

DIGNITY Publication Series on
Torture and Organised Violence
Praxis Paper

#18

LEGAL STUDY ON POLICING AND HUMAN RIGHTS STANDARDS

Internationally and in three countries of the global south (South Africa, Philippines and Liberia)

Jo-Anne Prud'Homme
Ernesto A. Anasarias
Themba Masuko
Malose Langa
Cara Casey Boyce
Kari Øygard Larsen
Steffen Jensen
N. Russell Allen

Legal study on policing and human rights standards; internationally and in three countries of the global south (South Africa, Philippines and Liberia)

A praxis paper on urban violence prepared in collaboration between Balay, CSVR, LAPS and DIGNITY for the Global Alliance

DIGNITY Publication Series on Torture and Organised Violence No. 18

© 2017 DIGNITY - Danish Institute Against Torture, the authors and the Global Alliance organizations

Balay Rehabilitation Center

www.balayph.net

The Centre for the Study of Violence and Reconciliation, CSVR

www.csvr.org.za

Liberia Association for Psychosocial Services, LAPS

www.lapsliberia.com

DIGNITY – Danish Institute Against Torture

www.dignityinstitute.org

ISBN online: 9788790878900

LEGAL STUDY ON POLICING AND HUMAN RIGHTS STANDARDS

**INTERNATIONALLY AND IN THREE COUNTRIES OF THE GLOBAL SOUTH
(SOUTH AFRICA, PHILIPPINES AND LIBERIA)**

A praxis paper on urban violence prepared in collaboration between Balay, CSVR, LAPS
and DIGNITY for the Global Alliance

By Jo-Anne Prud'Homme, Ernesto A. Anasarias, Themba Masuko, Malose Langa, Cara
Casey Boyce, Kari Øygard Larsen, Steffen Jensen and N. Russell Allen

Foreword	9
Executive summary	10
1. Introduction	12
2. Policing and International Human Rights Standards	14
2.1 Human Rights Principles Governing Law Enforcement	16
2.2 Anti-Corruption	18
2.3 Oversight Mechanisms	18
2.4 Rules Governing the Use of Force and Firearms	19
2.5 Dispersal of Unlawful Assemblies	22
2.6 Conclusion	22
3. South Africa: Legal and Policy Framework	23
3.1 Overview of Policing System and Structure	23
3.2 International Law	27
3.3 Regional Law	27
3.4 Domestic Law and Policies	28
3.4.1 Prohibition and Prevention of Torture	28
3.4.2 Organisation and Functions of Law Enforcement	28
3.4.3 Code of Conduct	29
3.4.4 Code of Ethics	29
3.4.5 Community Policing	30
3.4.6 Anti-Corruption Policies and Legislation	30
3.5 Oversight of the Police	31
3.5.1 South African Human Rights Commission	31
3.5.2 Civilian Secretariat for Police	32
3.5.3 Independent Police Investigative Directorate	32
3.6 Use of Force and Firearms	33
3.6.1 Rules Governing the Use of Force	33
3.6.2 Training in the Use of Force	34
3.6.3 After the Use of Force	34
3.6.4 Rules Governing the Use of Firearms	35

3.7 Dispersal of Assemblies	37
3.7.1 Rules Governing the Dispersal of Assemblies	37
3.8 Conclusion	38
4. Philippines: Legal and Policy Framework	39
4.1 Overview of Policing System and Structure	39
4.2 Applicable International Law	43
4.3 Domestic Law and Policies	43
4.3.1 Organisation and Functions of Law Enforcement	45
4.3.2 Code of Conduct	47
4.3.3 Code of Ethics	48
4.3.4 Community Policing	49
4.3.5 Human Rights Training	50
4.3.6 Anti-Corruption Policies and Legislation	51
4.4 General Human Rights Principles	53
4.5 Oversight of the Police	55
4.5.1 Director General of the PNP	55
4.5.2 Police Regional Directors	56
4.5.3 Police Provincial Directors	56
4.5.4 Chief of Police	56
4.5.5 Directorate for Investigation and Detective Management	56
4.5.6 Directorate for Intelligence	56
4.5.7 Internal Affairs Service	56
4.5.8 Philippines National Police Commission	57
4.5.9 People's Law Enforcement Boards	58
4.5.10 City and Municipal Mayors	58
4.5.11 Office of the Ombudsman	58
4.5.12 National Commission on Human Rights	58
4.5.13 Challenges	59

4.6 Use of Force and Firearms	59
4.6.1 Rules Governing the Use of Force	59
4.6.2 Rules Governing the Use of Firearms	62
4.7 Dispersal of Assemblies	63
4.8 Conclusion	66
5. Liberia: Legal and Policy Framework	69
5.1 Overview of Policing System	69
5.2 International Law	70
5.3 Regional Law	71
5.4 Domestic Law, Policy and Practices	71
5.4.1 General Human Rights Principles	72
5.4.2 Prohibition and Prevention of Torture	72
5.4.3 Organisation and Functions of Law Enforcement	73
5.4.4 Code of Conduct	73
5.4.5 Community Policing	74
5.4.6 Human Rights Training	75
5.4.7 Anti-Corruption Policies and Legislation	75
5.5 Oversight of the Police	77
5.6 Office of the Ombudsman	78
5.7 Professional Standards Division	78
5.8 LNP Civilian Complaints Review Board	80
5.9 Human Rights-Based Policing in Practice	80
5.10 Use of Force and Firearms	81
5.11 Dispersal of Assemblies	82
5.12 Conclusion	83
6. Conclusion and Recommendations	85

Foreword

Legal studies in relation to torture and cruel, inhuman and degrading treatment have often focused on places of detention and on what we could talk about as the more extraordinary forms of violations, especially against political opponents. These studies have largely mirrored the areas of focus of the comprehensive and highly competent institutional setup around not least the Committee Against Torture, the Subcommittee on the Prevention of Torture, the Universal Periodic Review process and other human rights mechanisms which all, in different ways, have a tendency to focus on torture and ill-treatment in the context of official custody. While this is clearly important, it seems to us that we need to begin concerning ourselves with state violence taking place outside of custodial settings in urban centers around the world, where state violence is prevalent but also normalized to the extent that it has become almost mundane. In this non-custodial context, law and legal regimes are no less important but human rights organizations and bodies have tended to pay less attention to the legal and policy frameworks guiding policing practices. In this paper, we address this omission and focus on international and national legal and policy frameworks for policing practices in non-custodial settings – including in the lead-up to arrests and in the dispersal of public assemblies – in three countries in the global south: South Africa, Philippines and Liberia. This has the double purpose of 1) providing human rights organizations with accessible information about legal and policy frameworks for policing practices in non-custodial settings in both international and national contexts, and 2) pointing to the necessity to both advocate for such legal and policy standards in such contexts and ensure that they are observed.

The paper is the product of a collaboration between four like-minded organizations – BALAY Rehabilitation Centre in the Philippines, The Centre for the Study of Violence and Reconciliation in South Africa (CSV), The Liberian Association for Psycho-Social Services (LAPS) and DIGNITY-Danish Institute Against Torture in Denmark. The collaboration has been formalised under the heading The Global Alliance against Authority-Based Violence in 2014. The basic premise of the alliance is that around the world and across different contexts, groups of people are deemed 'victimizable' by the powers that be, whether state or non-state – and hence legitimate targets of order-maintaining – or authority-based – violence. The risk groups might include young, indigent and criminalized men in slum areas, suspects of terrorism, migrants and refugees, sexual minorities or alleged carriers of disease. Their alleged transgressions might be based in a legal framework (like anti-drug laws) or in moral norms (like sexuality). However, all are likely victims of state or non-state violence. At the time of writing, the Philippine 'War on Drugs' provides a chilling example of the legitimacy of violence against such groups. How we might work with them depends on the crucial existence of legal frameworks that must be in place and importantly be adhered to.

As a central element in the collaboration, we produce a number of cross-cutting analyses of a variety of different issues while employing different methodologies. All topics emerge out of our common discussions on our different contexts and include linking human rights, development and violence in the city; psycho-social modelling for prevention and rehabilitation; social work models; community organizing strategies and partnership models.

Executive summary

This praxis paper examines the international and national legal and policy frameworks governing policing in non-custodial settings as well as exploring, in less detail, the prevalence, characteristics and patterns of police brutality in three countries – South Africa, Liberia, and the Philippines. What these countries have in common is that the prevailing police brutality, which is in effect a euphemism for torture and cruel, inhuman and degrading treatment or punishment, is a harsh and daily reality for many, particularly those living on the margins of society and in poor, urban neighbourhoods. The study seeks to shed light on the extent to which police officers respect the international and domestic legal frameworks in practice, drawing on information gathered from both police officers and victims of violations. The objective of this study is to review and analyse how the international human rights framework's stance on prohibition and prevention of torture is applied to police actions in the three countries, as well as how it resonates with their legal and policy frameworks. The focus is on police actions prior to detention of suspects, that is, in non-custodial settings.

The study reveals how states and police agencies choose to regulate their police forces. A comparative view exposes significant differences in the level and form of compliance between the domestic legal and policy frameworks and international standards in each country. The Philippines has an extremely comprehensive legal and policy framework for the police which includes robust and detailed regulations and policies aimed at ensuring the role of police in upholding and protecting international human rights standards. South Africa has a similarly robust system, though to a slightly lesser degree. Liberia, at the other end of the spectrum, is much less explicit in the regulations it imposes on the police for the protection and promotion of such standards. This is clearly indicative of the different historical trajectories. Liberia has relatively recently emerged from a bloody civil war and the nation is still in transition towards democracy. Philippines and South Africa are both much wealthier countries. Second, they have had more time since they emerged from historical processes that replaced racist and dictatorial governance with human rights-based regimes. Third, both countries benefit from vibrant civil societies that have been central in pushing progressive human rights agendas.

Despite these differences, there is some commonality seen in all three settings: namely, that the legal and policy framework for policing in general has little bearing on the way policing is carried out. In the Philippines, which has the strongest legal and policy human rights framework for policing, recent months have seen a dramatic rise in the number of extrajudicial killings carried out, with widespread impunity and in some cases acquiescence from police. But the problems are not just of a recent nature. Despite the progressive legal and policy framework, corruption is rampant and policing often falls under the control of political players – in fact, the police are sometimes part of local political machines. In South Africa, police brutality and violence continues to take place despite strong oversight mechanisms and explicit human rights legal and policy frameworks. In no small measure this is due to what is considered a rampant crime wave where the police have been seen as the thin blue line separating the country from absolute chaos and where human rights have been considered in many quarters as hamstringing the police. In Liberia, the police institution was all but destroyed by the war and whatever professionalism had existed before had disappeared. Instead, military factions took over. Despite justice sector reforms, this continues to hamper police legitimacy.

The conclusion is that while the legal and policy framework is important, it is insufficient on its own to ensure the full protection and promotion of human rights by police officers. However, this does not mean that legal and institutional reforms and human rights work should not be carried out. The praxis paper briefly outlines three recommendations organized around the gaps between international and domestic law; lack of implementation of human rights standards; and the relation between legal advocacy and other forms of interventions in poor, urban neighbourhoods. These recommendations are borne out of our research and work under the Community Led Interventions project, and notably our awareness of the need to focus on torture and ill-treatment taking place in non-custodial settings, which has often not received sufficient attention due to the focus on torture and ill-treatment in places of detention. Our aim with these recommendations is to encourage other organisations to take steps to examine the issue of torture and ill-treatment in non-custodial settings alongside more developed work around monitoring places of detention.

