

# **An acceptable price to pay?**

The use of lethal force by police in South Africa

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## Abbreviations

ICD	Independent Complaints Directorate
LAPD	Los Angeles Police Department
LASD	Los Angeles Sheriff's Department
NYPD	New York Police Department
PARC	Police Assessment Resource Centre
PPB	Portland Police Bureau
SAPS	South African Police Service

## Executive Summary

This paper is concerned with the use of lethal force by police in South Africa. Police in apartheid South Africa were associated with the excessive use of force. With the transition to democracy various measures were taken to control the use of force by police. This included the creation of the Independent Complaints Directorate (ICD) including provisions requiring the ICD to investigate deaths as a result of police action, and amendments to Section 49 of the Criminal Procedure Act, the law authorising the use of lethal force 'for arrest'. These measures may have initially contributed to reductions in the use of lethal force by police but it appears that this effect has been temporary. The most recently released ICD statistics indicate that deaths in shooting incidents involving police are now at their highest level since the ICD started operating in 1997.

Police use of lethal force can only be controlled effectively if police leaders are committed to ensuring that suitable standards are adhered to. Unfortunately, this has not been a feature of police leadership in South Africa post-1994. There appears to be a lack of concern relating to the use of lethal force. This stems partly from the high levels of violent crime but may also be attributed to the fact that the victims of the use of lethal force, are not only criminals but even where innocent, are politically and socially marginal.

Since 2005-06, when deaths as a result of shootings by police reached their lowest levels, there has been a dramatic rise in such deaths with the total number having increased by over 100% (102%) from 281 to 568, the highest figure recorded by the ICD.<sup>1</sup> Statistics over the four years from 2005-06 onwards indicate that 82% of shooting deaths were the killings of people alleged to be involved in violence against police or otherwise related to police duties. The remainder include 10% associated with disputes of one kind or another including 'domestic violence related' incidents, apparent firearm accidents (5%) and 'innocent bystanders' (3%) a category which may be expanded to include some of the deaths in vehicle accidents which take place during police vehicle pursuits. KwaZulu-Natal is the province which, relative to population, records the highest number of killings by police. KwaZulu-Natal has also made the greatest contribution to the increase of shooting deaths in the period since 2005-06 with deaths having increased by 162% (from 75 to 197) in this period. The increase in police shooting fatalities has been most pronounced in the 2008-09 year with 51% of the increase since 2005-06 (148 out of 287) having taken place in this year. KwaZulu-Natal accounted for 61% of the increase (90 out of 148) in this year including 12 of the 32 (38%) deaths of innocent bystanders. A major contributor to this increase has been the increasing role of Constables in fatal shootings. High levels of police violence in KwaZulu-Natal are not necessarily simply a

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<sup>1</sup> Higher figures have only been recorded in South Africa in 1976, 1985 and 1986 when killings by police included a large number in 'unrest' incidents. Close to 98% of killings are by the South African Police Service with the remainder involving the five municipal ('Metro') police departments.

response to high levels of violence in the environment in which the police work and may reflect the fact that the 'culture of violence' also permeates official culture in KwaZulu-Natal.

The following sections of the report draw on reports in the press. Summaries of 25 selected press reports are provided in Annexure A. It is emphasised that the individual press reports themselves do not necessarily represent a 'final truth' of any of the cases with which they deal, and are also not representative of press coverage of the use of lethal force or of incidents involving the use of lethal force by police, but are discussed in order to highlight specific issues including:

- Unlawful killings by police in the course of police duties.
- The problem of error and of shootings which are arguably unnecessary or inappropriate from a professional policing perspective.
- Questions to do with killings by, and risks to, police officers when they are off duty.

A number of press reports point to incidents in which it appears that police may have used lethal force unlawfully whilst ICD statistics indicate that ICD investigations have resulted in 40 convictions of murder and 18 convictions for culpable homicide over the most recent 6 years for which this data is reported. Whilst these investigations ensure a level of accountability on the part of the police they face various impediments including amongst others, the resource and capacity constraints of the ICD, the ability of police to manipulate evidence such as by placing 'drop guns' at death 'scenes', the politics involved in securing police cooperation (notwithstanding legal provisions requiring such cooperation) and the tendency of some prosecutors to favour police due to their close working relationship.

