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**Submission by
the Institute for Security Studies
to the Parliamentary Portfolio Committee on Justice and
Constitutional Development**

The Criminal Procedure Amendment Bill [B39- 2010]

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1. Introduction

The Institute for Security Studies (ISS) would like to thank the Portfolio Committee for the invitation to offer this submission. The ISS is an African non-governmental policy research institute. Our work is aimed at contributing to a stable and peaceful Africa characterised by sustainable development, human rights, the rule of law, democracy and collaborative security.

The Crime and Justice Programme of the ISS works to inform and influence policy and public discourse on crime, its prevention and criminal justice. We do this by conducting research, analysing policy, disseminating information and providing expertise as our contribution towards a safer and secure society. Since 1996, the Crime and Justice Programme has been conducting research focused specifically on improving policing in South Africa. More information about the ISS and its work can be found on our website: www.issafrica.org.

The first part of this submission will briefly present the data on violent crime and the use of deadly force by police in South Africa. This data shows that there is no clear link between the current legislation and a restriction on the ability of the police to address violent crime or use deadly force. This is necessary to bear in mind as it highlights the important oversight role that parliament has to play in addition to passing legislation when it comes to the use of deadly force by the police.

The second part of this submission focuses on the specific principles and phrasing of the amendment Bill. This submission focuses primarily on the impact of the amendment Bill on law enforcement agencies, with a particular focus on the South African Police Service (SAPS).

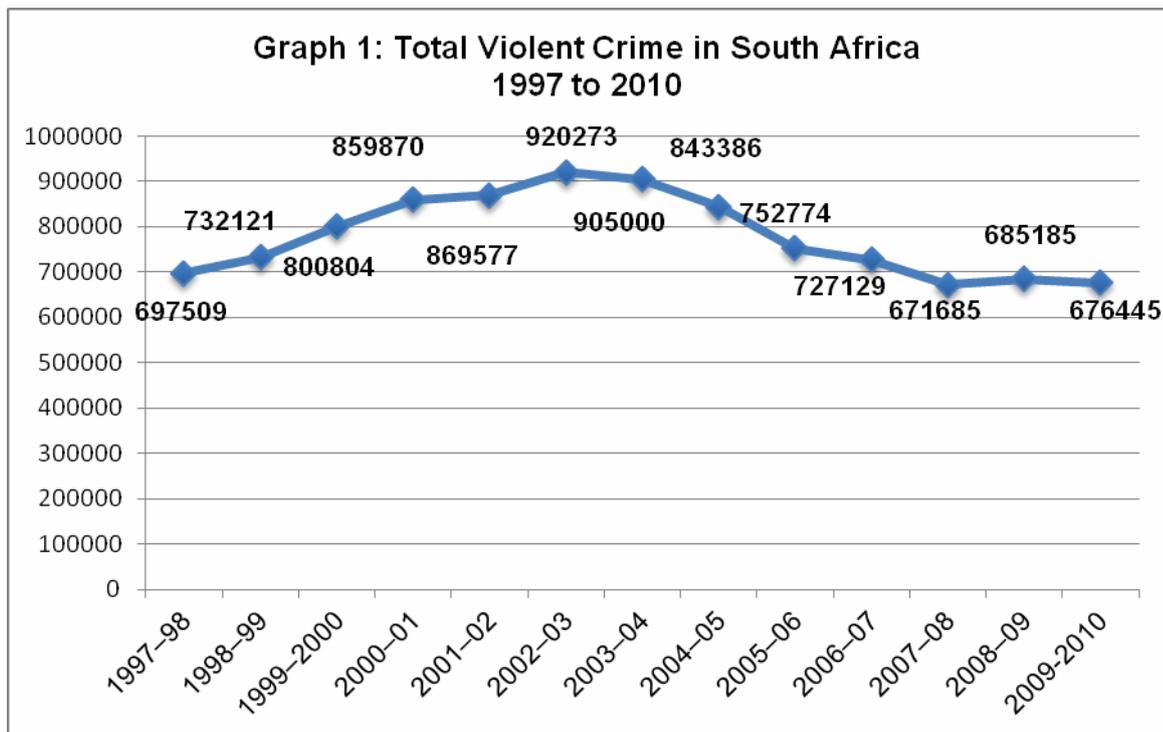
The third part of this submission reflects on the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offender as a basis for recommendations on how Parliament can play a more active role in supporting the lawful and professional use of force by South African law enforcement officials.