Recommendations to civil society:

1. Take steps to raise awareness about the issue of torture and cruel, inhuman or degrading treatment or punishment which takes place in non-custodial settings, such as in daily interactions between the police and public in the lead-up to arrests or in the dispersal of public assemblies in urban centers across the world.
2. Identify and address gaps between domestic and international legal and policy frameworks relating to torture and ill-treatment taking place outside of custodial settings until they exist in the same thorough manner as in relation to custodial policing.
3. Advocate for the implementation of international human rights standards through domestic legal and policy frameworks in non-custodial contexts, not least in relation to the ever-growing cities across the world, which are in many ways the new human rights frontier.

1. Introduction

The international legal regime governing the prohibition, prevention and combating of torture and other cruel, inhuman, or degrading treatment or punishment has attained considerable sophistication over the past decades. Much of this has focused on torture and ill-treatment taking place in 'traditional' settings, that is, torture of persons in custody, be it police detention or prison.

DIGNITY's Community-Led Interventions Project, which focuses on authority-based violence in poor, urban neighbourhoods, has sought to highlight and examine torture and ill-treatment which takes place outside the context of deprivation of liberty. While police torture in the detention setting has been given ample attention by the international human rights system and academia, what happens outside the gates of prison, in the poor urban neighbourhoods, is often overlooked by the international anti-torture legal framework and the international treaty bodies set up to monitor compliance with international norms. Our field of attention includes torture and ill-treatment by police officials in their interactions with civilians in public spaces, for example in the lead-up to arrests or in the dispersal of public assemblies.

The current study will examine the international and national legal frameworks governing policing in non-custodial settings as well as explore, in less detail, the prevalence, characteristics and patterns of police brutality in three countries, namely South Africa, Liberia, and the Philippines. What these countries have in common is that the prevailing police brutality, which is in effect a euphemism for torture and cruel, inhuman and degrading treatment or punishment, is a harsh and daily reality for many, particularly those living on the margins of society in poor, urban neighbourhoods.

For this reason, the Community Led Interventions Project opted to conduct a number of legal studies examining policing law and policy, as well as practices, in South Africa, Liberia and the Philippines and their compliance – or lack of compliance - with relevant international human rights standards. The focus of this report is not on policing practices as they pertain to criminal investigation and interrogation of suspects, but rather on police interactions with civilians in non-custodial settings, such as during patrols, in the lead-up to arrests, when responding to calls for assistance, the dispersal of public assemblies, and the like.

While much has been written by scholars and researchers about policing and human rights in all three countries, this study aims at examining the legal framework and the practical realities of policing in the countries under scrutiny and their compliance with international human rights standards.

Each country-specific chapter provides a detailed profile of the legal and policy framework relating to policing, including constitutional and statutory law, as well as codes of conduct and practice manuals, and they assess the degree to which these are adherent to applicable and relevant international human rights standards. Furthermore, the study seeks to shed light on the extent of respect for the international and domestic legal framework by police officers in practice, drawing on information gathered from both police officers and victims of violations by police officers. The objective of this study is to review and analyse how the international human rights framework, in particular as it pertains to the prohibition and prevention of torture, applies to police actions, with a focus on the actions of police prior to detention of suspects, that is, in non-custodial settings.

This endeavour is important for both the Global Alliance and potentially for human rights organizations working against urban violence, torture, and cruel, inhuman and degrading treatment in more mundane settings. First, legal frameworks governing policing outside the detention context differ, and in order to be able to develop relevant advocacy approaches it has been important for the members of the Global Alliance to be cognizant of these differences, both in terms of international treaty body advocacy and in relation to programming local projects. Secondly, and for a broader audience, this study of legal frameworks may assist other human rights organizations to identify potential strategies and ways of working against urban violence. Finally, the study allows us to identify gaps in the legal frameworks and find ways to fill them and it allows us to identify lack of compliance, which can facilitate the development of strategies to address the lack of implementation.

As a legal study, the paper is based on an examination of international legal frameworks and policies as well as national law and policies from the three countries under review. Initial analyses on South Africa and the Philippines were conducted as desk studies from Copenhagen. However, for Liberia, many of the documents were not available online; in fact parts of its legislative and policy framework are still being developed and written. Instead we conducted field work in Monrovia, identifying documents and interviewing important stakeholders in government and in international organizations. This allowed us to describe in detail the legal frameworks applying in the three contexts, including identifying gaps and lack of consistency with international human rights law. As a second part of the analysis, CSVR (for South Africa), BALAY (for the Philippines) and LAPS (for Liberia) have provided information about practice and the implementation (or lack thereof) of human rights standards and legal frameworks for policing in non-custodial settings. In this way, we have been able to identify the frameworks, the gaps in the frameworks and the (lack of) adherence to the frameworks in a collaborative manner.

Chapter 2 outlines the international human rights standards related to policing with respect to general human rights principles and individual human rights, anti-corruption standards, oversight mechanisms, and soft law standards governing the use of force and firearms and the rules pertaining to the dispersal of unlawful assemblies. These areas are all central to the international human rights standards regulating the role of the police in non-custodial policing. Chapters 3-5 go into detail, with the three case studies following more or less the same structure as Chapter 2; that is, focusing on the specific obligations of police officers to respect and protect human rights standards in the course of carrying out their role, but with more contextual analysis around policing structures. Throughout the analysis, we look at the legal frameworks, the practices of policing and the extent to which they are in compliance with international and domestic law. Finally, in Chapter 6, we draw out the important conclusions from the study and provide some lessons learnt and recommendations for human rights practice and research in relation to torture and ill-treatment in poor urban neighbourhoods.

2. Policing and International Human Rights Standards


The aim of this report is to assess the legal framework and practice on policing in South Africa, Liberia and the Philippines and the degree to which these comply with international human rights law. In order to conduct such an assessment, it is necessary to provide an overview of the international human rights standards relevant for the work of the police force. As agents of the state, which is the duty-bearer under the international human rights framework, police officers are required to carry out their role while promoting, protecting and upholding the human rights obligations of the state they represent.

This chapter sets out the international standards for policing as set out in a number of relevant hard and soft law instruments. These international standards will serve as the benchmark against which to assess the domestic laws, standards and policies governing law enforcement in the three countries addressed in this report. Each country chapter will include information on the level of compliance between the international human rights framework as it relates to policing and domestic legislation, as well as on the practical implementation (or lack thereof) of these international and domestic laws and standards.

It is important to note at the outset that across the three countries included in this study, the main function of the police is to maintain public order, to prevent and detect crime, and to protect all members of society from criminal acts. As such, police officers may encounter situations that put their safety, even in some cases their lives, at risk. Therefore, it is important that they are afforded specific powers to enable them to carry out this role, including the power to use force and firearms, to arrest and detain, and to carry out searches or seizures. However, these powers and the way they are exercised must conform to the principle of proportionality, and may not infringe on the human rights of those impacted by law enforcement work.

Human rights which can be impacted by police actions include:

1. Right to human dignity (and integrity);
2. Right to life;
3. Right to security and liberty, and freedom from arbitrary arrest and detention;
4. Freedom from torture and cruel, inhuman or degrading treatment or punishment;
5. Right to fair trial; and
6. Right to privacy.



Breaches of law by police officials have a severely negative impact on society as a whole, and greatly undermine the credibility of the law enforcement institution and, in turn, in their ability to carry out their role. Despite the difficulties and dangers faced by law enforcement officials in their work, it is fundamental that all police officers carry out their role in strict compliance with the law and maintain high legal and ethical standards.¹ This requires clear orders and procedures that are available for public scrutiny, and strong and independent oversight of police activities.

The role of the police therefore requires a balance between the rights of potential victims of crime and of society as a whole, as well as the rights of those impacted by law enforcement work.²

The international human rights instruments which bear most relevance to the function of the law enforcement are the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Civil and Political Rights (ICCPR, 1966) and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984). These instruments contain provisions which directly impact on the behaviour of law enforcement. A number of soft law instruments have elaborated on the basis of these provisions, and provide in significant detail the specific measures that law enforcement must adopt in order to ensure that their functioning is in compliance with the relevant provisions of international human rights law. These are the United Nations Code of Conduct for Law Enforcement³ and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, both adopted as UN General Assembly resolutions.⁴ In order to provide further guidance, the UN Office of the High Commissioner for Human Rights (OHCHR) has developed a collection of standards for policing known as the OHCHR International Human Rights Standards for Law Enforcement.⁵ In addition, a number of international agencies and organisations have elaborated guidelines and good practice manuals

1 ICRC, International Rules and Standards for Policing. Retrieved from: <https://www.icrc.org/eng/assets/files/other/icrc-002-0809.pdf>, p. 19.

2 Ibid.

3 Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979. Retrieved from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.

4 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Retrieved from: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>. (Hereafter 'Principles on Force and Firearms').

5 UN Office of the High Commissioner for Human Rights, International Human Rights Standards for Law Enforcement: A Pocket Book on Human Rights for the Police. Retrieved from: <http://www.ohchr.org/Documents/Publications/training5Add1en.pdf>. (Hereafter 'OHCHR Standards')

for law enforcement to ensure that they carry out their role in conformity with international human rights standards, such as the International Committee for the Red Cross (ICRC) International Rules and Standards for Policing⁶ and the Geneva Centre for Democratic Control of Armed Forces (DCAF) International Policing Standards Series, in particular the Guidebook on Democratic Policing and the Basic Human Rights Standards for Law Enforcement Officials.

Based on the abovementioned guidelines, the following section outlines the main obligations of law enforcement with regard to adhering to the international human rights legal framework, with particular focus on measures necessary to ensure respect, protection and fulfilment of the right to life, the right to liberty and security, and the right to be free from torture and other cruel, inhuman or degrading treatment. These are derived from:

2.1 Human Rights Principles Governing Law Enforcement

In order to ensure the correct balance is struck between protecting society from crime and upholding the rights of all citizens, including those suspected of or found responsible for crime, four main principles should be observed by police when carrying out actions that can impact on human rights:

- **Legality:** all actions should be based on existing legal provisions;
- **Necessity:** actions should not restrict or impact on human rights more than is (absolutely) necessary;
- **Proportionality:** actions should not impact on human rights in a way that is disproportionate to the aim; and
- **Accountability:** police must be accountable for all their actions and at all relevant levels (judiciary, public, government, internal chain of command).⁷

'Law enforcement' refers to all officers of the law who exercise police powers, especially the powers of arrest and detention. The following general principles should form the backbone of any policing service. They embody the human rights as well as the rule-of-law standards of democratic policing, which are fundamental to ensuring public confidence and trust in the police service, as well as a police service that respects and protects human rights. This section outlines seven basic human rights principles that bring the functioning of a police force into line with international human rights standards.

⁶ International Rules and Standards for Policing.

⁷ ICRC.