The control of police use of lethal force is also not purely a matter of discouraging unlawful shootings. Police who are acting with good intentions may use lethal force in circumstances where this may be regarded as unnecessary or inappropriate from a professional policing perspective which is concerned to protect human life. Police agencies may therefore control the use of lethal force not only by ensuring that their members act lawfully but by providing direction to police officers to better ensure their own safety as well as that of members of the public. Many police departments in the United States address this issue through specific use of force policies which direct members to pay particular attention to the safety of bystanders, and guide them around such issues as the use of warning shots, verbal warning, shooting at or from moving vehicles and the reporting of shooting incidents. Such policies may also address the values which should inform police use of force and direct police to avoid actions which may escalate the likelihood of the use of lethal force such as over-hasty entry into situations. The paper argues that such a policy should be developed by the SAPS (and other police services) partly in order to clarify issues which are not addressed by legislative amendments.

As indicated in the region of 10% of deaths in police shootings in recent years have taken place in 'domestic violence incidents' or other personal disputes involving police. These incidents sometimes involve the killings of police related where both parties to these disputes are sometimes police members, but also that the killers in these incidents may kill themselves after shooting another person. The latter 'murder-suicides' may also be seen as part of the broader problem of police suicides. A common factor in many of these different kinds of fatal incidents is police possession of service pistols. The need for police to be in possession of their weapons while off-duty is partly related to the obligation to 'place themselves on duty' and engage in armed interventions in crimes which they encounter while off-duty. The basis for the latter obligation is unclear, but it

appears to be a contributing factor to the large number of killings of police which take place off-duty, many of which are believed to occur in the course of such interventions. The paper argues that a use of force policy, of the kind referred to, should indicate that SAPS members are not obliged to engage in armed interventions in crimes which they encounter off duty but should call in on-duty police. This would remove the obligation on police to carry fire-arms when off duty with potentially beneficial consequences in relation to other undesirable aspects of off-duty firearm use.

In conclusion the paper argues that there is a need for greater attention to the control of the use of lethal force. One concern is that police should adhere to standards of legality but efforts to control the use of force need to go beyond an emphasis on sanctioning unlawful uses of force and also emphasise support to police to achieve the highest possible standards of professionalism in their use of lethal force. A use of force policy of the kind referred to can be of great benefit in this regard but its value depends on the backing of police leadership for efforts to improve standards.

# 1. Introduction

'The consistent pattern in policing has been that where the civil population or section of it is excluded from the status of 'citizen' it is subjected to more oppressive forms of policing'.<sup>2</sup>

During the apartheid period the police, and the use of lethal force<sup>3</sup> by police, was a principal instrument through which relationships of racial domination were maintained. Widespread use of force and lethal force against black South Africans was an expression of the beliefs implicit to apartheid ideology that police violence was acceptable as long as the bodies that were at the receiving end of police brutality were those of black South Africans. Police violence was therefore an embodiment of the central tenets of apartheid in so far as it articulated the idea that there were two different kinds of people in South Africa: people of one colour whose lives were important and who needed to be protected from violence, and people of another colour whose bodies were legitimate targets of official violence.

Associated with the transition to democracy, and the central place which was given to human rights in this process, two types of measures were adopted to restrain police use of lethal force. Firstly a 1998 legislative amendment was targeted at addressing the legal framework provided by Section 49 of the Criminal Procedure Act which was regarded as highly permissive in the leeway which it provided police officers (and in fact civilians) to use lethal force.<sup>4</sup> Secondly the legislation which provided for the creation of the Independent Complaints Directorate<sup>5</sup> (ICD) provided in Section 53(2)(b) that it should investigate all killings by police.<sup>6</sup>

How to evaluate the impact of these measures is unclear. The 1998 legislative amendment in fact only came into force in 2003. In that year the number of deaths increased relative to the previous year though in the following two years they did decline, reaching their lowest point since 1997 in the 2005-06 year. But if this was related to the impact of the legislation then the legislation's

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<sup>2</sup> Waddington, P, 1999:163.