2. Violent crime and police use of deadly force in South Africa.

Much has been written in the media about the need to amend section 49 of the Criminal Procedures Act so as to allow, “police to shoot criminals.”¹ When considering the amendments to the current section 49 of the Criminal Procedure Act it is important to reflect on the data about on violent crime and the use of deadly force by police in South Africa that shows little evidence to support the view that the current legislation has:

1. Prevented the police from tackling violent criminals or,
2. Prevented the police from using deadly force to arrest criminal suspects or to act in self-defence.

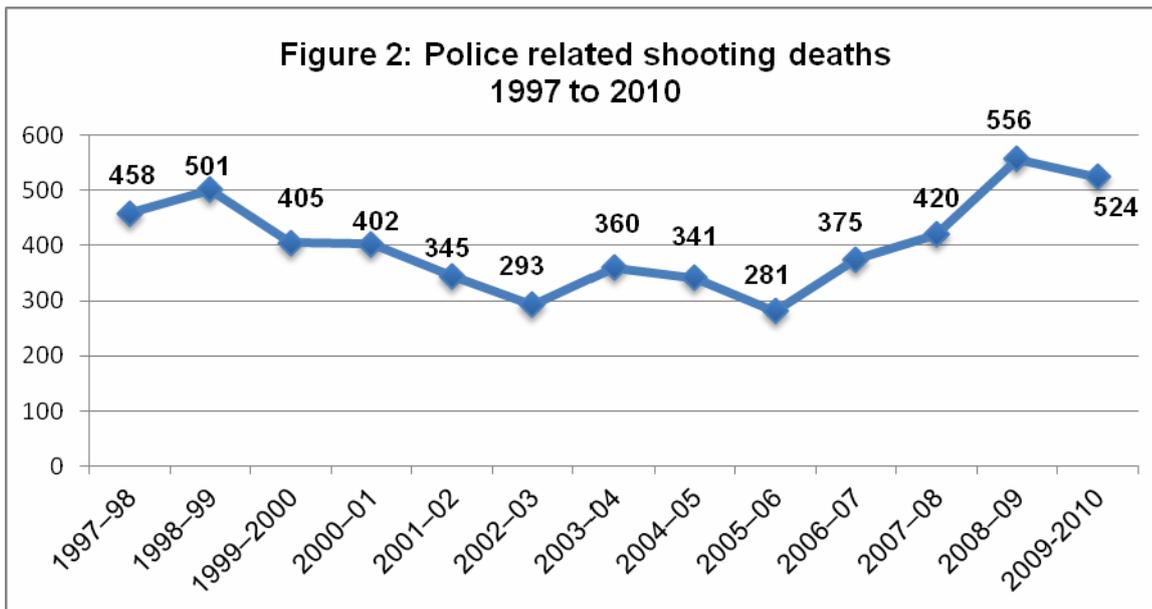
The table below presents the total violent crime recorded by the SAPS each year between 1997 and 2010. Total violent crime includes the crimes of murder, attempted murder, all categories of robbery and of assault. The graph shows that violent crime was at its highest in the 2002/03 financial year when 920 273 violent crimes were reported to the police. By 2010, total violent crime recorded by the SAPS had decreased by 26.5% (the equivalent of 234 826 fewer cases per year). It is therefore clear that the adoption of the existing section 49 amendments in 2003 has not prevented the reduction of violent crime in South Africa.



Graph 2, below shows the trend in relation to the number of people shot dead by SAPS members between the 1997/08 and 2009/2010 financial years.

This graph demonstrates, firstly, that the current legislation has not prevented SAPS members from using deadly force. This is evidenced by the fact that the number of people shot dead by the police almost doubled between 2005/06 and 2008/09. Of course this may be as a result of many police officials ignoring the law and not being held adequately accountable for doing so. However, it would require dedicated research to determine whether this is the case or not.

¹ See for example, the Mail and Guardian article from 9 October 2009, reporting that, “the killing of a police captain in Pretoria this week was an example of why South Africa needs to rewrite the Criminal Procedure Act to give police the right to shoot criminals, President Jacob Zuma said on Friday.” Accessed at <http://mg.co.za/article/2009-10-09-zuma-backs-changes-to-criminal-procedure-act>.