1. Law enforcement shall at all times fulfil the duty imposed on them by law, by serving the community and by protecting persons against illegal acts.⁸
2. Law enforcement officials shall at all times respect and obey the law.⁹
3. Law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.¹⁰
4. Law enforcement officials shall respect the principles of legality, necessity, non-discrimination, proportionality and humanity.¹¹
5. Law enforcement officials shall impose limitations on individuals only as determined and permitted by law.¹²
6. Limitations on the exercise of rights and freedoms shall be only those necessary to secure recognition and respect for the rights of others, and for meeting the just requirements of public order and the general welfare in a democratic society.¹³
7. Law enforcement officials shall treat all persons as being equal before the law, without discrimination of any kind, including discrimination on the basis of race, gender, religion, language, colour, political opinion, national origin, property, birth or other status.¹⁴

What do 'proportionality' and 'necessity' mean in practice?

The question of what proportionality and necessity mean in practice can sometimes seem elusive, and of course it is subject to a certain degree of discretion. However, there is existing guidance from key international bodies such as the ICRC and the European Court on Human Rights as to what the application of these principles looks like in practice. According to the ICRC, in order to adhere to the principles of proportionality and necessity, law enforcement officers are obliged to ensure that their actions are proportionate and necessary for the achievement of lawful objectives. Lawful objectives include preventing injury or damage to others or to property or carrying out a lawful arrest.¹⁵

Proportionality and necessity must be the underlying principles in all police actions, including both the decision to arrest and the execution of the arrest. In other words, not only must the reasons for the arrest be proportionate and necessary to achieve the lawful objective, but the methods (including the degree of force) used to carry it out must also be proportionate and necessary. While there is a degree of discretion afforded to a police officer in making this determination, there is also clear guidance from international human rights bodies. For example, in the case of Bouyid

- 8 UN Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly resolution 34/169 of 17 December 1979. (Hereafter 'Code of Conduct').
- 9 Code of Conduct, articles 1 and 8; OHCHR Standards.
- 10 Code of Conduct, article 2; OHCHR Standards.
- 11 Code of Conduct, articles 2, 3, 5, 7 and 8; Principles on Force and Firearms, preamble and principles 2, 4, 5, 9, 11, 13, 14, 15, 16, 24, 25 and 26; OHCHR Standards.
- 12 UDHR; article 29(2); OHCHR Standards.
- 13 UDHR, article 29(2); OHCHR Standards.
- 14 UDHR, article 7; ICCPR, articles 26; OHCHR Standards.
- 15 International Committee for the Red Cross, Use of Force in Law Enforcement Operations; Advisory Guidance, September 2015. Retrieved from: [file:///C:/Users/jop/Downloads/the-use-of-force-in-law-enforcement-icrc-eng%20\(1\).pdf](file:///C:/Users/jop/Downloads/the-use-of-force-in-law-enforcement-icrc-eng%20(1).pdf).

v. Belgium, the European Court of Human Rights held that “where an individual is ... confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person’s conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.”¹⁶ Article 3 of the European Convention on Human Rights prohibits torture and cruel, inhuman or degrading treatment or punishment. The concepts of proportionality and necessity are therefore clearly articulated by international bodies, and this explication helps to ensure their effective implementation in practice.

2.2 Anti-Corruption

While corruption itself does not constitute a violation of human rights, there is a wealth of evidence that shows that where corruption is able to thrive, so too does a lack of respect for basic human rights standards and principles.¹⁷ For this reason, a fundamental component of any human rights-based policing system is the prevention of corruption, which includes legislation prohibiting such acts as well as mechanisms for ensuring accountability for those guilty of corruption.

1. Law enforcement shall not commit any act of corruption. They shall rigorously oppose and combat all such acts.¹⁸

2.3 Oversight Mechanisms

A hallmark of democratic policing is the acceptance and establishment of civilian oversight.¹⁹ Good policing requires the police to be able to cooperate effectively with the public, and this in turn necessitates that the public have confidence and trust in the police. Ensuring that erring police officers are held accountable is a core component of building public trust and confidence in the police, and moreover accountability also serves as a dissuasive or deferring factor: if police officers’ unlawful practices are punished, this creates incentive for other police officers to ensure their actions are within the bounds of the law. According to the UN Office of Drugs and Crime (UNODC) Handbook on Police Accountability, Oversight and Integrity: “Accountability involves a system of internal and external checks and balances aimed at ensuring that police perform the functions expected of them to a high standard and are held responsible if they fail to do so. It aims to prevent the police from misusing their powers, to prevent political authorities from misusing their control over the police, and most importantly, to enhance public confidence and (re-)establish

16 Case of Bouyid v. Belgium, European Court of Human Rights (Application No. 23390/09), 28 September 2015. Retrieved from: <http://hudoc.echr.coe.int/eng?i=001-157670>.

17 See for example: Seventh Annual Report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN DOC: CAT/C/52/2, May 2015. Retrieved from: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/52/2&Lang=en.

18 Code of Conduct, Art. 7; OHCHR Standards.

19 UNODC Handbook on Police Accountability, Oversight and Integrity, 2011. Retrieved from: https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/PoliceAccountability_Oversight_and_Integrity_10-57991_Ebook.pdf, p. 7.

police legitimacy.”²⁰ This section outlines the basic standards for oversight of the police in order to ensure its effectiveness and functionality, based on international human rights principles.

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.²¹
2. Law enforcement shall be representative of and responsive and accountable to the community as a whole.²²
3. Superior officials shall be held responsible for the actions of police under their command if the superior knew or should have known of abuses but failed to take action.²³
4. Officials who refuse illegal orders shall be given immunity.²⁴
5. All police are to be subject to continuous and effective report and review procedures.²⁵

2.4 Rules Governing the Use of Force and Firearms

In order to carry out their function, the police are necessarily granted a degree of discretion. As described by UNODC, “police officers typically have some room for maneuver when using police powers, with the authority to make decisions on such matters as how much force to use and on whether to carry out arrests or searches.”²⁶ However, in the case of use of force, it is important that such discretion be carried out within certain guidelines and adhering to basic principles of proportionality and necessity. This section outlines the basic guidelines and principles that should be applicable to police forces in order to ensure they carry out their function, as it pertains to the use of force and firearms, in a way that complies with international human rights standards.

Use of Force

1. 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, in particular the right to life, security of the person, and freedom from torture and cruel, inhuman or degrading treatment and punishment.²⁷ This applies to both actions carried out directly by law enforcement officials, as well as actions carried out by non-state actors in the presence of or with the consent or acquiescence of a law enforcement officer.²⁸
2. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force. They may only use force if other means

20 Ibid, p. 9.

21 Code of Conduct, Art. 1; OHCHR Standards.

22 Code of Conduct, Preambular para. 8(a); OHCHR Standards.

23 Principles on Force and Firearms, principle 24; OHCHR Standards.

24 Principles on Force and Firearms, principle 25; OHCHR Standards.

25 Principles on Force and Firearms, principles 22-26; Code of Conduct, article 8; OHCHR Standards.

26 UNODC, Police accountability handbook.

27 Code of Conduct, article 2.

28 CAT, art. 1.

remain ineffective or without any promise of achieving the intended result.²⁹ Force is to be used only when strictly necessary.³⁰

3. Force is to be used only for lawful law enforcement purposes.³¹ When force needs to be used to achieve a legitimate objective, the consequences of such force may not outweigh the value of the objective to be achieved, which would render the use of force disproportionate.³²
4. No exceptions or excuses shall be allowed for unlawful use of force.³³
5. Restraint is to be exercised in the use of force.³⁴
6. A range of means for differentiated use of force is to be made available and all officers are to be trained in the use of the various means for differentiated use of force.³⁵
7. All officers are to be trained in use of non-violent means.³⁶
8. Whenever the lawful use of force is unavoidable, law enforcement shall:
 - Minimize damage and injury, and respect and preserve human life;³⁷
 - Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;³⁸ and
 - Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.³⁹
9. All incidents on the use of force shall be followed by reporting and review by superior officials.⁴⁰

Use of Firearms

1. Firearms are to be used only in extreme circumstances.⁴¹
2. Law enforcement officials shall not use firearms against persons except in self-defence or in defence of others against imminent death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such

29 Principles on Force and Firearms, principle 4; OHCHR Standards.

30 Principles on Force and Firearms, principles 4 and 5; OHCHR Standards.

31 Principles on Force and Firearms, principles 5 and 7; OHCHR Standards.

32 Code of Conduct, article 3.

33 Principles on Force and Firearms, principle 8; OHCHR Standards.

34 Principles on Force and Firearms, principles 2, 5(a), 9; OHCHR Standards.

35 Principles on Force and Firearms, principle 2; OHCHR Standards.

36 Principles on Force and Firearms, principles 4 and 20; OHCHR Standards.

37 Principles on Force and Firearms, principle 5(b); OHCHR Standards.

38 Principles on Force and Firearms, principle 5(c).

39 Principles on Force and Firearms, principle 5(d).

40 Principles on Force and Firearms, principles 6, 11(f) and 22; OHCHR Standards.

41 Principles on Force and Firearms, principle 4; OHCHR Standards.

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.⁴²

3. Rules and regulations for the use of firearms by law enforcement should include guidelines that:⁴³
 - Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the type of firearms and ammunition permitted;
 - Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
 - Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
 - 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;
 - Provide for warnings to be given, if appropriate, when firearms are to be discharged; and
 - Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.
4. Whenever the lawful use of firearms is unavoidable, law enforcement shall:⁴⁴
 - Exercise restraint in such use and act in proportion to the seriousness of the offense and the legitimate objective to be achieved;
 - Minimize damage and injury, and respect and preserve human life;
 - Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; and
 - Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.
5. All incidents on the use of firearms shall be followed by reporting and review by superior officials.⁴⁵
6. Superior officials shall be held responsible for the actions of police under their command if the superior official knew or should have known of abuses but failed to take concrete action.⁴⁶

42 Principles on Force and Firearms, principle 9.

43 Principles on Force and Firearms, principle 11(a)-(f).

44 Principles on Force and Firearms, principle 5(a)-(d).

45 Principles on Force and Firearms, principles 6, 11(f) and 22; OHCHR Standards.

46 Principles on Force and Firearms, principle 24; OHCHR Standards.

2.5 Dispersal of Unlawful Assemblies

An important role of the police is maintenance of public order, which includes the dispersal of unlawful public assemblies. This part of the police function is one which in many contexts raises questions regarding the lawfulness of use of force by police officers. It is therefore important that police forces are governed by clear standards and rules when it comes to the permissible actions they may take when dispersing unlawful assemblies, so as to ensure that this role is carried out in compliance with international human rights standards. These are outlined in this section.

1. In the dispersal of non-violent assemblies, law enforcement shall avoid the use of force, or, where that is not practicable, shall restrict such force to the minimum extent necessary.⁴⁷
2. 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.⁴⁸

2.6 Conclusion

The legal norms detailed in this chapter, which reflect international human rights standards, provide a clear and detailed picture of the obligations of states and their law enforcement officers —both in terms of legislation and practice—when it comes to ensuring that the police carry out their function whilst respecting and protecting international human rights standards. In the country chapters of this report, the domestic legal framework of the respective countries will be examined to determine to what extent it is in compliance with the international standards detailed above.

⁴⁷ Principles on Force and Firearms, principle 13.