<sup>3</sup> This paper is concerned with the use of lethal force by police in South Africa. While lethal force may be defined more broadly (to include for instance deaths as a result of assaults or incidents where people are killed by police vehicles) the focus of the paper is on shootings involving police officers.

<sup>4</sup> Bruce, 2003. The amendment was preceded in 1997 by a South African Police Service Special Service Order which also narrowed down the circumstances in which lethal force was authorised.

<sup>5</sup> See Chapter 10 of the South African Police Service Act, 68 of 1995. The ICD was created in pursuant to Section 222 of South Africa's interim Constitution (Act 200 of 1993) which provided that an 'independent complaints mechanism' should be created whose principal function would be to ensure that 'complaints in respect of offences and misconduct allegedly committed by members of the [South African Police] service are investigated in an effective and efficient manner'.

<sup>6</sup> The category referred to in Section 53(2)(b) is 'deaths in police custody or as a result of police action'. This paper focuses on deaths as a result of police action, and in particular shooting related deaths, and does not address deaths in custody. In relation to the distinction between these two categories see Bruce, 2005:144-146.

restraining effect on the use of lethal force by police was only temporary.<sup>7</sup> Following 2005-06 deaths as a result of police action began to increase steadily, with the most recent figures being the highest as yet recorded by the ICD.

The reporting of annual statistics on deaths as a result of police action was therefore one of the by-products of the creation of the ICD. During the apartheid period figures of this kind were also released by the Minister of Law and Order in response to questions in Parliament.<sup>8</sup> The creation of the ICD therefore means that the process of collation of statistics has a degree of independence from police control. As illustrated above however, along with uncertainties about whether legislation has had any kind of enduring impact, it also remains unclear as to what type of effect the ICD has had on the use of lethal force by police.

Policy measures of this kind therefore may be largely cosmetic or 'presentational'<sup>9</sup> in nature. While ensuring that there is an appropriate legislative framework and that there is independent investigation of killings by police are important policy measures, at the end of the day, the use of lethal force cannot be controlled in a meaningful way without a full commitment by police leaders themselves to ensuring that police adhere to suitable standards in relation to their use of lethal force. In this respect therefore the control of the use of lethal force by police in South Africa has hardly moved on from the apartheid era.

Alongside widespread indifference to deaths at the hands of the police by some members of the public, recent developments in South Africa associated with a move by government towards addressing crime in a more vigorous manner have raised concerns about official attitudes towards the use of lethal force by police. Statements from political leaders calling on police to 'kill the bastards',<sup>10</sup> to 'teach them a lesson'<sup>11</sup> by means of the use of lethal force or to show 'no mercy'<sup>12</sup> to criminals have raised questions about the official attitudes towards the use of lethal force and about whether political officials wish to signal to police officers that they are encouraged to disregard legal provisions regulating the use of lethal force. Anxieties in this regard have also been fuelled by government's announcement that it intends amending legislative provisions relating to the use of lethal force, though in relation to the latter issue at least it is arguable that there is a need for provisions which are poorly formulated within the current law to be clarified.<sup>13</sup>

The point of departure for this paper is that killings by police should not be a matter of indifference. In so far as state officials, or members of the public, reinforce the idea that these deaths don't matter, or are even desirable, they perpetuate the system inherited from apartheid in terms of which South Africa is a nation of first and second class citizens. Many of the alleged acts of police violence which have been reported in the press in the recent period (see Appendix A) are only regarded as tolerable because their victims are regarded as second class citizens. If acts of violence of this kind were inflicted on affluent South Africans they would be regarded as an intolerable

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<sup>7</sup> In the year after the 1997 Special Service Order was introduced (see footnote 4 above) ICD statistics recorded an increased number of deaths as a result of police action. This might however have been partly a reflection of more consistent reporting of deaths by South African Police Service members as the 1997 was the year in which the ICD started operating and there may have been less rigorous adherence to provisions requiring the reporting of deaths to the ICD in that year.

