is generally an unarmed service. It is recognised however that firearms need to be available quickly, easily and safely. The principle of minimum personal carriage and minimum visibility of firearms and related equipment is to be applied at all times.
- (2) Firearms are not to be carried on the person as a matter of general practice, but may be carried in authorised police vehicles to ensure they are available if needed.

<sup>262</sup> Mark Scott, “[How New Zealand police compare: firearms, tasers, pursuits and dogs](#)”, *North & South*, 26 May 2017.

<sup>263</sup> Crimes Act, 1961 (New Zealand), ss. 39-41, 48, 62.

### 39. Force used in executing process or in arrest

Where any person is justified, or protected from criminal responsibility, in executing or assisting to execute any sentence, warrant, or process, or in making or assisting to make any arrest, that justification or protection shall extend and apply to the use by him or her of **such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, warrant, or process can be executed or the arrest made by reasonable means in a less violent manner:**

provided that, **except in the case of a constable or a person called upon by a constable to assist him or her, this section shall not apply where the force used is intended or likely to cause death or grievous bodily harm.**

### 40. Preventing escape or rescue

(1) Where any person is lawfully authorised to arrest or to assist in arresting any other person, or is justified in or protected from criminal responsibility for arresting or assisting to arrest any other person, that authority, justification, or protection, as the case may be, shall extend and apply to the use of **such force as may be necessary -**

(a) **to prevent the escape of that other person if he or she takes to flight in order to avoid arrest; or**

(b) **to prevent the escape or rescue of that other person after his or her arrest - unless in any such case the escape or rescue can be prevented by reasonable means in a less violent manner:**

provided that, **except in the case of a constable or a person called upon by a constable to assist him or her, this subsection shall not apply where the force used is intended or likely to cause death or grievous bodily harm.**

(2) Where any prisoner of a prison is attempting to escape from lawful custody, or is fleeing after having escaped therefrom, every constable, and every person called upon by a constable to assist him or her, is **justified in using such force as may be necessary to prevent the escape of or to recapture the prisoner, unless in any such case the escape can be prevented or the recapture effected by reasonable means in a less violent manner.**

### 41. Prevention of suicide or certain offences

Every one is justified in using **such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one**, or in order to prevent any act being done which he or she believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence.

\*\*\*

### 48. Self-defence and defence of another

Every one is justified in using, **in the defence of himself or herself or another**, such force as, in the circumstances as he or she believes them to be, it is **reasonable to use.**

\*\*\*

### 62. Excess of force

Every one authorised by law to use force is criminally responsible for any excess, according to the nature and quality of the act that constitutes the excess.

The defences in sections 39-40 apply to anyone who makes an arrest or tries to prevent a suspect from fleeing, but *only police and persons called upon to assist them* can justifiably use force which could be lethal or cause grievous bodily harm. In theory, these defences are available whatever the offence – as long as the arrest itself is justified.

There is some overlap between sections 41 and 48 – section 48 justifies the use of force in the defence of oneself or another, while section 41 justifies force to prevent an offence which would be likely to cause immediate and serious injury to any person or property (including suicide). There is also some overlap between these two sections and the justifications for the use of force to make an arrest or to prevent crimes that put people or property at risk of harm. One commentator suggests that the sections differ in the sense that the concept of “reasonable force” in section 48 on self-defence embodies a requirement of proportionality which is not included in the concept of force that is “reasonably necessary” in terms of section 41 – conceding that the difference is probably not great. However, it is asserted that section 48 is clearer and so perhaps more workable to utilise in practice:

In practice, when section 48 provides a more favourable defence, it is likely to be used in preference to the more specific alternatives. An example of where section 48 might be preferred is where a mistake (especially an unreasonable mistake) has been made about the danger posed by the suspect. Another situation is where there was no statutory authorisation for the arrest or use of force to prevent crime or for the amount of force actually used. This particular overlap, therefore, has the consequence of diluting the restrictions to the permission to use force that are written into sections 39 and 40. Indeed, even where the arrestor is a police officer, section 48 might well be preferred, since its meaning is much clearer.<sup>264</sup>

Case law indicates that the defences will fail –

- if invoked in the case of an arrest made without reasonable and probable grounds
- if more force was used than was necessary or
- if the arrest could be effected in a less violent manner.<sup>265</sup>

The courts have defined “excessive force” as being “more force than is necessary to overcome any force used by the defendant in resisting arrest”.<sup>266</sup> There is also a line of cases holding that the test for the reasonableness of the force used is an objective one, and cannot be based solely on the subjective view of the person who used the force.<sup>267</sup>

Interestingly, the courts have also found that a crime suspect has a right of self-defence against the perceived use of excessive force by police officers seeking to make an arrest, holding in the case of *R v Thomas* that self-defence may apply in a situation where the suspect has an “honest albeit mistaken belief that the police are using excessive or unlawful force and uses reasonable force against the police in response”.<sup>268</sup> Similarly, in *R v Stepanicic*, a man being arrested for burglary faced excessive force when police allegedly pepper-sprayed him and assaulted him. He alleged that he struck out in response and punched the police officer, rendering him unconscious. His

---

<sup>264</sup> Michael Spisto and Fran Wright, “(Justifiable) Homicide Whilst Effecting an Arrest: When is This Lawful- A Comparison between the South African and New Zealand Systems of Law”, 7 *Waikato Law Review* 147 (1999), text preceding note 42.

<sup>265</sup> *Hill v Police* (1994) 12 CRNZ 89 (HC) at 94.

<sup>266</sup> *Stepanicic v R* [2015] NZCA 35, citing *Beagle v Attorney-General* [2007] DCR 596 where the police treatment of a slight, non-violent man by constables who were much bigger and stronger was considered “over-vigorous” and “wholly unnecessary”.

<sup>267</sup> *R v Howard* (2003) 20 CRNZ 319 at 325, as discussed in Lloyd Gallagher, “Police Shootings: Justice for the victim or administrative law to protect government coffers?”, 1 December 2009.

<sup>268</sup> *R v Thomas* [1991] 3 NZLR 141.

conviction was overturned after the Court held that the jury should have considered whether the officer's use of force in this incident was excessive ("more force than is necessary to overcome any force used by the defendant in resisting arrest") and might thus have justified the suspect's actions as being self-defence.<sup>269</sup>

The New Zealand Police are provided with more detailed guidance in police policy documents. The police *Use of Force* policy sets out the range of options available to police officers when attempting to de-escalate a situation, restrain a person, effect an arrest or otherwise carry out lawful police duties: communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), pepper spray, batons, police dogs, tasers and firearms.