Secondly, this graph demonstrates that the increase in the use of deadly force by the police is not responsible for reductions in violent crime. Between 2003/04, the use of deadly force by the police decreased consistently until 2005/06 when the lowest number of people, (281) were shot dead. Over this time period of four years, total violent in South Africa decreased by 18% or the equivalent of 167 499 fewer cases per year. Over the following three years (2006/07 to 2008/09), deadly shooting by the police almost doubled but violent crime continued to decrease at a much slower rate (by 5%). There is therefore no correlation between reductions in violent crime and the use of deadly force by the police.

The above points are important to consider as they demonstrate that on its own, the law restricting the use of deadly force in South Africa neither improves nor hampers the police's ability to address violent crime, arrest dangerous criminals or defend themselves. Rather, the most important issues that should be focused on relate to the ability of the South African Police Service (SAPS) to recruit, train and manage its members effectively. These issues and the role of parliament in this regard will be further explained in the last section of this submission.

3. Principles and phrasing of the Amendment Bill

3.1 Application of this amendment should apply only to law enforcement officials

The legislation should differentiate between law enforcement officials and the general citizenry. Law enforcement officials are specifically trained and equipped to carry out arrests and to enforce the law. Ordinary citizens are not generally subjected to this type of training and therefore should not be encouraged to use deadly force to arrest another person.

The law providing for self-defense is adequate to ensure that citizens can defend themselves using deadly force when they believe that their lives, or the lives of others are at imminent risk. The amendment law as it now stands may thus encourage untrained citizens to place themselves and others in unnecessary risk by allowing them to decide to use deadly force to try and arrest a dangerous individual.

3.2 The Principle of the Protection of Life

The Constitution is clear that the “right to life” is a fundamental right and therefore should frame the purpose of this submission. It should be clearly stated in the legislative amendment that the purpose of Section 49 is to provide for the use of deadly force to affect arrest only in circumstances that protect the ‘right to life.’

This is also a core principle in the *United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* where it is stated that the “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

It is therefore recommended that this intention is specifically stated in the legislation. Wording to this effect is presented below in section 3.4.

3.3 The circumstances under which use of deadly force can be used.

It is recommended that subsection 49(2)(b) of the bill should be amended to provide that the arrestor may use deadly force *with the intention to protect life* and if he or she has reasonable grounds to believe that:

1. The suspect has committed a crime involving the infliction or threatened infliction of grievous bodily harm; and
2. The suspect is likely to inflict grievous bodily harm in the future if not apprehended; and
3. There are no other reasonable means of effecting the arrest, whether at that time or later; and
4. The use of deadly force will not endanger innocent bystanders.

3.4 Ministerial Regulations on the Use of Force

The extent to which the police are able to use force justifiably and effectively relies on a range of organisational policies and regulations to guide police training and practice, and the existence of measures to effectively ensure compliance with these policies and regulations.

It is for this reason that the ‘UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’ states that, “*Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials.*”

In many law enforcement agencies internationally, such regulations are referred to as a ‘Use of Force Policy’ and is instrumental in determining the training provided and the managerial guidance provided to operational law enforcement officials. It would be beneficial for the SAPS to develop a single coherent ‘use of force policy’ document. Parliament could encourage such a development through requiring Ministerial regulations to accompany this amended legislation. It is therefore recommended that the amendment to section 49 includes the following provision:

“to ensure that deadly force by law enforcement officials is used in accordance this legislation and in the protection of life, the Minister of Police must pass regulations pertaining to:

1. The control, storage and issuing of firearms;
2. The training and assessment of the skills of law enforcement officials in the use of deadly force;
3. The establishment of effective reporting and review procedures for all incidents where deadly force is used that includes a focus on the responsibilities of supervising officers to

ensure that law enforcement officials under their command are provided with the necessary guidance and support when using force.”

4. Parliamentary oversight

Parliament’s role is to hold the Executive Authority accountable for its implementation of legislation and the exercise of its authority. It is therefore recommended that the Portfolio Committee on Police investigate the extent to which the Minister of Police and the SAPS have developed appropriate policies, regulations and procedures for ensuring the appropriate and effective use of force by law enforcement officials.

Such measures should be based on the *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 Offender.