⁴⁸ Principles on Force and Firearms, principle 14.



South Africa

3. South Africa: Legal and Policy Framework

3.1 Overview of Policing System and Structure

Chapter 11 of the Constitution of the Republic of South Africa, Act 108 of 1996, provides for the creation of security services. Section 199 (1) states: “The security services of the Republic consists of a single defence force, single police service and any intelligence services established in terms of the Constitution.” The structure of the SAPS is outlined in Section 205 (1), where it specifies that the “national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.”

In 1990 there were 11 police forces in South Africa, each constituted under its own piece of legislation and operating within its own jurisdiction. This was a result of the apartheid regime’s system of ‘homelands’, which designated certain territories within the larger national space for different racial or ethnic groupings and legislated for a certain measure of autonomy in governing their own affairs. This autonomy included police systems that operated outside of the police system in South Africa. The fall of apartheid culminated in the creation of one unitary state, including the amalgamation of the security forces.

Political changes such as the unbanning of political parties, release of Mandela and other political prisoners, and safe return of exiles included a reform of the police. Part of this reform process included the following key priorities:

- Depoliticisation of the police force;
- Increased community accountability and oversight of the police;
- More visible policing, particularly in black communities that were previously under-policed;
- Establishment of improved and effective management practices;
- Reform of the police training system (including racial integration); and
- Restructuring of the police force in line with the Constitution.

After 1994 the new government moved swiftly to change some of the symbols associated with apartheid policing. These included:

- Name change from South African Police (SAP) to South African Police Service (SAPS) to symbolise the shift from 'force' to 'service';
- A new police leadership was appointed, with the National Commissioner appointed directly by the President of the Republic; and
- The rank system was demilitarised and revised according to the British model. For example:

General = became Commissioner

Brigadier = became Director

Colonel = became Senior Superintendent

However, in 2010, as part of ongoing struggles within the service – not least resistance to the civilian oversight body and public critique from human rights organizations – the police reverted to a more military style, including the ranking system, as part of a strategy to address high crime levels, which many saw as a result of the 'new' emphasis on human rights in policing.⁴⁹

- The uniform was changed. In the old dispensation, each of the eleven police forces had its own uniform and insignia. A new uniform was designed for the new SAPS, which was slightly less militaristic;
- A new insignia was created for the SAPS, to replace that of the eleven former police forces. The new badge consists of the image of an aloe (an indigenous South African plant with healing properties) with nine spikes, to symbolise the nine new provinces;

49 For analyses of these debates, see Julia Hornberger (2013) "From general to commissioner to general: On the popular state of policing in South Africa", *Law & Social Inquiry*, 38, 3: 598–614 and Stefan Jensen (2014) "Conflicting Logics of Exceptionality: New Beginnings and the Problem of Police Violence in Post-Apartheid South Africa", *Development and Change*, 45, 3: 458–478.

- The colour of police vehicles changed, with all new vehicles being painted white with blue lettering, instead of the bright yellow which had become associated with fire-brigade style policing in armoured vehicles; and
- In some provinces, the names of police stations were changed, where they had previously been named after apartheid-era politicians or police leaders. The most notable was the John Vorster Square police station, where numerous detainees had been tortured and killed by Security Police, which became the Johannesburg Central police precinct.

These symbolic changes, while superficial, did contribute to changing public perceptions of the police service. They also required a great deal of internal negotiation and had quite severe financial implications for the new police service.

A deeper reform in the SAPS saw significant change to its personnel composition. At the dawn of democracy the majority of commanders were white while black police officers occupied lower ranks. Twenty-three years later the staff demographic reflects the national one.

Another indication of the democratisation of the police included regarding police officers as workers. This gave them the right to organise, form or join unions and to negotiate for better working conditions and salaries.

One more aspect of the transformation of the SAPs was the adoption of a community policing approach. Community Policing is a philosophy aimed at achieving more effective crime control by reducing fears of crime, improving community police relations and improving police services through proactive partnerships and programs with communities. In short, the Community Policing approach was aimed at strengthening – or in many instances creating – a partnership between the police and the community to jointly solve policing and safety problems. The Constitution provides for the creation of Community Police Forums (CPF), and for their participation in policing.

According to police reports, by 2016 CPFs had been established in all of the country's 1 138 police stations⁵⁰. In terms of the SAPS Act, the implementation of the CPFs rests with the police. This has weakened the functioning of the CPFs and their ability to influence policing and hold the police to account for policing at community level. However, civilian control is not always the answer. A tendency that has weakened the functioning of many CPFs is a struggle by political parties for control of them, which sometimes results in people without the capacity taking over the structure for political expediency. A strong trend is for CPFs to function better in more affluent communities than in poor communities. In affluent communities, the participation of business people, lawyers and other professionals has been important in providing the necessary capacity and expertise to influence policing and hold the police accountable. In other instances, affluent communities have contributed resources to the police to ensure that effective policing of their communities takes place. The same cannot be said about poor communities, where there are often high levels of apathy from community members, who have other priorities despite high crime levels.

Challenges

The SAPS faces challenges on many fronts, including:

- High crime levels, especially violent ones, have the effect of putting the police as an institution in the spotlight. In an attempt to increase public confidence in their efficiency by bringing the numbers down, police may use excessive force but this can have the opposite effect, notably increasing public distrust and alienating the communities they are meant to serve. As confidence in the criminal justice system ebbs so does the incidence of vigilantism rise, as people in despair see no option but to take the law into their own hands.
- Disgruntlement over the reform process and affirmative action policies resulted in the loss of highly skilled police officers, mostly to the private security sector. This vacuum resulted in the promotion and recruitment of young and inexperienced police officers to senior positions, which further lowered the force's crime fighting capacity and, in turn, its morale.
- Police corruption remains a cancer in the SAPS despite the fact that police officers are better paid than other public service employees. It corrodes police community relations, respect for the rule of law and the functioning of other criminal justice institutions.
- The leadership of the SAPS has also come under scrutiny. Two police commissioners have been dismissed for serious misconduct and a third had been suspended for 18 months at the time of writing. Commissioner Jackie Selebi was sentenced to 15 years in prison for corruption in August 2010. His successor, Bheki Cele, was dismissed in 2012 amid a maladministration scandal involving over R1.5 billion. His successor, Riah Phiyega – appointed in 2012 with no policing background or experience – was still suspended on full salary by March 2017 although in November 2015 an internal inquiry found that she had committed perjury and in November 2016 a judicial commission of inquiry found her unfit to hold her office and held her responsible for the deaths of 34 striking miners, shot by police in a protest at Marikana in 2012.

Also, police leaders have down the years sent confused and confusing messages about police use of force, the rule of law and use of firearms. For example, in April 2008 Deputy Police Minister Susan Shabangu told police: "You must kill the bastards if they threaten you or the community.... You must not worry about the regulations. That is my responsibility.... I want no warning shots. You have one shot and it must be a kill shot."⁵¹ During his term as national police commissioner from July 2009 to June 2012 Bheki Cele was well known for voicing a similar philosophy, which has been held responsible for encouraging police brutality and increasing the number of deaths at police hands. In line with this trend, the police service in 2010 was remilitarised, that is, the apartheid-era military ranking system was restored and civilian participation severely weakened. Since then, the number of killings by police officers has increased, including the abovementioned massacre of 34 striking miners in Marikana in August 2012.

51 The Telegraph, "Kill the bastards' South African police advised," 10 April 2008, retrieved from: <http://www.telegraph.co.uk/news/worldnews/1584641/Kill-the-bastards-South-African-police-advised.html>.

3.2 International Law

South Africa is party to a number of international human rights treaties, including the IICCPR, ratified in 1994; the International Convention on the Elimination of All Forms of Racial Discrimination, ratified in 1998; the Convention on the Elimination of all Forms of Discrimination Against Women, ratified in 1995; and the CAT, ratified in 1998. While South Africa has signed the Optional Protocol to the Convention against Torture (OPCAT), it has yet to ratify it. Under Chapter 14, Section 231 of the Constitution of South Africa, international treaties ratified must be incorporated into domestic law by means of enacting legislation in order for them to apply domestically, unless their provisions are self-executing, a concept which has not been acted on in South African legislative history.⁵² Once treaties have been incorporated, they have the same legislative status and applicability as other legislation adopted by the legislature, and courts generally follow the rules for interpreting international treaties as found in the Vienna Convention on the Law on Treaties.

Under Section 232 of the Constitution customary international law is deemed law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament. In addition to this, Section 233 states that when interpreting any legislation, “every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” Thus, international law has supremacy in the Republic, ensuring that domestic law evolves alongside international standards and encompasses all human rights principles and norms enshrined in customary international law.

3.3 Regional Law

As a member of the African Union, the treaties and other instruments adopted by the African Commission on Human and Peoples’ Rights are applicable to South Africa, and have the same standing as international law. The African Commission has adopted treaties containing specific individual and group rights that law enforcement officials must uphold when carrying out their duties. The African Charter on Human and Peoples’ Rights (African Charter) came into force in 1986 and enshrines the rights of individuals and groups on the African continent. It draws heavily on the Universal Declaration of Human Rights and other subsequent core international human rights instruments. Article 5 of the African Charter provides for the right to the human dignity “inherent in a human being and to the recognition of his legal status.” The article also prohibits all forms exploitation and degradation, including torture. The Robben Island Guidelines for the Prevention and Prohibition of Torture in Africa (Robben Island Guidelines), adopted by the African Commission on Human and Peoples’ Rights in 2002, expounds on the prohibition and prevention of torture in Africa, and also addresses the needs of torture victims. These guidelines draw extensively from international law, in particular the UNCAT, OPCAT and ICCPR, and provide that investigations into allegations of torture should be guided by the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Istanbul Protocol). The African Commission on Human and Peoples’ Rights adopted the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa in 2014.

52 Constitution of the Republic of South Africa 1996, Chapter 14, Section 231. Retrieved from: <http://www.gov.za/documents/constitution-republic-south-africa-1996-chapter-14-general-provisions#231>. See also: Erika de Wet, Holger Hestermeyer, Rudiger Wolfrum, The Implementation of International Law in Germany and South Africa. Pretoria University Press: 2015. Retrieved from: <http://www.icla.up.ac.za/images/news/2015/The%20implementation%20of%20international%20law%20in%20Germany%20and%20South%20Africa.pdf>.

3.4 Domestic Law and Policies

3.4.1 Prohibition and Prevention of Torture

As mentioned above, South Africa is bound by a number of international human rights treaties, which have been ratified and many of which have been incorporated into domestic law. The Constitution of South Africa, which is the supreme law of the land, seeks to establish a society based on “democratic values, social justice and fundamental human rights.” The Constitution enshrines the rights found in the Universal Declaration of Human Rights, the ICCPR and the International Covenant on Economic, Social and Cultural Rights, among others, in the extensive Bill of Rights contained in Chapter 2.⁵³ The comprehensive nature of the human rights protection in the South African Constitution reflects the importance of human rights in the South African political and administrative processes.