<sup>8</sup> Bruce, 2005.

<sup>9</sup> Sanders and Young, 2000:75.

<sup>10</sup> 'Kill the bastards' – Minister's astonishing order to police, the Star, 10 April 2008.

<sup>11</sup> SAPS must fight fire with fire, Citizen, 12 November 2008.

<sup>12</sup> Burger, 2009.

<sup>13</sup> This paper does not discuss in detail the legal issues to do with amending Section 49. For perspectives on this issue see Bruce, 2003 and Centre for the Study of Violence and Reconciliation, 2010.

outrage. The use of lethal force by police therefore is one of the ways in which inequality in South African society continues to be articulated and is perpetuated and reinforced.

The victims of police shootings are not only violent criminals but include an unknown number of innocent victims who are killed in different circumstances whether as victims of mistaken identity shootings, in disputes or arguments with police officers, or as innocent bystanders. These victims are consistently from disadvantaged communities in South Africa. In more explicit terms – they tend to be young, black men. Not only because they are assumed to be criminals, but also because of their marginal status in South Africa, their deaths at the hands of police provoke little concern. For these reasons these deaths, or at least most of them, are regarded with indifference by many South Africans. Though there are moments of concern about police abuses, the seriousness of the problem of violent crime motivates many South Africans to see the death toll from the use of lethal force by police in South Africa as an acceptable and necessary consequence of the fight against crime.

This is not to say that many killings by police are not justified, and are not a regrettable but necessary part of efforts to address the problem of crime, and particularly violent crime in South Africa. But it does mean that greater attention needs to be paid towards questions of controlling the use of lethal force and of ensuring that such use of lethal force accords with professional policing standards.

Towards this end this paper then uses available information to shed light on the nature of the use of lethal force by police in South Africa. It relies primarily on two sources, statistics provided by the ICD, and media reports, to try and illuminate problematic aspects of the use of lethal force by police in South Africa including the issue of unlawful police killings, error and unnecessary use of lethal force, and killings by and of police off-duty.

## 2. Recent trends in the use of lethal force

Figures on deaths as a result of police action which have been reported by the Independent Complaints Directorate are reflected in Table 1. As is apparent from the data in the table recorded deaths as a result of police action are primarily the result of shootings which account for over 90% of the total. Alongside shootings are 'other' deaths on which more detailed data has only been provided in ICD reports since 2001-02. Since then 88% (256 of 291) of 'other' deaths as a result of police action have been attributed to vehicle accidents with the remaining 12% (35) being attributed to assaults or torture by police.<sup>14</sup>

As is apparent from Table 1 the number of deaths recorded in 2008-2009 is the highest number of deaths ever recorded by the ICD. One contributor to this is the fact that the ICD has been recording a particularly high number of deaths in vehicle accidents in recent years with the total number recorded in the four most recent years totaling 188. However the far more significant factor is that deaths as a result of shootings have increased dramatically in the last year with the 568 shooting deaths being the highest recorded by the ICD. Prior to this the highest figure for these deaths was the 501 recorded in 1998-1999. Relative to the 420 shooting deaths recorded in 2007-08 the 2008-09 figure represents an increase of 148 (35%).

It may be noted that the 2008-09 figure is the fourth highest figure ever recorded for killings by police in South Africa. Higher figures have only been recorded in 1976 (653), 1986 (716) and 1985 (763) though it is also reasonable to question the reliability of figures on killings by police recorded during the apartheid period.<sup>15</sup> As is also apparent the recent increase in killings by police also includes a very high proportion of bystanders with the 32 killed during the 2008-2009 year accounting for 6% of all shooting related deaths in 2008-09 and accounting for 35% of all bystander deaths recorded by the ICD in the past eight years.