Police policy also provides an assessment framework designed to help officers ensure that their use of force is necessary and proportionate to the level of threat and the degree of risk to themselves and others. The recommended analysis is referred to as the "TENR (Threat, Exposure, Necessity and Response) operational threat assessment".<sup>270</sup>

- **'Threat'** is about how serious the situation is (or could be), and the present or potential danger the situation, environment, or suspect presents to themselves, other members of the public or Police. Police must assess the threat posed by the suspect, based on all available information including what they see and hear, and what is known about the suspect.
- **'Exposure'** is about the potential harm to Police employees, Police operations, Police reputation and to others. Exposure can be mitigated through assessment and planning.
- **'Necessity'** is the assessment to determine if there is a need for the operation or intervention to proceed now, later or not at all.
- **'Response'** means the proportionate and timely execution of Police duties aided by the appropriate use of tactics and tactical options.

The overriding principle when applying TENR is 'safety is success'. Any force must be considered timely, proportionate and appropriate given the circumstances known at the time. Victim, public and Police safety always take precedence, and every effort must be taken to minimise harm and maximise safety.<sup>271</sup>

Tasers were introduced in New Zealand in 2010, as a potentially useful alternative to more lethal weapons. One assessment of taser use in the five years from 2010 to 2015 found that they were deployed 4 196 times but fired only 623 times – showing that they were being exhibited in many cases to enforce compliance with being used.<sup>272</sup> Police policy on the use of tasers has been summarised as follows by the Independent Police Conduct Authority:

64. Police policy states that a Taser may only be used to arrest an offender if the officer believes the offender poses a risk of physical injury and the arrest cannot be effected less forcefully. A Taser must only be used on a person who is assaultive (defined as "*actively hostile behaviour accompanied by physical actions or intent, expressed either verbally and/or through body language, to cause physical harm*") and cannot be used on a person who uses passive resistance in relation to Police.

---

<sup>269</sup> *Stepanicic v R* [2015] NZCA 35.

<sup>270</sup> "Use of Taser Following Arrest in Auckland", Independent Police Conduct Authority, 9 March 2017 at paras 57-58.

<sup>271</sup> Id, paras 59-60 (emphasis added).

<sup>272</sup> Mark Scott, "How New Zealand police compare: firearms, tasers, pursuits and dogs", *North & South*, 26 May 2017.

65. Police policy expressly states that a Taser should never be used against an uncooperative but non-aggressive person to induce compliance.
66. To encourage de-escalation and to warn others nearby, officers must give a verbal warning in conjunction with the deployment of a Taser unless it is impractical or unsafe to do so. The warning relevant to the presentation of a Taser is “*Taser 50 000 volts*”. The warning relevant to a discharge or contact stun is “*Taser, Taser, Taser*”.<sup>273</sup>

However, the Committee against Torture has expressed concern about reports of inappropriate or excessive use of tasers in New Zealand and called on the government to ensure that they are “used exclusively in extreme and limited situations, where there is a real and immediate threat to life or risk of serious injury, as a substitute for lethal weapons and by trained law enforcement personnel only” – and never on children or pregnant women, or in prisons.<sup>274</sup>

At the most extreme end of the spectrum, the “Police General Instructions” contain specific guidelines on the use of firearms:

#### **F061 – Use of Firearms by Police**

- (1) Members must always be aware of their personal responsibilities in the use of firearms. Under Section 62 of the Crimes Act 1961 a member is criminally liable for any excess force used. An overriding requirement in law is that minimum force must be applied to effect the purpose. Where practical Police should not use a firearm unless it can be done without endangering other persons.
- (2) Police members shall not use a firearm except in the following circumstances:
  - (a) to DEFEND THEMSELVES OR OTHERS (Section 48 Crimes Act 1961) if they fear death or grievous bodily harm to themselves or others, and they cannot reasonably protect themselves, or others, in a less violent manner;
  - (b) to ARREST an offender (Section 39 Crimes Act 1961) if they believe on reasonable grounds that the offender poses a threat or death or grievous bodily harm in resisting his or her arrest;  
AND  
the arrest cannot be reasonably effected in a less violent manner  
AND  
the arrest cannot be delayed without danger to other persons;
  - (c) to PREVENT THE ESCAPE of an offender (Section 40 of the Crimes Act 1961) if it is believed on reasonable grounds that the offender poses a threat of death or grievous bodily harm to any person (whether an identifiable individual or members of the public at large)  
AND  
he or she takes to flight to avoid arrest, OR he or she escapes after his or her arrest  
AND  
such flight or escape cannot reasonably be prevented in a less violent manner.
- (3) In any case an offender is not to be shot:
  - (a) until he or she has first been called upon to surrender, unless in the circumstances it is impracticable and unsafe to do so  
AND
  - (b) it is clear that he or she cannot be disarmed or arrested without first being shot  
AND

<sup>273</sup> Independent Police Conduct Authority, “Use of Taser following arrest in Auckland”, 9 March 2017 at paras 64-66, accessed from this [link](#). After an incident involving a feral goat, the policy on taser use was amended to provide that: “A Taser can be used to deter an attacking animal, but not to capture an animal that is otherwise not attacking.” New Zealand Police, “[TASER policy changed following 2016 incident involving feral goat](#)“, 26 July 2018.

<sup>274</sup> Committee against Torture, “[Concluding observations on the sixth periodic report of New Zealand](#)“, CAT/C/NZL/CO/6, 2 June 2015, at para 17.

- (c) in the circumstances further delay in apprehending him or her would be dangerous or impracticable.<sup>275</sup>

New Zealand's Independent Police Conduct Authority (IPCA), which investigates complaints against police,<sup>276</sup> has considered the question of what constitutes excessive force in respect of the use of tasers and firearms, in several recent incidents.