With regard to torture, the Constitution specifically guarantees freedom from torture as well as cruel, inhuman and/or degrading acts. Furthermore, it contains critical legal safeguards against torture, including the prohibition of evidence obtained “in any manner that violates any right in the Bill of Rights.” These constitutional provisions have been translated into statutory law through the adoption of the Prevention and Combating of Torture of Persons Act in 2013.⁵⁴

3.4.2 Organisation and Functions of Law Enforcement

The Interim Constitution established the South African Police Service (SAPS) in 1994. Heavily influenced by the National Peace Accords (NPA) in 1991, it established a single national police service for SA under the executive command and control of a National Commissioner, appointed by the President. The SAPS Act, adopted in 1995, reiterates the constitutional provision for the establishment of the police force, and provides for the organisation, regulation and control of the SAPS, and matters in connection therewith. In 1996, the new Constitution was signed and came into force in 1997, expanding on its predecessor by establishing not only the new structures, powers and functions of the SAPS, but also its governing principles, which set out standards for the conduct of its members as well as for the transparency and accountability of the service.⁵⁵ The Constitution provides for the creation of the Security Services which “consists of a single defense, single police service, and any intelligence services established in terms of the Constitution.”⁵⁶ The structure of the SAPS is set out in Section 205(1) of the Constitution, which provides that: “The national police service must be structured to function in the national, provincial and the appropriate local sphere of government.”⁵⁷

Police-specific legislation, like much of SA’s post-apartheid legislation, has been relatively comprehensive in its language of human rights and adoption of internationally recognised standards. The SAPS Act⁵⁸ remains the central piece of legislation governing the police, with lawyers forced to draw upon other pieces of legislation and soft law provisions clarifying specific areas of policing. This becomes apparent below in the sections of this chapter relating to the use of force and firearms, as

53 Constitution of the Republic of South Africa 1996, Chapter 2, Sections 7-39.

54 Prevention of Combating and Torture of Persons Act 2013. Retrieved from: <http://www.justice.gov.za/legislation/acts/2013-013.pdf>.

55 Chapter 11 of the Constitution

56 Section 1 of the Constitution

57 Section 205(1) of the Constitution

58 Act 68 of 1995

well as the dispersal of public assemblies. The Criminal Procedure Act (CPA)⁵⁹ is another important piece of legislation, as it provides for the principles of necessity and proportionality in the protection of the law by the police. The CPA allows use of force “as may be reasonably necessary” or “not out of proportion to the circumstances,” or “proportional to the seriousness of the crime.”⁶⁰

3.4.3 Code of Conduct

The SAPS Code of Conduct (CC) introduced on 31 October 1997 is published on the SAPS website. While easily accessible to civilians, the CC does not constitute legislation and is therefore non-binding on SAPS officers. The CC can also be found in Chapter 2, Part 1 of the SAPS Employment Regulations (2008). This document provides guidelines for SAPS members’ relationships with the legislature and executive, the public and fellow employees, as well as for their conduct in the performance of their duties, personal conduct and private interests. These regulations are comprehensive, regulating police conduct not only in relation to members of the public but also among their peers and in their private lives, as well as with the state and the legislation they are bound to respect and uphold. Articles are detailed and comprehensive in their exploration of each layer of policing, with general human rights principles evident throughout. Annexures 1-3 of the regulations include 1) the employment contract for the national commissioner of the SAPS, 2) the permanent employment contract for the senior management of the SAPS, and 3) the fixed term contract for the senior management service of the SAPS. Under each of these contracts the employee undertakes to comply with the prescribed CC, and if he or she “does not perform satisfactorily in relation to the requirements,” “the employer may deal with him or her in accordance with procedure.” As such, these regulations only hold service members accountable to their employers, and do not appear to provide redress for members of the public who may fall victim to violations of the CC. Despite this, such contracts provide employees with an incentive to follow protocol, leaving public redress in the hands of SA’s various oversight mechanisms. The only remaining concern is whether an incentive exists for employers to monitor employee conduct and follow procedure in order to ensure law enforcement accountability. Consequently, monitoring must exist at all levels.

3.4.4 Code of Ethics

Enquiries through SAPS regarding their Code of Ethics (CE) are directed to the SAPS website, raising similar doubts surrounding their significance in everyday policing, their legitimacy as a source for police practice and SAPS transparency in general. While the CE reflects clear parallels with international human rights principles discussed in Chapter 2, suggesting domestic standards are in keeping with international ones, their lack of legal status raises the same concerns regarding accountability. The absence of accessible legislation on police ethics available to public scrutiny is also concerning from a human rights perspective.

The SAPS Regulations produced by the Department of Safety and Security (2008) and published in the Government Gazette include provisions for ethical policing. Section 18 stipulates the designation of an ethics officer. It states: “The National Commissioner must designate or appoint an ethics officer for the service to (a) promote integrity and ethical behaviour in the Service; (b) advise employees on ethical matters; and (c) identify and report unethical behaviour and corrupt activities to him or her.” While this provision neglects to stipulate what ‘ethical’ or ‘unethical’ behaviour entails, the incorporation of an individual responsible for safeguarding and promoting such standards demonstrates a

59 Criminal Procedure Act 51 of 1977

60 Section 49(2) of the Criminal Procedure Act

commitment toward ethical policing. In addition to this, Section 75 discusses ethics and conduct of Senior Management Service (SMS). It states: "Members of the SMS must ... display the highest possible standards of ethical conduct ... set an example to their subordinates and maintain high levels of professionalism and integrity in their interaction with political office-bearers and the public...ensure that they minimise conflicts of interest and ... put the public interest first (and) avoid any conflict of interest that may arise in representing the interests of the Service and being a member of a trade union." By providing additional measures particular to senior officials, SAPS regulations recognise the need for monitoring at all levels. Section 75.2 also stipulates that the National Minister may, after consultation with the Public Service Commission, make determinations to promote ethical conduct amongst the SMS members and supplement the SAPS CC. He or she may also provide guidance and assistance to SMS members as he or she may deem necessary to minimize conflicts of interest and to promote professional conduct. While such measures allocate a significant amount of power and influence to the National Minister, they also ensure SMS members are held accountable to ethical standards and are encouraged to promote ethical policing. Although these measures demonstrate a clear commitment to ethical policing among the SAPS, a hard law CE is still missing from the relevant legislation, without which the law arguably remains ambiguous.

3.4.5 Community Policing

Community Policing was first provided for under the Interim Constitution (1993) as the new prescribed approach to policing in a democratic South Africa. Section 221(1) and (2) directed that an Act of Parliament was to "provide for the establishment of community-police forums in respect of police stations," which would promote accountability and cooperation between the SAPS and local communities, monitor the effectiveness and efficiency of the SAPS, advise on local policing priorities, evaluate the provision of visible policing services, and request enquiries into policing matters in the locality concerned. Additionally, Section 222 stipulated that the Act was to provide for the establishment of an independent complaints mechanism, to ensure that police misconduct could be independently investigated. Thus, the SAPS Act (1995) formally established the Civilian Secretariat for Safety and Security, an Independent Complaints Directorate, and the Community Police Forums (CPFs). These legislative developments marked a shift from an authoritarian approach to a community-orientated policing philosophy. This aimed to go further than the existence of CPFs, adopting a philosophy that recognised that policing is not something done to people, but with people.

Today's CPFs possess the same functions as those outlined in the Interim Constitution. It remains the responsibility of the police, particularly the station, area and provincial commissioners, to establish CPFs at police stations, and area and provincial boards. This means that community consultation and input is therefore structured throughout the SAPS's command and management structure. Chapter 7 of the SAPS Act provides for the objects, establishment, functions and procedural matters of the CPFs and boards. The law states that CPFs should be founded with a view to establishing and maintaining a partnership between the community and the service. However, the specifics of their functions are neglected in the legislation.

3.4.6 Anti-Corruption Policies and Legislation

There are a number of statutes and policies in place in South Africa to combat corruption. The primary piece of legislation in this regard is the Prevention and Combating of Corrupt Activities Act adopted in 2004, which criminalises corruption in broad terms. In 2011, the SAPS adopted the SAPS Anti-Corruption Strategy, the latest of many such strategies aimed at addressing the rampant corruption

that has long plagued the institution.⁶¹ Previous strategies failed for a number of reasons, the most prevalent of which was the failure to effectively implement them. The 2011 SAPS strategy contains both proactive and reactive elements aimed at reducing corruption in the police force.⁶²

While the adoption of the SAPS Anti-Corruption strategy is indicative of commitment within the institution to combat corruption, the policy is regrettably not effective in ending corruption among SAPS officers of all ranks. In interviews conducted as part of the field research for this chapter, current and former police officers described the rampant corruption they witnessed firsthand. In reference to the police of the past and present and the impact of corruption, one interviewee said: "The police was a disciplined organisation, an organisation that is needed now. A structure they then destroyed!" Another interviewee lamented the vulnerability of the police, in particular the Metro police, to corruption. He gave an example of how Metro police officials often harass taxi drivers and demand bribes for allowing them to drive taxis that are not roadworthy. He argued incidents such as these contribute to tainting the image of the police.

In talking about corruption, another interviewee stated that the Metro police (especially Johannesburg Metro Police Department) were notorious for demanding bribes from motorists. He justified this saying: "Police officers don't take bribes because they are criminals but rather because they are struggling." He argued that the pay was below what could be considered a proper living, and therefore they needed to take bribes in order to make ends meet. In some instances, he explained, a community member's complaint is not taken seriously unless there is some monetary value placed on the need for assistance. This interviewee believes that until police officials receive a decent wage, there will always be corruption.⁶³

3.5 Oversight of the Police

3.5.1 South African Human Rights Commission

Section 148 of Constitution provides for the establishment of the South African Human Rights Commission (SAHRC), tasked with promoting respect for human rights, as well as their protection, development and attainment, and with monitoring and assessing violations of human rights in the Republic. Under section 148(2) the SAHRC possesses powers that include investigating and reporting on the observance of human rights, taking steps to secure appropriate redress for violations and carrying out research. As stipulated in section 13.3(a) of the SAHRC Act (2013), the commission is mandated to conduct investigations on its own initiative, or on the receipt of a complaint, whereby after due investigation, if the commission is of the opinion there is substance in any complaint, it must, in so far as it is able, assist the complainant and other persons adversely affected to secure redress and any necessary and appropriate relief. The

⁶¹

⁶² Institute for Security Studies, "Walking the Talk? The South African Police Service Anti-Corruption Strategy," 9 November 2011. Retrieved from: <https://www.issafrica.org/iss-today/walking-the-talk-the-south-african-police-service-anti-corruption-strategy>.

⁶³ See David Bruce (2012) "The Law for Sale: The Endemic Corruption in the Johannesburg Metropolitan Police Department." Johannesburg: Corruption Watch.

SAHRC is therefore able to receive and deal with complaints against the police, playing an important role in ensuring accountability for misconduct. While the commission has investigated allegations of violations by police,⁶⁴ it is limited in its powers and can only make recommendations to respondents rather than pursue criminal or civil charges.

3.5.2 Civilian Secretariat for Police

In addition to SAHRC oversight, section 208 and 210 (b) of the constitution provide for civilian monitoring of security services through the establishment of a Civilian Secretariat for Police (CSP). Among its objectives, as stated in section 5 of the Civilian Secretariat for Police Act of 2011, the Secretariat has the power to exercise civilian oversight of police, give strategic advice to the Minister in respect of developing and implementing policies, and provide administrative support services to ensure engagement with relevant international obligations, as well as provide guidance to community police forums (CPFs) and associated structures.⁶⁵ Such measures provide hard law commitments to civilian oversight, forging trust and respect between the service and the public, and facilitating community-oriented policing.