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<sup>14</sup> That ICD reports have not recorded any assault or torture related deaths in statistics for deaths as a result of police action since 2005-06 when 14 assault related deaths were recorded, the highest number recorded by the ICD in any year. It is not clear whether the absence of a line for assaults reflects the absence of assault related deaths in 2006-2007 and subsequent years, is an omission on the part of the ICD, or perhaps reflects the fact that these are now all recorded under the 'deaths in custody' category. The 2006-2007 annual report in fact only provides a figure of 312 deaths as a result of police action for 2005-2006 but the table which provides this figure (Table 4) has no line for assaults, which account for the difference between this figure and the figure of 326 provided in the 2005-2006 annual report. Cases documented in the report of the ICD's Investigations Programme (Programme 2) which, in the 2008-09 report for instance documents cases of an arrestee who subsequently died of 'blunt trauma wounds' and another who allegedly died of suffocation whilst undergoing torture (ICD, 2009:36). Statistics on deaths are provided as part of the report of the Information Management and Research Programme (Programme 3).

<sup>15</sup> Bruce, 2005:155-156. These were years in which a large number of killings by police were in incidents of 'unrest'.

**TABLE 1: ICD figures on deaths as a result of police action, 1997–2009<sup>16</sup>**

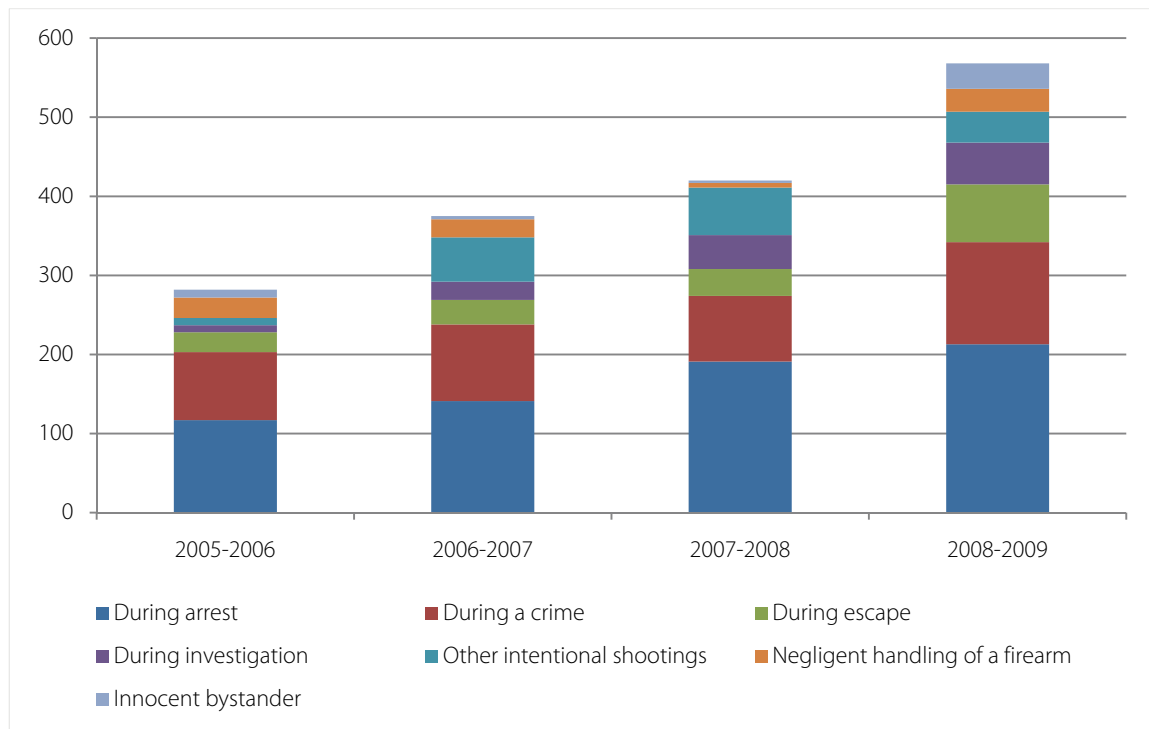
Year	Shootings	Other	Total
1997–98	458	60	518
1998–99	501	57	558
1999–2000	405	67	472
2000–01	402	30	432
2001–02	345 (includes 20 innocent bystanders)	26 (18 struck by police vehicle; 7 beaten with hands, fists or other object; 1 tortured)	371
2002–03	293 (includes 9 innocent bystanders)	18 (9 struck by police vehicle; 8 assaults or beatings; 1 torture)	311
2003–04	360 (includes 8 innocent bystanders)	20 (18 in vehicle accidents; 2 beaten with hands / fists)	380
2004–05	341 (includes 5 innocent bystanders)	25 (23 in vehicle accidents; 2 beaten with hands / fists)	366
2005–06	282 (includes 10 innocent bystanders)	44 (30 in vehicle accidents; 14 assaults)	326
2006-07	375 (includes 4 innocent bystanders)	44 (all in vehicle accidents).	419
2007-08	420 (includes 3 innocent bystanders)	70 (vehicle accidents)	490
2008-09	568 (includes 32 innocent bystanders)	44 (vehicle deaths)	612
TOTAL: 12 years	4 738 (90.3%) (includes 91 innocent bystanders in the period April 2001–March 2009)	505 (9.7%) (includes 256 struck by police vehicles; 33 assaults or beatings; 2 torture in the period April 2001–March 2009)	5255