In one case, an officer used a taser to subdue a man with a concealed knife who had been threatening suicide before being taken into custody. After he was in custody, a struggle ensued. Police officers were concerned that he might have a knife hidden inside his clothing which he could use to harm himself or others, so they were trying to get him to remove his clothes and change into a tear-resistant gown. He was tasered twice when he resisted the officers physically in a small room where pepper spray or assistance by other officers was deemed not to be feasible. However, the IPCA found that the police officer's use of the taser was excessive and unjustified in this situation, as the man was not assaultive when he was tasered – in fact, he had turned his back on the two officers in the room with him at the time when the taser was actually fired. The IPCA ruled that other, less violent options were available to the officers to deal with the situation.<sup>277</sup>

In another review of taser use during an arrest, police confronted a group of people drinking in a public park where alcohol was banned. After receiving a report that the group had behaved in a threatening manner towards a couple, two officers arrived on the scene. The officers requested back-up and asked the group to leave. One member of the group became aggressive and was pepper-sprayed when he began advancing towards the officers. He fell to the ground but resisted being handcuffed, while other members of the group started becoming aggressive. One officer gave a verbal warning of possible taser use, "laser painted" the man with the taser (sighting the taser on him as a visual warning of its possible use) and "arced" the taser (causing it to display an arc of electricity which is intended to serve as a visual deterrent). The other officer then pepper-sprayed two other members of the group who were becoming increasingly aggressive. The group leader who was the initial focus was tasered once after he continued "swinging punches and thrashing around", and then again after he had fallen to the ground to prevent him from getting back up. The IPCA found that the pepper spray and the first use of the taser were justified. The police were outnumbered by a drunk and aggressive group of people. The group leader's behaviour

---

<sup>275</sup> New Zealand Police, "Use of Firearms by Police", 27 September 2007, quoting Police General Instructions, F061 – Use of Firearms by Police. An earlier version of this instruction provided less detail:

1. In defence of the officer or another if the officer fears death or grievous bodily harm and protection cannot reasonably be provided by less violent means, or
2. To arrest an offender if he or she poses a risk of death or grievous bodily harm in the course of resisting arrest, the arrest cannot be reasonably effected less violently or delayed without causing danger, or
3. To prevent escape of an offender who has taken flight to avoid arrest or escaped after arrest, who poses a risk of death or grievous bodily harm to any person, and only if the flight or escape cannot reasonably be prevented less violently.

*Manual of Best Practice*, Police General Instructions, F061(3), as quoted in Lloyd Gallagher, "Police Shootings: Justice for the victim or administrative law to protect government coffers?", 1 December 2009, text following note 40 and Michael Spisto and Fran Wright, "(Justifiable) Homicide Whilst Effecting an Arrest: When is This Lawful- A Comparison between the South African and New Zealand Systems of Law", 7 *Waikato Law Review* 147 (1999), text preceding note 38.

<sup>276</sup> Independent Police Conduct Authority Act, 1988 (New Zealand).

<sup>277</sup> "Use of Taser following Arrest in Auckland", Independent Police Conduct Authority, 9 March 2017.

was assaultive, and the *initial* use of the taser was “pivotal to the officers being able to avoid being harmed as well as to gain control of a very difficult situation”. However, the IPCA found that the *second* discharge of the taser, when the group leader was already lying on the ground, was not justified.<sup>278</sup>

Another incident concerned the use of a firearm after police responded to a distress call from a woman who claimed that her male partner was threatening her with a firearm. She informed police that he had 17 rounds of ammunition and a bullet-proof vest, and that her 21-year-old son-in-law was asleep in the house and possibly also at risk. The couple left the house by car, and the tyres were deflated by road spikes which the police had deployed for this purpose. The man pointed his firearm at police and ignored police instructions to put his gun down. Several shots were fired, and the man was disabled after being shot multiple times. It was later determined that he had fired no shots although he was carrying multiple rounds of ammunition. The IPCA, noting that the suspect was carrying a loaded firearm and had threatened to fire his weapon if he saw police, found that police had no opportunity to use other tactical options in the circumstances and were justified in shooting him to prevent him from carrying out his threats.<sup>279</sup>

The use of force by prison officials in New Zealand is regulated by the **Corrections Act 2004**:

### 83. Use of force

- (1) No officer or staff member may use physical force in dealing with any prisoner unless the officer or staff member has reasonable grounds for believing that the use of physical force is reasonably necessary -
  - (a) in self-defence, in the defence of another person, or to protect the prisoner from injury; or
  - (b) in the case of an escape or attempted escape (including the recapture of any person who is fleeing after escape); or
  - (c) in the case of an officer -
    - (i) to prevent the prisoner from damaging any property; or
    - (ii) in the case of active or passive resistance to a lawful order.
- (2) An officer or staff member who uses physical force for any of the purposes or in any of the circumstances referred to in subsection (1) may not use any more physical force than is reasonably necessary in the circumstances.
- (3) If an officer or staff member uses physical force in dealing with any prisoner, the prisoner must, as soon as practicable after the application of that force, be examined by a registered health professional, unless that application of force is limited to the use of handcuffs of a kind that have been authorised for use as a mechanical restraint.
- (4) Nothing in this section limits or affects any other provision in this Act or any other enactment that authorises an officer or staff member to use physical force, or any provision of the Crimes Act 1961, or any rule of law, that makes any specified circumstances -
  - (a) a justification or excuse for the use of force; or
  - (b) a defence to a charge involving the use of force.

The New Zealand Department of Corrections emphasises that force is not used as a means of punishment, and is a last resort after prison staff have exhausted every effort to communicate with prisoners to diffuse a situation peacefully. Physical force is limited to the minimum degree reasonable and necessary to resolve the situation, and only where there are reasonable grounds to

---

<sup>278</sup> “[Use of Taser during arrest in Auckland](#)”, Independent Police Conduct Authority, 22 November 2018.

<sup>279</sup> “[Non-Fatal Shooting of Mr X in Karepehi](#)”, Independent Police Conduct Authority, 20 April 2017.

believe that force is necessary – such as in self-defence, to prevent property damage or an escape, or to address resistance to a lawful order.<sup>280</sup>

## 5.3 Canada

Canada appears to give somewhat more leeway than some other jurisdictions to law enforcement officers who must act in the heat of the moment, considering their use of force both subjectively and with a view to objective reasonableness.

Canadian law on the use of force is contained in Canada's federal Criminal Code:

### **25. Protection of persons acting under authority**

- (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
- (a) as a private person,
  - (b) as a peace officer or public officer,
  - (c) in aid of a peace officer or public officer, or
  - (d) by virtue of his office,
- is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

#### **Idem**

- (2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

#### **When not protected**

- (3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

#### **When protected**

- (4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if
- (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
  - (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
  - (c) the person to be arrested takes flight to avoid arrest;
  - (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
  - (e) the flight cannot be prevented by reasonable means in a less violent manner.

#### **Power in case of escape from penitentiary**

- (5) A peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary within the meaning of subsection 2(1) of the *Corrections and Conditional Release Act*, if
- (a) the peace officer believes on reasonable grounds that any of the inmates of the penitentiary poses a threat of death or grievous bodily harm to the peace officer or any other person; and
  - (b) the escape cannot be prevented by reasonable means in a less violent manner.