3.5.3 Independent Police Investigative Directorate

Police-specific legislation provides additional mechanisms for accountability by way of CPFs and the Independent Police Investigative Directorate. As previously discussed, CPFs aim to facilitate partnerships between the SAPS and communities, promote communication and cooperation, and strive toward the improvement of transparency and police services to the community. While the legislation lacks specifics on their functions, it is indicative of the commitment to ensuring public oversight and accountability of police services. Section 206.6 of the Constitution provides for a complaints body independent of the SAPS to be established under national legislation. The Independent Police Investigative Directorate (IPID) Act of 2011 establishes such a body, which is responsible for ensuring oversight and providing impartial investigations of policing matters, with the power to make disciplinary recommendations. All members of the SAPS are obligated to report to and cooperate with IPID on investigated matters, with National and Provincial Commissioners obligated to initiate disciplinary proceedings and report on their progress. As hard law, the IPID Act establishes strong domestic oversight of the police force and is pivotal to ensuring its compliance with international standards. However, the law lacks explicit provisions stipulating the responsibility of superior officials for the actions of police under their command for abuses they knew – or should have known – about but failed to take action against, as well as provisions designating immunity for officials who refuse unlawful superior orders. These omissions demonstrate that discrepancies remain between international and domestic standards.

The mechanisms discussed above, in combination with many of the reporting methods referred to in other sections of this report, demonstrate a marked commitment in SA legislation to maintain clear and complete records on all matters of police activity in compliance with international standards. While many of these appear in soft law standards, the establishment of IPID under hard law provides an oversight mechanism for police activity with which the SAPS are legally bound to comply.

64 See for example, South African Human Rights Commission Report No. FS/2011/0009, "In the matter between Council for the Advancement of the SA Constitution (Complainant) and South African Police Service (Respondent)."

65 Civilian Secretariat for Police Act 2011. Retrieved from: http://www.gov.za/sites/www.gov.za/files/a2_2011.pdf.

3.6 Use of Force and Firearms

Domestic legislation pertaining to the lawful use of force by law enforcement in SA remains scattered, with no single piece of legislation focused on the matter. The absence of a definitive piece of legislation has not gone unnoticed, with much of the secondary literature focused on policing in SA calling for the development of a use of force policy by the SAPS, and a 'professionalization' of the use of force. The following section takes provisions from various pieces of legislation in order to examine the domestic standards in place in light of the international policing standards enumerated in Chapter 1 of this report.

3.6.1 Rules Governing the Use of Force

Section 49 of the Criminal Procedure Act of 1977 and section 13 (3) (b) of the SAPS Act (1995) are the main provisions regarding the lawful use of force by law enforcement officials in everyday policing. Section 49 of the Criminal Procedure Act, amended for the second time in 2003, stipulates the lawful use of force in effecting arrest. Sub-section 2 states:

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

- (a)** the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b)** the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

In keeping with international standards Section 49(2) stipulates that the use of force may only be used when attempts to arrest a suspect without the use of force are resisted and have been exhausted. This mirrors international standards by stipulating that members should, as far as possible, use non-violent means before resorting to force, which may only be used when strictly necessary. Section 49(2) further limits the use of force by stipulating that it may only be applied as "reasonably necessary and proportional in the circumstances, to overcome the resistance, or to prevent the suspect from fleeing." These limitations reflect international standards by referring to principles of necessity and proportionality, and clearly stipulating the objectives for which the use of force may be used to achieve. Limitations are also provided for in Section 13.3(b) of the SAPS Act which reduces the lawful use of force to the bare minimum reasonable, stating: "Where a member who performs an official duty is authorized by law to use force, he or she may use only the minimum force which is reasonable in the circumstances." As such, domestic legislation repeatedly stipulates that restraint is to be exercised by members applying the use of force, in compliance with international standards.

On the other hand, subsections 49.2(a) and (b) arguably contradict international standards. While international standards require the use of force (when unavoidable) to “minimize damage and injury, and respect and preserve human life,” permitting the intentional lethal use of firearms only when strictly unavoidable and in order to protect life, subsections (a) and (b) provide for circumstances where any person authorised to arrest or assist in arresting a suspect may exercise the use of deadly force. While these provisions aim to make clear circumstances for the lawful use of deadly force, such grounds rely heavily on the discretion of the arrestor, and as such leave the law vulnerable to manipulation and abuse. Such discrepancies in the law are concerning, especially as domestic law in SA holds no provision stating that the unlawful use of force is unacceptable, or that there may be no exceptions to the unlawful use of force by law enforcement. The lack of such provisions fails to make the arbitrary or abusive use of force by law enforcement a criminal offense under domestic law, arguably harming efforts towards accountability. In light of these provisions, and the reliance they place on the discretion of SAPS members, extensive training in the appropriate use of force is fundamental to the prevention of authority-based violence and the abuse of law enforcement powers.

3.6.2 Training in the Use of Force

Section 32 of the SAPS Act stipulates that the National Commissioner shall determine the training that members undergo. No specifics are included regarding what the training should entail, or whether education in the use of force should be included. Chapter 2 Part 6 of the SAPS Employment Regulations (2008) refers to training in the same regard. While it stipulates institutional arrangements for the training, education and development of members, as well as training assistance, no specifics are provided on the content of law enforcement training, or whether it includes the use of non-violent means as required in international standards. While the legislation examined contains no specifics on law enforcement training, the SAPS Basic and Specialised Training Overview offers some insight.⁶⁶ According to the overview, SAPS members receive both basic and specialised training, with intensity and skill level escalating as the level of threat increases. While the information provided makes no explicit reference to training in the use of non-violent means, the “exit level outcomes” for basic training stipulate that on completion the learner will be able to “balance the constitutional and legal rights of individuals with the competence to legally infringe those rights in the service of maintaining a safe and secure society” and “evaluate situations and select tactical techniques and skills needed to perform policing duties and maintain the safety of the self and others,” suggesting such training presumably occurs. Despite this, legislation still neglects to account for the details, raising concerns over the consistency and transparency of SAPS training. Without such details it is unclear whether SAPS training complies with international standards by ensuring members are equipped with a range of means for differentiated use of force. This presents a significant omission in law enforcement legislation on the use of force.

3.6.3 After the Use of Force

Although Standing Order (General) (SOG) 349 on the Medical Treatment and Hospitalization of a Person in Custody (2010) provides for the assistance and medical aid rendered to injured and affected persons in police custody, legislation which refers to the use of force makes no provision for the assistance or medical aid of persons injured or affected as a result of the use of force by SAPS members prior to arrest. In doing so, domestic legislation fails to meet

international standards by neglecting to include provisions that require the prompt assistance and rendering of medical aid to an injured or affected person. Furthermore, the legislation examined makes no mention of notifying relatives or close friends of the injured or affected persons in such an event either. The absence of such provisions from domestic legislation presents a concerning omission, failing to place members under a legal obligation to tend to the needs of injured and affected persons after the use of force, and thus hold them accountable should such circumstances go awry.

The Independent Police Investigative Directorate (IPID) Act (2011) stipulates incidences that call for an investigation. Among these are: "(a) any deaths in police custody; (b) deaths as a result of police actions; (f) any complaint of torture or assault against a police officer in the execution of his or her duties." The obligatory investigation of such matters complies with international standards, but the need for a complaint to trigger investigations of torture and assault falls short of international standards, which require prompt reporting and reviews of all cases of death or serious injury. By stipulating submission of a complaint as a prerequisite for investigations of excessive use of force, domestic law fails to comply with international standards and fails to protect those who may be unable or unwilling to file a complaint for fear for their safety, or lack of faith in the system.

3.6.4 Rules Governing the Use of Firearms

SAPS Standing Orders appears to be the only document containing specific rules and regulations governing the use of firearms. While SAPS members are encouraged to follow such policies, failure to do so does not constitute a breach of the law as the Standing Orders document is not considered hard law. The lack of hard law on the use of firearms presents yet another concerning omission from domestic legislation. However, as they are the only accessible standards containing such information, an examination of the existing soft law criteria is critical.

Article 251.2 of Standing Order (SOG) 251 on the Use of Arms states: "When a member is required to perform duties in a neighbourhood or in circumstances perilous to life, he shall be adequately armed for self-preservation or the protection of life and property. He must not, when necessary, hesitate to make use of his arm(s)." Article 251.3 acknowledges the dangers of making hard and fast rules with regard to all the circumstances under which firearms may be used, and as such Article 251.4 states that it is essential members have thorough knowledge of the circumstances under which firearms may be legally used, so that members may confidently act on their own initiative in accordance with the law.

The Firearms Control Amendment Act of 2006, Section 120(3) stipulates circumstances where use of a firearm constitutes an offense. These are: (a) When negligent use or discharge of it causes bodily injury to any person or damage to property of any person, and (b) When it is discharged or handled "in a manner likely to injure or endanger the safety or property of any person or with reckless disregard for the safety or property of any person." In addition to this, section 120(7) prohibits the discharge of a firearm in a built-up area or public place without good reason.

Yet again, while these standards reflect international rules and regulations, assessing circumstances for the lawful and unlawful use of firearms relies heavily on the discretion of the acting member. Despite this, in light of Article 251.4 of Standing Order 251 on the Use of Arms,

domestic mechanisms for the reporting and investigation of the use of firearms, concerns over accountability may be reduced. In accordance with international standards Article 251.6.1 of the Standing Order stipulates that “however justified a member may consider himself to be in shooting,” all acts involving the use of firearms – whether or not the results are accompanied by the loss of life – “will have to be subjected to an investigation.” Under such circumstances, domestic law states that “a member ... shall have to prove that he acted with all reasonable care and without recklessness or negligence, but that he was compelled by circumstances to make use of his firearm and that the degree of force and the nature of the weapon used, were not out of proportion to the circumstances necessitating the use of it.” In addition to this, Article 251.15 stipulates that if a member, irrespective of the circumstances, fires a weapon, allows a weapon to be fired or orders the firing of a weapon, he must immediately report the fact to his immediate commander, or the next available senior officer so that the scene can be investigated straight away in accordance with protocol stipulated in its subsections. Such provisions comply with the international principles of proportionality and necessity, and fulfil international standards that stipulate all incidents where law enforcement officials use firearms in the performance of their duty must be followed by a system of reporting. The IPID Act of 2011 provides additional measures for investigation. Section 28.1(a) – (h) of the IPID Act stipulates that the Directorate must investigate any complaint relating to the discharge of an official firearm by any police officer. However, of the nine ‘matters’ which require an investigation by the IPID, only two – 28.1(c) discharge of a firearm and 28.1(f) torture – require a complaint to trigger an investigation by IPID.