Below are the key principles that parliament should monitor and suggestions as to how this could be done.

4.1 Monitor the police rules and regulations guiding the use of force of any kind.

The legitimate use of force is a fundamental characteristic of all public policing the world over. It is therefore important that all spheres of government, the Executive, the Legislature and the Judiciary act in tandem to promote the highest standards of police professionalism.

If the government fails to proactively and consistently improve police professionalism, the consequences will be high levels of police brutality and poor levels of police safety. On the other hand, a police agency which is seen to be professional and that adheres to high standards of conduct will win public respect and trust. This will improve officer safety and result in the police being more effective in addressing crime.

In playing its role to achieve this vision of policing in South Africa, the Portfolio Committee on Police should require the Minister of Police, SAPS Senior Management, the Independent Complaints Directorate (soon to be the Independent Police Investigative Directorate) and any other agency with appropriate insight and knowledge to present an assessment of the extent to which the guidelines, policies and regulations relating to the use of force by police are adequate and are being effectively implemented. The issues presented below should receive particular attention in this regard.

4.2 Monitor the implementation of guidelines aimed at controlling police firearms

The UN principles state that guidelines should clearly 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.”*

Parliament has already received information revealing shortcomings in the control of firearms by the SAPS. On 12 March 2010, the Minister of Police revealed while answering parliamentary questions that between 2008/09 and 2009/10, the SAPS had lost 5 362 firearms and only recovered 565 (10.5% of those lost). This means that a total of 4 797 police firearms have potentially entered the illegal market and may be used by criminals. Only 56 police members were charged for the loss or theft of their firearms. This suggests that there substantial organisational and managerial weaknesses in the SAPS that need to be urgently addressed.

Parliament should pay careful attention to the management of firearms by the SAPS and require detailed briefings on the steps taken improve control and reduce the loss of these deadly weapons.

4.3 Monitor the impact of the training of police officials in the use of deadly force

The UN Basic Principles state that:

“Government and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms [and that] Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.”

One of the important challenges facing SAPS training is the extent to which SAPS members are properly tested in accordance to appropriate proficiency standards in the use of their firearms. Random testing should be undertaken on small samples of SAPS members who have completed their training on firearms so as to establish the extent to which the training has transferred the required skills and knowledge to use firearms effectively and within the law. The National Secretariat of the Police should facilitate such audits and the results presented to parliament on an annual basis.

4.4 Monitor the implementation of effective reporting and review procedures mechanisms

The UN principles state that,

Governments and law enforcement agencies shall establish effective reporting and review procedures for all use of force incidents and provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

Although there are standing orders that require SAPS members to report any use of their firearms, it is not clear that these are consistently complied with across the organisation. It is only when a police member kills an individual or where a criminal charge is opened that an investigation is undertaken. These investigations in turn only focus on whether a law was broken or whether disciplinary regulations were breached.

What is required however, to ensure that police officials and citizens are not exposed to unnecessary danger is a system of reporting and review that goes beyond focusing only on legality. The UN principles require that police systems be put in place whereby each incident where police firearms is assessed to ascertain whether this is being done in line with the training provided. The continuous assessments of police firearm incidents can ensure that the highest standards of police and civilian safety are adhered to when potentially deadly force is used by or against police officials.

Parliament should request that such a system is established in line with the UN Principles and that its use and results are regularly reported on to the Portfolio Committee of Police.

4.5 Employee wellness support for law enforcement officials involved in violent incidents

The UN principles state that

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

Policing can be a very stressful job and it often exposes law enforcement officials to traumatic events and experiences. The consequences of post-traumatic stress can be detrimental to police members who are not provided with appropriate psychological support. This can have further consequences where it could contribute to some police members misusing force or not adhering to procedures. It is important that the SAPS provides training for its members to become councilors so that experienced police officials are available to support those who are not comfortable receiving assistance from civilian councilors.

Parliament should request that the SAPS regularly report on the extent to which its members who are involved in violent attacks are provided with appropriate counseling and employee wellness support.

5. Conclusion

The ISS thanks the committee for the opportunity to make this submission. We are willing and ready to assist the committee further in any way we can. Reports and research findings related to the police and policing in South Africa are freely available from our website at www.issafrica.org/crimehub and we can make hard copies available upon request. We wish the committee all the best in its deliberations on this legislation.