---

<sup>280</sup> "Use of force", Department of Corrections, undated.

[\*\*\*]

## **26. Excessive force**

Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

## **27. Use of force to prevent commission of offence**

Every one is justified in using as much force as is reasonably necessary

- (a) to prevent the commission of an offence
  - (i) for which, if it were committed, the person who committed it might be arrested without warrant, and
  - (ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or
- (b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).

[\*\*\*]

## **34. Defence – use or threat of force**

- (1) A person is not guilty of an offence if
  - (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
  - (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
  - (c) the act committed is reasonable in the circumstances.

### **Factors**

- (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
  - (a) the nature of the force or threat;
  - (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
  - (c) the person's role in the incident;
  - (d) whether any party to the incident used or threatened to use a weapon;
  - (e) the size, age, gender and physical capabilities of the parties to the incident;
  - (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
  - (f.1) any history of interaction or communication between the parties to the incident;
  - (g) the nature and proportionality of the person's response to the use or threat of force; and
  - (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

### **No defence**

- (3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

## **35. Defence – property**

- (1) A person is not guilty of an offence if
  - (a) they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;
  - (b) they believe on reasonable grounds that another person
    - (i) is about to enter, is entering or has entered the property without being entitled by law to do so,

- (ii) is about to take the property, is doing so or has just done so, or
- (iii) is about to damage or destroy the property, or make it inoperative, or is doing so;
- (c) the act that constitutes the offence is committed for the purpose of
  - (i) preventing the other person from entering the property, or removing that person from the property, or
  - (ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and
- (d) the act committed is reasonable in the circumstances.

**No defence**

- (2) Subsection (1) does not apply if the person who believes on reasonable grounds that they are, or who is believed on reasonable grounds to be, in peaceable possession of the property does not have a claim of right to it and the other person is entitled to its possession by law.

**No defence**

- (3) Subsection (1) does not apply if the other person is doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.<sup>281</sup>

On the one hand, Canadian law requires that force must be necessary, proportionate and reasonable for it to be justified,<sup>282</sup> in line with the international standards discussed above. It additionally requires that lethal force may be used to prevent a suspect from fleeing or an inmate from escaping only where there is a threat of death or grievous bodily harm.<sup>283</sup>

On the other hand, Canadian law on the use of force is on some points more lenient than some other jurisdictions. Canadian jurisprudence not only evaluates the proportionality and necessity requirements objectively, but also subjectively – from the viewpoint of the law enforcement official using the force.<sup>284</sup> This means that, in evaluating these requirements, courts must have due regard to whether the law enforcement official, based on his or her assessment of the exigencies of the moment could reasonably have judged the force to be proportionate and necessary.<sup>285</sup> The underlying idea of this approach is that courts should avoid holding law enforcement officials to a standard that might be reasonable when assessing the facts retrospectively from the calmness of the court room, but would be unreasonable to apply in the moment at hand when quick decision-making is required.

The judicial approach to applying section 25 to the use of force by police has been usefully summarised in the 1985 *Gamache* case in Quebec, where a law enforcement officer was acquitted

---

<sup>281</sup> Criminal Code R.S.C., 1985, c. C-46 (Canada), ss. 25-27, 34-35.

<sup>282</sup> The necessity requirement is explicitly provided for in section 25, with regard to non-lethal (s. 25(1)) and lethal force (s. 25(4)(e)). The proportionality requirement was read into section 25 by Canadian jurisprudence (for example *Her Majesty the Queen v Magiskan* 2003 CanLII 859 (ON S.C.), para 22).

<sup>283</sup> Criminal Code R.S.C., 1985, c. C-46 (Canada), ss. 25(4)(d); 25(5)(a).

<sup>284</sup> *R v Nasogaluak* 2010 SCC 6 at para 32; *Stewart v Canada (Attorney General)* 1999 CanLII 9221 (FC) at para 90. In the *Nasogaluak* case, the police were in the process of arresting a drunk driver after a high-speed chase. When he resisted, he was punched in the head, pinned face down on the pavement with one officer straddling his back and another kneeling on his thigh and then punched in the back with sufficient force to break his ribs, which resulted in a punctured lung. The court found this force to be excessive. In the *Stewart* case, no excessive force was found where police grabbed and twisted a woman's arm and handcuffed her during an arrest for illegally parking in a handicapped parking zone at an airport, causing some injuries to her neck, shoulder, arm and wrist as she struggled to resist.

<sup>285</sup> *R v Nasogaluak* 2010 SCC 6 at paras 34-35; *Stewart v Canada (Attorney General)* 1999 CanLII 9221 (FC) at para 90.

of a charge of assault for using pepper spray in the course of an arrest, on a suspect who was already handcuffed, after attempting lesser means of overcoming the suspect's resistance:<sup>286</sup>

[19] Policing is a dangerous profession. Police officers are often placed in situations where they must make quick decisions in circumstances where their safety and the safety of the public may be at risk. As the Supreme Court wrote in *R. v. Asante-Mensah*, “[a] certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances”.

[20] Under paragraph 25(1) of the *Criminal Code*, peace officers are protected from liability for the use of necessary force in the course of their duties. This provision recognizes that peace officers must have a reasonable zone of protection in carrying their functions. It provides a “safe harbour from liability for those who are required to enforce the law”.

[21] The protection for use of necessary force by a peace officer is a legal justification. The legal effect of a justification is to absolve the wrongfulness of an action that would otherwise technically constitute a crime.

[22] The onus on a plea of justification for the reasonable use of force lies with the person who asserts it. If the accused presents sufficient evidence to establish a justification for the use of force under paragraph 25(1) of the *Criminal Code*, the onus shifts to the Crown to rebut the justification and prove beyond a reasonable doubt that the force was excessive.

[23] For paragraph 25(1) of the *Criminal Code* to apply in relation to the use of force in the course of an arrest, three requirements must be satisfied: (1) the peace officer is authorized by law to carry the arrest; (2) the officer acted on reasonable grounds in using force; (3) he did not use unnecessary force, in the circumstances.

[24] The third branch of the test focuses on the level of force used. The allowable level of force is constrained by the principles of necessity, proportionality and reasonableness.

[25] The perception of the events by the police officers, subjectively, must be considered in determining whether the level of force was reasonable. That perception must also be objectively reasonable.

[26] On the objective analysis, the court should place itself “in the shoes of the officer” at the moment of the impugned action, not in retrospect.

[27] In this context, police officers are not expected to carefully measure the exact amount of force required in a given set of circumstances. They are not to be judged against a standard of perfection. It is in fact unrealistic and unreasonable to expect that, in the heat of the moment, they will use the least amount of force necessary to achieve a valid law enforcement objective.