Although Standing Order (General) 262.4 (b) stipulates the types of firearms used in the policing of public gatherings and protests, no other accessible legislation prescribes the type of firearms and ammunition members are permitted to carry in everyday policing. While we can presume such regulations exist, the lack of legislation available for public scrutiny on these matters is concerning, and fails to comply with international standards. Additionally, while SA has a comprehensive firearms control regime in place, very little information is available on the regulation of control, storage and issuing of firearms within the SAPS, and procedures ensuring that they are accountable for firearms and ammunition issues to its members. Another concerning omission regards protocol surrounding the actual use of firearms in the field. While SOG 251 includes a number of provisions pertaining to the command and management of the use of firearms, no explicit reference is made to the obligation to deliver a verbal warning prior to the discharge of a firearm, nor an adequate waiting time for a warning to be obeyed (depending on the imminence of death or serious injury). The absence of such information fails to comply with international standards, and raises concerns about the accountability, transparency and consistency of SAPS protocol on the use and control of firearms.

SOG 251.15.5 provides some relief to concerns of accountability by requiring members to file a full factual report following any shooting incident; this will be kept in the relevant member, station, and district commander and commissioner’s files, in keeping with international standards. While this SOG contains no provisions stipulating the responsibility of superior officials for the actions of police under their command, if they knew or should have known of abuses but failed to act, the attachment of ranked officials to all factual reports suggests attention is paid to the chain of command. Nonetheless, the lack of concrete provisions stating accountability of commanding officers within the law fails to comply with international standards. SOG 251.15.5 discusses in detail the mandatory content of a full factual report. Among its requirements members must record whether the shooter gave a verbal warning before firing. Although accessible regulations do not hold provisions stipulating an obligation for members to deliver a verbal warning before the use of firearms, its reference here

suggests protocol demands a verbal warning must be given. As such, while we can assume SAPS members are expected to deliver a verbal warning before the use of a firearm, domestic law holds no explicit obligation to do so. While this may be included in legislation beyond the reach of this report, such provisions should be available for public scrutiny, and clearly explicated in domestic law pertaining to police conduct.

3.7 Dispersal of Assemblies

3.7.1 Rules Governing the Dispersal of Assemblies

Section 205.3 of the Constitution of the Republic of SA states that the functions of police are: “To prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.” While public protest is fully within the constitutional rights of the people of SA, SAPS policy states that as “the merits of public protest actions are not always clear-cut,” domestic laws, policies and regulation(s) on public order policing aim to work within the framework of international laws on the “right to public gatherings” including human rights standards.

Section 17 of the SAPS Act provides for the establishment of a Public Order Policing (POP) Unit, which is maintained and deployed at the discretion of the National Commissioner. However, the act provides little detail on the criteria for deployment, stating only that the POP Unit will be responsible for restoring public order in circumstances where ordinary SAPS protocol cannot. The POP Unit exists in a different form today, and as such reports have criticized its restructuring, claiming such efforts have impacted its ability to effectively execute its mandate and function under section 17.⁶⁷

In its implementation of Section 17 of the SAPS Act, the SAPS adopted Standing Order 262 – Crowd Management (SOG 262) and the National Municipal Standards for Crowd Management (NMSCM). Both SOG 262 and the NMSCM, which are soft law, include provisions discouraging the use of force, or, where that is not practical, restricting it to the minimum extent necessary. While Section 12.1 of the NMSCM states the use of force must be avoided “as far as reasonably possible,” SOG 262 stipulates it “must be avoided at all costs.” Both require members to display the highest degree of tolerance and refer to the requirements stipulated in sections 9.1 and 9.2 of the Regulation of Gatherings (RG) Act (1993) for rules and regulations on the dispersal of crowds when the use of force becomes unavoidable. The basic premise of the RG Act is “to ensure that every person has a right to peaceful participation in gatherings with the protection of the police,” with the majority of its provisions arguably concerned with regulating the former. Chapter 3, section 9 of the RG Act stipulates the powers of police during public protests and gatherings. Article 9.2 (b) excludes the use of weapons likely to cause serious bodily injury or death, presumably including firearms. However, section 9.2 (d) permits the use of firearms in extenuating circumstances detailed in (i) and (ii). Such provisions reflect international standards and incorporate principles of proportionality and necessity when the use of force is exercised, whilst demonstrating a determination to avoid the use of firearms in public order policing. These principles are

67 Eye Witness News, “Nhleko: Public Order Policing needs urgent review,” 2 September 2015, retrieved from: <http://ewn.co.za/2015/09/02/Nhleko-Public-order-policing-must-be-urgently-reviewed>; University of Cape Town, “Joint Statement: Excessive use of force by the South African Police Service (SAPS),” 23 October 2015, retrieved from: https://www.uct.ac.za/usr/press/2015/MediaRelease_23October2015.pdf.

similarly reflected in SOG 262 and the NMSCM, both of which provide more detail on the prohibition of certain weapons. Comparatively, these soft law documents provide more insight into rules and regulations of public order policing, and provide necessary clarification to the many gaps that exist in the RG Act.

Although both SOG 262 and the NMSCM stipulate all members deployed for public order policing purposes must be trained in the management of crowds, neither stipulates what such training should entail. However, both provide for the debriefing and reporting of all police activities after each event or gathering, which trainers must attend. Good practice and shortcomings must be recorded as part of a learning process to enhance good skills and address or prevent recurrences of identified mistakes. As this is designed to take place in partnership with trainers, these provisions demonstrate a marked effort for progress and the development of crowd management techniques. The emphasis on reporting also bodes well for accountability, although no explicit mention is made with regard to repercussions following the abuse of policing powers during crowd management functions. It also must be kept in mind that, as they are soft law principles, SAPS officers are not legally bound by such provisions. Regrettably, there are numerous examples of SAPS officers using excessive, in some cases even lethal, force to disperse lawful peaceful assemblies.

3.8 Conclusion

Overall, domestic legal standards for the protection and promotion of human rights by South African police are comprehensive. However, policy documents aimed at clarifying the scope and content of these rules and regulations rely heavily on soft law documents and leave much room for interpretation and the discretion of police officers. The fact that there is such reliance on such soft law documents, which are not legally binding, raises questions about the potential to hold offending police officers accountable. Nonetheless, the legal commitments for robust oversight of the actions of the police demonstrates that there are strong mechanisms for ensuring accountability of police officers who fail to uphold, respect and protect applicable international human rights standards as well as domestic law.

However, while the legal and the institutional frameworks are highly developed in South Africa, police officers still brutalize and extort their compatriots, sometimes in overt and spectacular ways. This was the case in Marikana, where 34 miners were shot dead, though sometimes it is in more mundane forms on the streets of urban centres. Hence, continued work in South Africa must include a focus on implementation of human rights standards, particularly in urban centres, where a perpetual war on gangs and crime legitimizes state and police violence. And it must focus on protecting the gains that have been made by human rights organizations against a backlash that demands some provisions are rolled back. Reverting to military titles is an indication of things that might come, as it has in the Philippines, which is the topic of the next chapter.



Philippines

4. Philippines: Legal and Policy Framework

4.1 Overview of Policing System and Structure

In the Philippines, the structure of the policing system is somewhat complex. Law enforcement functions are carried out by 30 national agencies and local government units across the country, some of which focus on criminal investigation and others on police actions during arrest, search and seizure, while some are mandated to carry out both functions. The main law enforcement agency with a mandate for both criminal investigation and police action is the Philippines National Police (PNP), a national police force with a civilian character that is administered by the National Police Commission (NAPOLCOM). Institutionally, the PNP and NAPOLCOM both fall under the Philippines Department of Interior and Local Government, but this is for administrative purposes only, and functionally NAPOLCOM is the body responsible for control of the PNP.

The PNP is made up of an extensive network of regional, provincial, municipal and district offices and police stations. In light of the vast territory that makes up the Philippines, which is an archipelagic country including more than 7000 islands, local government units (LGUs) play a key role in connecting all areas of the Philippines to the national government, and as such serve as agencies of the national government in many functions, including law enforcement. Local government officials' operational supervision and control of PNP officers is limited to supervising the day-to-day functions of PNP officers. In practice, LGUs, as well as other law enforcement agencies, depend on PNP officers to conduct arrests, seizures and crime scene investigations. At the local government level, the PNP also plays a role in local peace and order councils, which are responsible for developing and monitoring implementation of plans and

strategies for improving peace and order in their jurisdiction. Local peace and order councils are also responsible for evaluating applications for the PNP and recommending candidates to NAPOLCOM.

Adding to the complex nature of the policing structure in the Philippines is the existence of 'tanods', also known as barangay police officers or BPSOs (barangay peace and security officers). A barangay is the smallest government administrative division in the Philippines, and there are approximately 42,000 barangays in the country. Many barangays are made up of several hundred or thousand people, while others are significantly larger. Barangays are headed by elected officials, namely a barangay chairperson or captain (punong barangay) who is aided by a barangay council. The council is considered a Local Government Unit (LGU), and among its functions is the Barangay Justice System (BJS, Katarungang Pambarangay) which is an alternative, community-based mechanism for resolving disputes between residents of a barangay. The BJS was established by Presidential Decree 1508, and is regulated by the Local Government Code of the Philippines.

While there are certain complaints which the BJS cannot address⁶⁸, it can resolve a broad range of disputes, and such cases must be brought to it before being considered in a court.

Furthermore, the barangay structure includes a law enforcement element, barangay tanods, which are the lowest level of law enforcement in the Philippines, though they do not form part of the PNP structure. Barangay tanods are community brigades made up of civilian volunteers who are appointed by the punong barangay upon recommendations made by the barangay peace and order committee. Tanods are divided into teams made up of a team leader and 2-4 members. There is a maximum of 20 tanods permitted per barangay. In practice, the appointment process of tanods is highly politicized as those selected are usually close family or friends with barangay council officials. In light of the role played by tanods in policing in practice in the Philippines, commentators have argued that policing in the Philippines is "subsumed under local, electoral politics and family and community relations."⁶⁹

Historical Developing of Law Enforcement in the Philippines

The PNP as it is known today evolved from the former Philippines Constabulary, a gendarmerie force responsible for law enforcement, and the Integrated National Police, the municipal police force for cities and large towns. In 1990, with the adoption of Act No. 6975, the Philippines Constabulary and Integrated National Police were merged to form the Philippines National Police as a civilian body under the control of the National Police Commission. The aim of this reform process was to decentralize and demilitarize the police force, and was in response to the serious abuses and violence carried out by the police during the Marcos dictatorship of the 1970s. However, the PNP administration today is highly centralized, which poses many challenges to its effective functioning, as described in further detail below.

As a result of the colonial history of the Philippines, there has long been a connection between political power and policing, as the police force was initially established to maintain the power

68 These include (i) cases brought by or against the government or an instrumentality thereof and/or public officers or employees, (ii) offenses punishable by imprisonment exceeding 1 year or a fine exceeding P5,000 (\$106), (iii) disputes involving real property located in different cities unless both parties agree to BJS jurisdiction, (iv) cases involving the Agrarian Reform Law, (v) cases involving labour disputes, and (vi) actions to annul judgment on a compromise.

69 Steffen Jensen and Karl Hapal, "Policing Bagong Silang: Intimacy and Politics in the Philippines."

of the ruling elite before being redesigned to prevent crime and enforce the law.⁷⁰ However, the politicization of the police force and its role in protecting the interests of the ruling elite has in many ways been maintained despite the reform process. According to commentators Jensen and Hapal, “[I]n many municipalities and provinces, the police came to serve ... a democracy in which (landed) elites manage to secure their hold on state power through electoral processes. Law enforcement agencies play a central role in this where the municipal mayor can assert authority over the PNP and the punong barangay exerts control over the lowest level of the state law enforcement system, the Barangay Justice System.”