[28] In essence, police officers are entitled to be wrong, providing however that they acted reasonably.<sup>287</sup>

It has been noted that the courts tend to allow the use of greater force during arrests than against persons who are already in police custody.<sup>288</sup>

---

<sup>286</sup> *Gamache c. R* 2015 QCCS 5175 (CanLII). The police officer attempted to use verbal and physical methods to quell the suspect's spitting and kicking before resorting to pepper spray, and he gave a warning before deploying the spray. The Court noted that the use of pepper spray was an intermediate response, and more appropriate than more dangerous weapons such as a baton, taser or firearm. *Id* at paras 78-82.

<sup>287</sup> *Id*, paras 19-28 (footnotes omitted).

<sup>288</sup> “The Law on Police Use of Force Worldwide: Canada”, 2019.

Sections 34 and 35 of the Criminal Code cover the issue of self-defence which is additional to the justifiable use of force covered in the other sections cited above. In *Hebert v R*,<sup>289</sup> the Canadian Supreme Court considered the elements of self-defence, being that (i) the accused was unlawfully assaulted; (ii) the accused did not provoke the assault; (iii) the force used by the accused was not intended to cause death or grievous bodily harm; and (iv) the force used by the accused was no more than necessary to enable him to defend himself.<sup>290</sup> There is no requirement of proportionality in respect of self-defence, in the sense that the force used in self-defence does not have to be proportionate to the force being used in the assault which is being responded to,<sup>291</sup> and there is also no requirement that the force be no greater than necessary to prevent death or grievous bodily harm.<sup>292</sup>

## 5.4 European jurisprudence

The jurisprudence of the European Court of Human Rights (ECHR) on the use of force by law enforcement officials represents a comparatively more restrictive model for the lawful use of force, with the guiding standard being “absolute necessity”

Although Article 2(2) of the *European Convention on Human Rights* allows for the use of force in defence of any person from unlawful violence, in order to effect a lawful arrest or to prevent escape of a person lawfully detained, and in action lawfully taken for the purpose of quelling a riot or insurrection, the only aim the ECHR has accepted in practice for the use of force is the protection of the life of a person.<sup>293</sup>

To be non-excessive, the ECHR requires that the use of lethal force must be “**absolutely necessary**”, which the Court describes in the 1995 *McCann* case as a stricter and more compelling test than mere necessity.<sup>294</sup> Use of deadly force will only meet this elevated necessity requirement if, in addition to the force used being necessary to achieve the aim, the control and organization of the operation was done in a way to minimize recourse to lethal force to the greatest extent possible.<sup>295</sup> The idea is that if the control and organization of the operation rendered the use of force inevitable, then the resulting force cannot be considered absolutely necessary. This

### European Convention on Human Rights

#### ARTICLE 2 – Right to life

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

<sup>289</sup> *Hebert v R* [1996] 2 SCR 272.

<sup>290</sup> *Id* at para 23.

<sup>291</sup> *Id* at para 16, citing *R v Ward* (1978), 4 C.R. (3d) 190 (Ont. C.A.).

<sup>292</sup> *Ibid*, citing *R v Mulder* (1978), 40 C.C.C. (2d) 1 (Ont. C.A.).

<sup>293</sup> Council of Europe, “The European Convention on Human Rights and policing – A handbook for police officers and other law enforcement officials”, 2013 at 26.

<sup>294</sup> *McCann and Others v United Kingdom*, no. 18984/91, ECHR (Grand Chamber), 27 September 1995 at para 149.

<sup>295</sup> *Id* at para 194.

stricter necessity requirement is inspired by the importance the Court attaches to the right to life, which it considers to be one of the most fundamental human rights and one of the basic democratic values.<sup>296</sup>

In the *McCann* case, the Court found that the anti-terrorist operation under examination was not controlled and planned in a way that minimized the recourse to lethal force, so that the deadly force was not absolutely necessary.<sup>297</sup> The UK authorities that planned the operation made the use of lethal force by the soldiers on the operation inevitable, given that they did not prevent the terrorist suspects from entering the country while they had the means to do so, and they did not sufficiently allow for the possibility that their intelligence assessments might be erroneous – especially given that the operation was carried out by soldiers who were trained to continue shooting once they opened fire until the target was dead.<sup>298</sup>

In the 2005 *Simsek* case, the ECHR found that the absolute necessity requirement was not met where police officers tasked to police a protest were given only firearms, instead of a range of equipment such as tear gas, water cannons or rubber bullets – thus forcing them to rely on lethal force.<sup>299</sup>

This absolute necessity requirement has been influential in many other jurisdictions, such as South Africa. In the *Ntamo* case, South Africa's Supreme Court of Appeal found that the planning and control of an operation should be considered in evaluating the proportionality of the use of force, explicitly citing the ECHR jurisprudence as an example.<sup>300</sup> The Court identified this to be a way to curb possible police excesses and unjustified taking of human life, yet clarified that the required planning depends on the nature of the harm to be averted and the time available for taking appropriate action.<sup>301</sup>

The ECHR has also found that the right to life not only obliges law enforcement officials to refrain from unlawful or excessive use of force, but also to act to protect life. It also requires an independent and effective investigation when death results from use of force by law enforcement officials.<sup>302</sup> The emphasis on thorough investigation is to render the right to life effective by ensuring that officials who use force that endangers life are held accountable.<sup>303</sup>

---

<sup>296</sup> Id at para 147.

<sup>297</sup> Id at para 213.

<sup>298</sup> Id at paras 202-213.

<sup>299</sup> *Simsek v Turkey*, nos. 35072/97 and 37194/97, ECHR, 26 October 2005.

<sup>300</sup> *Ntamo and others v Minister v Safety and Security* 2001 (1) SA 830 (Tk) at paras 37-39, confirmed on appeal 2003 (1) SA 547 (SCA).

<sup>301</sup> Id at paras 38 and 39.

<sup>302</sup> *Osman v the United Kingdom*, no 87/1997/871/1083, ECHR, 28 October 1998; *Nachova and Others v Bulgaria*, nos. 43577/98 and 43579/98, ECHR (Grand Chamber), 6 July 2005.

<sup>303</sup> *Nachova and Others v Bulgaria*, nos. 43577/98 and 43579/98, ECHR (Grand Chamber), 6 July 2005 at paras 110.

## 5.5 US jurisprudence

Another judicial touchstone on this issue is the 1985 US Supreme Court case of *Tennessee v Garner*,<sup>304</sup> which has been influential in a number of jurisdictions.

The Fourth Amendment to the US Constitution protects the security of persons against State interference, while the Eighth Amendment prohibits cruel and unusual punishments. These rights have been interpreted by the courts to protect individuals, including prisoners and detainees, from the excessive use of force.<sup>305</sup>

In *Tennessee v Garner*, the Court applied the Fourth Amendment in considering the use of deadly force by a law enforcement officer to prevent the escape of an apparently unarmed person suspected of committing a burglary. Considering the competing principles, the Court remarked:

The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement."

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects.<sup>306</sup>

The Court held that that deadly force may be used only if (a) it is necessary to prevent escape; (b) the officer has probable cause to believe that the suspect committed a crime involving the infliction or threatened infliction of serious physical harm *or* that the suspect poses a significant threat of death or serious physical injury to the officer or others; and (c) the officer has, if feasible, warned the suspect of imminent use of deadly force.<sup>307</sup> (Note that this standard does *not* require that the harm threatened by the fleeing suspect must be imminent.)

The dissenting opinion was of the view that:

Because burglary is a serious and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance. Where a police officer has probable cause to arrest a suspected burglar, the use of deadly force as a last resort might well be the only means of apprehending

---

<sup>304</sup> *Tennessee v Garner* 471 US 1 (1985). In this case, police shot a burglary suspect who was attempting to escape by climbing over a fence. The suspect died of his injuries. The officer was acting within the authority of a Tennessee state statute which provided that "[i]f, after notice of the intention to arrest the defendant, he either flees or forcibly resists, 'the officer may use all the necessary means to effect the arrest'." *Id* at 4.

<sup>305</sup> See, for example, R Wilson Freyermuth, "Rethinking Excessive Force", 1987 *Duke Law Journal* 692.

<sup>306</sup> *Tennessee v Garner* 471 US 1 (1985) at 9-11 (footnotes and other references omitted).

<sup>307</sup> *Id* at 11-12.

the suspect. With respect to a particular burglary, subsequent investigation simply cannot represent a substitute for immediate apprehension of the criminal suspect at the scene.<sup>308</sup>

The dissenters were of the opinion that statutes such as the one at issue assist the police to apprehend suspected perpetrators of serious crimes, as well as putting the public on notice that they may not ignore a lawful police order to submit to arrest with impunity.<sup>309</sup>

In 1986, in the case of *Whitley v Albers*, the US Supreme Court considered the use of force in a prison setting in terms of the Eighth Amendment, holding that the resulting infliction of pain did not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied in the circumstances was unreasonable or not strictly necessary. The key question is whether the force was applied in a good faith effort to restore order, and not for the purpose of wantonly inflicting harm.<sup>310</sup>

In 1989, in the case of *Graham v Connor*, the US Supreme Court determined that the standard for determining whether force was excessive in terms of the Fourth Amendment is objective reasonableness, based on what a reasonable law enforcement officer would have done in the situation – mindful of the fact that police officers are often forced to make split-second judgments about the degree of force that is appropriate in tense, uncertain, and rapidly evolving circumstances.<sup>311</sup>

The Fourteenth Amendment’s guarantee of due process was the basis for the 2015 case of *Kingsley v Hendrickson*, which involved the use of a taser against a pre-trial prisoner charged with a drug offence, who disobeyed directions to remove a paper obscuring the light fitting in his cell. The US Supreme Court held that a pre-trial detainee claiming excessive use of force by law enforcement officials must show only that the force used was objectively unreasonable, and is not required to prove that the officers subjectively intended to violate his rights.<sup>312</sup>

Another leading case on the use of tasers (and similar devices) is a 2016 federal Court of Appeals judgment in *Armstrong v Village of Pinehurst*.<sup>313</sup> The Court, applying the standard of “objective reasonableness” under the Fourth Amendment – and emphasizing the extreme pain and possible injury posed by tasers and stun guns – held that the use of these weapons constitutes “proportional force *only* when they are deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser.”<sup>314</sup> The Court noted that noncompliance with lawful orders “justifies some use of force, but the level of justified force varies based on the risks posed by the resistance”.<sup>315</sup>

---

<sup>308</sup> Id at 27 (dissenting opinion).

<sup>309</sup> Id at 28 (dissenting opinion).

<sup>310</sup> *Whitley v Albers* 475 US 312 (1986).

<sup>311</sup> *Graham v Connor* 490 US 386 (1989) at 396-397.

<sup>312</sup> *Kingsley v Hendrickson* 135 S. Ct. 2466 (2015).

<sup>313</sup> *Armstrong v Village of Pinehurst* 810 F.3d 892 (4th Cir. 2016). In this case, police officers used tasers to stun a mentally-ill patient who has been involuntarily committed to a hospital for treatment because he was considered to be a danger to himself. He was stunned several times after being given a warning, which inadvertently resulted in his death.

<sup>314</sup> Id at 903.

<sup>315</sup> Id at 901.

## 6. Analysis

**Does current Namibian law on the use of force comply with the relevant international standards?** The answer appears to be no:

- (1) The **Police Act** is very vague, permitting “such force as is reasonable”, with no mention of necessity, proportionality or preventative measures.
- (2) Section 49 of the **Criminal Procedure Act** has been qualified by judicial interpretation which is not obvious in its formulation. Furthermore, its emphasis on the underlying crime which is suspected of having been committed does not tie proportionality to immediate threat – which is particularly problematic in respect of the use of lethal force. Additionally, the Schedule 1 list of crimes justifying the use of lethal force includes some non-violent crimes that are unlikely to involve imminent danger to person or property.
- (3) **Nampol’s Operational Manual** is more clear, detailed and consistent with case law than the statute, with a more limited list of offences that warrant the use of deadly force, and a better approach than the statute in terms of necessity and proportionality in the context of arrests. However, the fact that the *Operational Manual* and the statute do not match up well is confusing.
- (4) The **Correctional Service Act** is fairly detailed on the use of weapons, and is commendable for requiring a prior verbal warning before weapons are employed. It generally embodies the principles of necessity and proportionality, referring to the force that is “reasonably necessary” and allowing use only of the “minimum force necessary in the circumstances to restrain the act intended”. However, as noted above, it has been suggested by Amnesty International that even this law could benefit from more detail.<sup>316</sup>
- (5) The **Public Gatherings Proclamation** allows the use of force to disperse a gathering in response to speech alone, without requiring any signs that violence or harm are actually imminent – although it does mention the principles of reasonableness and proportionality.