Over the years, the PNP has exerted efforts to improve itself and make it more effective in fulfilling its mission to “serve and protect” the population. In 2013, the police launched a program to promote ‘human-rights based policing’ as it acknowledged that a “police organization that resorts to unbridled force is doomed to fail.”⁷¹ The core principles and values of this endeavour are summarized through its CODE-P credo, which stands for Competence, Organizational Development, Discipline, Excellence and Professionalism. Achieving this intention requires quality rights-based trainings and seminars; the designation of accessible Human Rights Desk Officers down to the station level; strict adherence to policies that give premium to human dignity; the use of up-to-date investigative technology that delivers immediate, impartial and credible results; and professionalism, which is the end product of all human rights-based initiatives at all levels of community service and peacekeeping operations.⁷²

A key component of this policing paradigm is the element of ‘community participation’ which, in the mind of the police, entails multisector consultations, dialogues, and other activities that encourage and enable citizens and sectoral representatives to interact with the police and provide inputs needed for the development of policies, plans, strategies, and programs. It also includes the formation of police auxiliary groups consisting of civilian volunteers and other PNP-accredited civilian organizations for peacekeeping and anti-criminality operations. A visible and arguably much accessed aspect of this program is the women and children protection desk (WCPD) in the precinct or at police station level.

The police leadership has acknowledged that good police-community relations serve more purposes than simply improving the PNP’s public image. Rather, they are seen as the foundation to building a network of civilian supporters that can assist the police in the monitoring of community safety, gathering of information that can be useful in the detection and investigation of crimes, and other police tasks that need the cooperation and support of the citizenry. In 2015, the NAPOLCOM embarked on another program known as the Community and Service-Oriented Policing or CSOP to “ensure safe, secure, and productive communities.” Its proponents call it an approach that facilitates the transition from a traditional, reactive, incident-driven model of policing which seeks to identify and dynamically resolve community problems, and say that it aims to build and strengthen collaborative partnerships between communities and local executives to promote public order and safety.⁷³

70 Ibid.

71 Police Director General Alan Madrid Purisima, 2013, Message on the launching of the “PNP Guide-book in Human Rights-Based Policing”.

72 Ibid.

73 <https://napolcom5.wordpress.com/2015/05/16/press-release-napolcom-to-pilot-test-community-and-service-oriented-policing-system-in-puerto-princesa-city/>

However, public distrust continues to haunt individual police officers and their organization. Senator Panfilo Lacons, who served as the head of the Philippine National Police before he was elected to parliament, believes that the biggest challenge facing the police is the “PNP itself” – referring to the apparent lack of discipline and widespread corruption among police officers that would require “internal cleansing” to resolve.⁷⁴ Those who try to parry to this observation argue that in the Philippines, incidents of crime and violence involving policemen are individual acts of misbehaviour – a stance which holds that there are a few ‘bad apples’ in every barrel. Terms like ‘scalawags’ and ‘erring policemen’ are commonly used to describe cops who have broken the law. The fact is, these events are commonplace and indicate a much deeper problem, as well as a complete refusal of the senior leadership to treat the situation with the seriousness it deserves.

A focus group study conducted by a civil society organization in a poor urban neighbourhood in Manila has articulated the widely held public view that there is a marked difference between the official ‘by the book’ way and the ‘how we really do it’ way among police authorities. The general public perception is that planting evidence, gunning down cell phone snatchers or drug users and protecting other crooked cops are accepted, and even condoned, practices within their institution.

Think about how this actually works. A policeman, or a group of policemen, makes an arrest, brings the subject to the station and locks him up, and then conducts business-style negotiations with the subject or his relatives, ending with the payment of “bail” and the release of the subject. All going on right inside the police station. This happens because higher authorities are not supervising. Or if they do, they are also part of the usual procedure, reeking with abuse of authority, use of threatened and actual violence, and corruption. Procedures already exist to prevent this kind of activity, but they are not being followed, and they are not being enforced. Officially, locking a person up in a police station’s detention cell involves more than one person, and a bit of paperwork. At the very least, there is always supposed to be a blotter entry and an incident report, and that means that the station commander or shift supervisor must be involved.

This view validated results of a study on Civilianization and Community Oriented Policing in the Philippines almost fifteen years ago that concluded that the police in general continued to be regarded in bad faith – they are seen as poor role models who are unable to fulfil their duties because of a lack of integrity, competence and discipline. The study argues for a ‘demilitarized’ PNP where there is transparency as well as greater consultation and participation by communities. It notes that community policing is a working partnership between the police and the community to prevent crime, arrest offenders, find solutions to recurring problems and enhance the quality of life.⁷⁵

A multitude of laws, codes of conduct, ethical manuals and operational procedural guidelines exist to regulate the conduct and functioning of law enforcement in the Philippines. As described

74 “Ping: PNP’s problem is PNP itself,” Manila Standard, January 6, 2015, <http://manilastandardtoday.com/news/-main-stories/top-stories/167483/ping-pnp-s-problem-is-pnp-itself.html>

75 <http://journals.upd.edu.ph/index.php/kasarinlan/article/view/1650>

above, the main agencies responsible for policing in urban settings, and in particular in the settings which are the areas of focus for this project, are the Philippines National Police and the barangay tanod brigades. While the international legal framework is applicable to all public officials in the Philippines, the domestic legal framework applicable to the PNP and barangay tanod brigades are significantly different, despite the broad overlap in their function.

4.2 Applicable International Law

The Philippines is party to a number of key international human rights treaties, including the ICCPR, which it ratified in 1986, the CAT, also ratified in 1986, and the OPCAT, ratified more recently in 2012.

Under Article II, Section 2 of the Philippines Constitution, “[t]he Philippines ... adopts the generally accepted principles of international law as part of the law of the land.” Accordingly, the international human rights law applicable to the Philippines has the force of domestic law, and can be invoked by Filipino courts to settle disputes in the same way that domestic legislation would be used.⁷⁶ What is not clear, however, is whether international law has supremacy over domestic law where there are contradictions. However, the Vienna Convention on the Law of Treaties has made clear, and it is also a generally accepted principle of international law, that a state may not invoke its domestic law as a justification for failing to adhere to its treaty obligations.⁷⁷

The Philippines is particularly interesting in that it has incorporated the UN Code of Conduct for Law Enforcement Officials (adopted by the UN General Assembly resolution 34/169) in its entirety as part of the Ethical Doctrine Manual of the PNP under Chapter VI, Section 4. This means that the Code of Conduct is applicable to all PNP officers. Unfortunately, this section of the Ethical Doctrine Manual only makes mention of the Code of Conduct and does not include the code in its entirety, making it difficult to ensure that PNP officers are familiar with its requirements. Nevertheless, the inclusion of the Code of Conduct, a non-binding UN instrument, is significant.

4.3 Domestic Law and Policies

This section focuses on the domestic law and standards applicable to the PNP and barangay tanods. It is important to note here that while barangay tanods perform a law enforcement function, the regulations and guidelines applicable to the PNP described below are not applicable to barangay tanod brigades.

The PNP as it exists today was established following the 1987 Philippines Constitution, which provides that “the state will establish and maintain one police force, which shall be national in scope and civilian in character, to be administered and controlled by a national police commission. The authority of local executives over the police units in their jurisdiction shall be provided by law.”⁷⁸

⁷⁶ Joaquin G. Bernas, *Foreign Relations in Constitutional Law*, (1995), p. 19.

⁷⁷ Vienna Convention on the Law of Treaties, Article 27.

⁷⁸ Philippines Constitution, 1987, Article XVI, Section 6.

In 1990, the Philippines National Police Act, No. 6975, was adopted. The full title of the act is An Act Establishing the Philippine National Police under a Reorganized Department of the Interior and Local Government, and for Other Purposes.⁷⁹ This act sets out the organizational structure of the PNP, as well as its powers and functions, qualifications for appointments, professional evaluation systems and the role of local executives in the administration of the PNP. The act also establishes the administrative disciplinary machinery and procedures for the PNP, as well as the National Police Commission, responsible for administrative control and operational supervision of the PNP. In 1998, the Philippines legislature adopted Act No. 8551, aimed at reforming and reorganising the PNP (hereafter Police Reform Law), which amended the 1990 PNP Act. The specific provisions of the 1990 Act and the 1998 Reform Act will be discussed in more detail through the course of this chapter.

Pursuant to Section 5 of the 1998 Police Reform Law, the National Police Commission is mandated to “develop policies and promulgate a police manual prescribing rules and regulations for efficient organisation, administration and operation” as well as to “examine and audit, and thereafter establish the standards for such purposes on a continuing basis, the performance, activities and facilities of all police agencies throughout the country.” The manual, developed and adopted by the commission, is the PNP Operational Procedures Manual, which provides clear instructions and guidance on the functioning of members of the PNP. According to the PNP website, the manual must be “strictly adhered to in all aspects of police work”⁸⁰ but the manual itself is not binding legislation. While the manual contains an elaborate and extensive set of rules regarding the conduct of members of the PNP in the discharge of their function, these do not have the status of being legally binding. However, these rules are indicative of the official policies of the PNP and the operating procedures to be followed by its members, and therefore are included in this examination of the PNP’s compliance with the international human rights obligations applicable to the Philippines.

In addition to the above-mentioned legislation and Operational Procedure Manual, the PNP is also guided in its function and management by a number of non-binding codes of conduct, guidebooks and manuals. This chapter also examines the content of these guides and manuals, and their compatibility with international human rights standards for policing. Specifically, these include the Philippines National Police Guidebook to Human Rights Based Policing, which outlines the human rights-based approach to policing in the Philippines⁸¹ and the Philippines National Police Ethical Doctrine Manual.⁸² Chapter I, Section 1-2(b) of the Ethical Doctrine Manual makes clear that it applies to all uniformed and non-uniformed personnel of the PNP “unless stated otherwise.” Section 2 of the same chapter further states that “all members of the Philippine National Police shall abide, adhere to and internalize the provisions of the Ethical Doctrine.” It should be highlighted that the UN Code of Conduct for Law Enforcement, adopted by the UN General Assembly resolution 34/169, has been incorporated in its entirety into the Ethical Doctrine Manual of the PNP under Chapter VI, Section 4. Unfortunately, this section of the manual only makes mention of the Code of Conduct and does not include it in its entirety, making it difficult to ensure that PNP officers are familiar with its requirements.

79 The full text of the act can be found at: http://www.lawphil.net/statutes/repacts/ra1990/ra_6975_1990.html.

80 PNP website, <http://pnp.gov.ph/portal/index.php/component/content/article/25-about-pnp/organization/2627-pnp-operational-procedures-manual-2>.

81 Philippines National Police Human Rights Guide (HRB Policing): http://www.hss.de/fileadmin/suedostasien/PNP-Guidebook_Human-Rights.PDF.

82 Philippines National Police Manual, Ethical Doctrine Manual: <http://proarmm.pnp.gov.ph/downloads/EthicalDoctrine.pdf>.