**Section 49 of the Criminal Procedure Act is particularly concerning.** In South Africa, during the time when section 49 of its Criminal Procedure Act was identical to Namibia’s current version, even the South African Police Service conceded that section 49 was problematic. It noted that the concept of proportionality had been incorporated into subsection 49(1) by judicial interpretation, requiring that the amount and method of force must be proportional to the objective, that it must be the minimum force that would be reasonably effective and feasible in the circumstances, and that the use of force must be weighed against the nature and seriousness of the crime in question. This is true in respect of Namibia as well, but in terms of clarity and public understanding, it would

---

<sup>316</sup> [Use of force: Guidelines for implementation of the UN basic principles on the use of force and firearms by law enforcement officials](#)“, Amnesty International, 2015 at 47, note 24. This criticism may be somewhat unfair as it cites section 35(1) without reading it alongside the remainder of section 35.

be better if these limitations were stated explicitly.<sup>317</sup> However, the South African Police Service noted that subsection 49(2) does not include a strict requirement of reasonability in every instance, as noted by the courts and criticised in legal writings. It also observed that “the position is further exacerbated” because some of the crimes listed in Schedule 1 (to define the circumstances where deadly force is justified) are over broad for this purpose, not being “of such a serious nature as to warrant using lethal force”.<sup>318</sup>

This is an understatement. It is in fact shocking that the law on its face authorizes law enforcement personnel to use deadly force against someone attempting to evade arrest for a range of non-violent crimes including counterfeiting, fraud, forgery, receiving stolen goods, consensual sodomy and bestiality – as well as *any* criminal offence which can be punished by imprisonment for more than six months without the option of a fine. It is impossible to argue that such crimes pose an imminent threat to public safety.

**Deadly force requires particular attention.** If the State has no right to take life in the punishment of a convicted criminal, how may it retain the right to kill a person who is only *suspected* of having committed an offence? The idea that it is justifiable to risk killing someone in order to bring them to justice sits oddly with the principle of the presumption of innocence. Yet, as noted above, if suspects can regularly evade arrest, the criminal justice system will be unable to function. This makes it crucial to strike the correct balance.

**The UN Special Rapporteur on extrajudicial, summary or arbitrary executions emphasises the importance of a good domestic legal framework setting out the conditions under which force may be used in the name of the State, as a key step in protecting the right to life:**

The specific relevance of domestic law in this context stems from the fact that the laws of each State remain the first line and in many cases effectively the last line of defence for the protection of the right to life, given the irreversibility of its violation. National and local laws play an important role in defining the understanding by law enforcement officials and the population alike of the extent of the police powers, and the conditions for accountability. As such, there is a strong need to ensure that domestic laws worldwide comply with international standards. It is too late to attend to this when tensions arise.<sup>319</sup>

**It is important, however, to be aware of the realities of actual policing situations.** The Namibian Police have rightly pointed out the practical difficulties of making decisions in dangerous situations in the line of duty:

Should one adopt the approach of an armchair pundit, everything would be ideal. All things will take place in a controlled atmosphere. The reality on the ground is however far different from that. No criminal will ever inform you that he is about to go and commit whatever offence. Even in the event that the Police detected a person had engaged in criminal conduct, in more cases than not will that person try and evade capture, such is the reality of the situation.

---

<sup>317</sup> South African Police Service, “[Submission on the Judicial Matters Amendment Bill 95 of 1997: Proposed Amendment to section 49 of the Criminal Procedure Act 51 of 1977](#)”, undated, “The Present Section and its Application”, citing *Matlou v Makhubedu* 1978 1 SA 964(A) at 956E-G.

<sup>318</sup> Ibid.

<sup>319</sup> *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, A/HRC/26/36, 1 April 2014 at para 29.

Thus it is not always possible to have prior knowledge of a situation in which a crime is committed.

Law enforcement officers operate in various precarious and difficult circumstances and within a blink of an eye, an officer is expected to take a critical decision. We are not infallible and therefore bound to make mistakes under the circumstances.<sup>320</sup>

Reform of Namibian law on the use of force by law enforcement personnel would be a good starting point to curb the excesses that have been recently observed. Improved laws should set clear standards which are consistent with the Namibian Constitution and the relevant international guidelines, while recognising the need to retain a reasonable degree of flexibility for police discretion in uncertain situations.

## 7. Recommendations

In order for law reform proposals to be acceptable to law enforcement officials, they should be drafted in consultation with representatives of the armed forces and other stakeholders. Instead of presenting draft provisions, the recommendations set out here attempt to outline the issues which should be considered and discussed. These ideas are based in great part on the *BPUFF* principles, which are clear and straightforwardly worded and could in many instances form the crux of reworded provisions in the Police Act, the Criminal Procedure Act and the Correctional Service Act.

The following outline could be used as a guideline for law reform discussions:

1. **Should the justification of private defence be re-stated?** The justification of private defence is already available to law enforcement officials at common law. Should this defence be re-stated or referred to in statutory provisions on the use of force, as some other countries have done?
2. **Should there be different rules for different types of personnel?**
  - 2.1 Should there be different rules for Nampol members and for other law enforcement officials carrying out police functions, such as NDF members and City Police?
  - 2.2 Should correctional services personnel have different, or additional, rules?
  - 2.3 Should persons *other than* law enforcement officials (ie, private persons) be allowed to use force justifiably when making an arrest on their own, or when assisting law enforcement personnel? If some use of force can be justified, should such persons be allowed to use lethal force justifiably beyond the bounds of private defence?
3. **What criteria should justify the use of nonlethal force and lethal force?** The UK police reportedly use the acronym “PLAN” to embody the four key principles which must be kept in mind in respect of any use of force: **P**roportionality, **L**awfulness, **A**ccountability and **N**ecessity.<sup>321</sup> Law reform on this topic should incorporate these principles and closely follow the *BPUFF* guidelines.

---

<sup>320</sup> Ministry of Safety and Security, “[Press Release: Alleged Shoot to Kill Instructions](#)“, 6 January 2017 (Major-General JB Tjivikua, Deputy-Inspector General for Operations, Namibian Police).

<sup>321</sup> Anneke Osse, “[Understanding Policing: A resource for human rights activists](#)“, Amnesty International, 2007 at 128.

The following provisions could serve as a skeleton framework for improved legal provisions on **the use of force in general**:

- (1) Force may be used only to achieve a **lawful objective**.
- (2) Force should be used only where it is **reasonably necessary** to achieve a lawful objective, where the law enforcement official -
  - (a) has attempted non-violent means but found them ineffective or without any promise of achieving the intended result; or
  - (b) reasonably believes that it is not possible to attempt non-violent means in the circumstances.
- (3) Any use of force must be **proportionate** to the threat perceived or the objective to be achieved, and must always be the minimum amount of force that is necessary.

**In respect of lethal or deadly force**, the idea of a list of serious offences should be eliminated, in favour of a more general assessment of the degree of risk involved. It should also be remembered that the concept of *private defence* already applies to situations where there is an imminent threat to the safety of persons or property – so statutory reform needs to focus on *additional* justification for the use of deadly force.

South Africa's definition of deadly force is instructive:

“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.

One proposed wording to supplement private defence on the use of deadly force is as follows:

Police officers may use deadly force to stop a fleeing suspect only if they have reasonable grounds to believe that the suspect -

- (1) has committed an offence involving the actual or threatened infliction of serious physical injury or death, and
- (2) is likely to endanger human life or cause serious injury to another unless apprehended without delay.<sup>322</sup>

The law should also incorporate an explicit requirement of a **verbal warning** before firearms (or similar instruments of force such as tasers or rubber bullets) are used, along the lines proposed by *BPUFF*. A possible approach might be as follows:

Before utilising firearms or other weapons, a law enforcement official must -

- (a) identify himself or herself as a law enforcement official; and
  - (b) give a clear warning of the intent to use a weapon, with sufficient time for the warning to be observed,
- unless these steps would -

---

<sup>322</sup> R Botha & J Visser, “Forceful arrests: An overview of section 49 of the Criminal Procedure Act 51 of 1977 and its recent amendments”, 15 (2) *Potchefstroom Elektroniese Regsblad* 2012, citing D Bruce, “Shoot to kill: The use of deadly force by police” in the Report on the *Conference on Policing in South Africa: 2010 and beyond*, 30 September to 1 October 2010, Muldersdrift at 8-9.

- (i) place the law enforcement officials at undue risk;
- (ii) create a risk of death or serious harm to other persons; or
- (iii) be clearly inappropriate or pointless in the circumstances.

**5. What criteria should apply to the use of force against persons in custody?** The general principles of lawfulness, necessity and proportionality should apply, but there is a need to consider the special circumstances of persons in custody – *both in police custody and under the authority of correctional services officers*. These principles would be consistent with BPUFF and the Nelson Mandela Rules:

- (1) The use of force other than deadly force by law enforcement personnel against persons in custody should be allowed only when –
  - (a) strictly necessary for the maintenance of security and order within the place of custody;
  - (b) when personal safety is threatened; or
  - (c) to prevent the escape of a person in custody.
- (2) Weapons should be used against persons in custody only –
  - (a) in self-defence or in the defence of others against the immediate threat of death or serious injury; or
  - (b) to prevent the escape of a person in custody, where the law enforcement official reasonably believes that preventing the escape is necessary to prevent danger to human life or serious injury to another person.

**6. Is there a need for special rules for the use of force in the context of public gatherings?** The provisions on the use of force in the Public Gatherings Proclamation should be repealed. One question for discussion is whether there is a need for special legal rules on the use of force in respect of public gatherings, or whether the same rules should apply as in any other context. It is helpful to try and keep the rules as clear and simple as possible, to facilitate training and also to make them feasible to apply in practice.

**7. In assessing the use of force, should the law apply an objective or a subjective standard?** In other words, should the use of force be measured against the assessment of a reasonable person, or from the perspective of the individual law enforcement official concerned? The relevant standard could incorporate elements of both subjective and objective approaches (ie, the point of view of a reasonable person in the same circumstances as the individual law enforcement official concerned).

**8. Are Namibia's mechanisms for accountability sufficient?** In Namibia, law enforcement officials are already subject to criminal sanction when they use excessive force, both in theory and in practice. The *Nampol Operational Manual* requires immediate reporting and investigation by a senior office of any shooting incident, with details on the investigation procedure and the possible consequences.<sup>323</sup> One question for discussion is how well the current procedure work in practice and whether there is a need for any additional accountability mechanisms.

---

<sup>323</sup> *Nampol Operational Manual*, Chapter 2, 22 May 2014, J. USE OF PISTOL OR RIFLES, J.8 Shooting Incident by Member.

In New Zealand, the Independent Police Conduct Authority is an independent body headed by a judge that investigates complaints against police as well as any police incidents involving death or serious bodily harm. It also monitors the treatment of persons in police custody. It does not have the power to lay criminal charges, but can conduct investigations which run parallel to internal police investigations or criminal matters – and it can recommend that disciplinary or criminal proceedings be considered. It regularly releases reports on its investigations, and it has the power to recommend changes in police policy and procedure.<sup>324</sup>

This is one of several examples of independent oversight bodies which could be cited, such as the UK Independent Office for Police Conduct<sup>325</sup> and the various provincial and federal Canadian Police Oversight Agencies.<sup>326</sup>

**9. Enhancing options for proportional use of force:** To enhance proportionality, it is important to make sure that all personnel engaged in policing functions have a broad range of techniques and equipment available to them, including self-defence equipment (such as shields, helmets and bullet-proof vests) and non-lethal tools such as pepper spray and possibly electric shock equipment (although electrical shock implements should be treated with the same caution as firearms).

**10. Training:** It is important to provide adequate *and recurrent* training in minimum force techniques for *all* law enforcement officials, especially for members of the defence force who are not generally trained to exercise law enforcement functions.

---

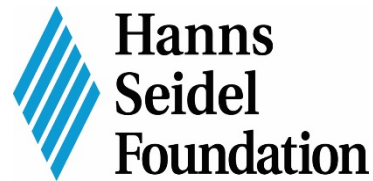
<sup>324</sup> See Independent Police Conduct Authority Act, 1988 (New Zealand) and the Independent Police Conduct Authority [website](#).

<sup>325</sup> See the Independent Office for Police Conduct [website](#).

<sup>326</sup> A list of links to Canadian Police Oversight Agencies can be found [here](#).

Prepared by the  
**Legal Assistance Centre**  
with funding from the  
**Hanns Seidel Foundation**

November 2019



**LEGAL ASSISTANCE CENTRE**  
4 Marien Ngouabi Street, Windhoek  
P.O. Box 604, Windhoek, Namibia  
Telephone: 061-223356  
Fax: 061-234953  
Email: [info@lac.org.na](mailto:info@lac.org.na)  
Website: [www.lac.org.na](http://www.lac.org.na)

Prepared by the  
**Legal Assistance Centre**  
with funding from the  
**Hanns Seidel Foundation**

November 2019