ICD reports from 2003-04 onwards have provided figures indicating to what extent deaths as a result of police action are linked to Metropolitan Police Departments rather than the SAPS. These indicate that the SAPS has accounted for just under 98% and metropolitan police departments have accounted for just over 2% of deaths during this six year period. Of municipal police departments the Durban City Police (20 deaths) has been the most prominent contributor, particularly in 2003-04 and 2004-05, followed by the police departments in Johannesburg (14), Ekurhuleni (13) and Cape Town (10). Tshwane Metropolitan Police Department (2) has, according to these figures, accounted for very few deaths.<sup>17</sup>

<sup>16</sup> Figures are mostly from ICD annual reports except that for 1998-99 which is from statistics provided by the ICD. All figures are for the financial year 1 April – 31. The increased amount of detail provided since 2001 reflects increased detail provided in ICD annual reports. In categorising deaths as a result of police action some ICD reports include a category of 'Possible negligence' or 'negligence'. It is assumed that this is the same as the category of 'negligent handling of a firearm' used in other ICD reports and therefore relates to shooting deaths, but this is not clear from the ICD reports themselves. For 2008-2009 it is also assumed that all non-vehicle deaths are shootings but this is not clear from the data provided.

<sup>17</sup> The Cape Town Metropolitan Police Department had 513 uniformed members and 69 in its administrative component providing a total of 582 as of April 2010 (Email message from Superintendent S.P. Phillips, 14 April 2010). The JMPD has 2253 full time operational members though its total staff complement including admin staff (1251) and those involved in training (trainers and trainees) and part time staff is 3703 (email communication from Hendri Prislou, 10 October 2008). The EMPD is estimated to have around 800 operational police officers. The Tshwane MPD is estimated to have around 1200 police

**FIGURE 1: ICD classification of circumstances of shooting deaths, 2005–2009**



ICD reports also classify deaths as a result of police action according to what might roughly be referred to as the circumstances in which they occur. Figure 1 illustrates ICD statistics in this regard for the last four years. The first four categories – during arrest, a crime, an investigation or an escape – might roughly be described as dealing with circumstances which legitimately form part of ordinary police work. If it is assumed for the moment that these shootings were all legally justified then these would be shootings either in situations where police use lethal force to defend themselves or other people, or in terms of the Section 49 of the Criminal Procedure Act which authorises the shooting of fleeing suspects in certain circumstances. During this four year period these four categories accounted for 76% of the total number of deaths or 82% of deaths as a result of shootings. Of shooting related deaths there were therefore another 18% which one might regard as deaths which are a by-product of the use of force by police during police work and the related fact that police are often in possession of firearms not only when on but also when off duty. These include:

- A category of deaths referred to by the ICD variously as ‘other intentional shootings’ or ‘domestic violence related and off-duty deaths’ which account for 10% of shooting related deaths. It should be noted here that police who are off-duty and encounter a crime in progress are expected to ‘put themselves on duty’ and intervene in the crime (this issue is discussed in more detail later).<sup>18</sup> However deaths which occur in these types of situations are presumably classified by the ICD under one of the first four categories (assuming that they don’t involve the shooting of bystanders). However it would appear that some of the deaths in this category (unfortunately ICD reports do not provide clarity on these

members (conversation with Gareth Newham, 10 October 2008). Data on personnel numbers for the Durban City police could not be obtained for this report.

<sup>18</sup> See section on ‘Killings by and of off-duty police officers’.

questions) might include deaths which occur when a member who is off-duty is attacked (for instance in a robbery) and uses lethal force to defend him or herself. It would appear however that the major contributor to deaths in this category are arguments or disputes between people of which a significant number are related to conflict between two people who are or have been involved in an intimate relationship. A 2009 report produced by the ICD research unit for instance indicates that in 2006-07 the ICD recorded 24 femicides by male SAPS members accounting for 40% of the 60 deaths in this category in that year.<sup>19</sup> It may be assumed that, in addition to femicides, deaths in this category also include other killings related to arguments or other interpersonal conflict. These are likely to include a number which whilst they are not femicides also emerge from intimate relationships including the killing of rivals in 'love triangles' and potentially the killing by female SAPS members of male intimate partners.<sup>20</sup> It may be noted that all of these killings cannot be presumed necessarily to be unlawful. Some might be lawful killings in self defence by police officers who are the target of an attempt on one's life by an intimate partner, a jealous rival or another person whom one is involved in a dispute with. The two people involved in the dispute may both be police officers and therefore victims of these killings sometimes are also police.

- A category of deaths classified by the ICD as 'negligent handling of a firearm' which account for 5 % of shooting related deaths. These may be understood as shooting accidents of one kind or another which potentially may be prosecuted as cases of culpable homicide where negligence appears to be provable. Again the victims might include SAPS members, the family or friends of SAPS members, or other people.
- A category of deaths which is classified by the ICD as 'innocent bystander' which presumably involves shooting incidents which mostly occur in the context of incidents which fall under the first four 'crime related' categories, where a person who is not a suspect is killed by the police.

It may be reasonable to add to the category of 'innocent bystanders' a number of the people who were killed in vehicle accidents involving police. As reflected in Table 1, ICD statistics indicate that 188 people have been killed in vehicle accidents involving police in the last four years. A substantial number of the latter deaths probably take place during police pursuits of suspects who are trying to evade arrest. As with shooting situations, police involved in vehicle pursuits may not necessarily take sufficient care to ensure that pedestrians or other civilians in vehicles are not harmed not only by their own driving but by that of the person whom they are pursuing. 'If the suspect becomes reckless or refuses to stop, it is the officer and the officer's supervisor who must determine the value of continuing the pursuit, and the risk of the pursuit to the officer, innocent bystanders, passengers and pedestrians'.<sup>21</sup> A pursued suspect who is driving dangerously is more likely to stop doing so if police terminate the pursuit.

It should be emphasized then that a certain amount of guesswork is involved in the interpretation of these statistics. This is reflected partly in the various assumptions made in the previous

<sup>19</sup> ICD Proactive Research Unit: 2009.4. The report also indicates that 11 such deaths were recorded in 2004-05 and 14 such deaths were recorded in 2005-06. Note that the latter figure is greater than the 9 deaths recorded by the ICD in the 'other intentional' category in that year, an inconsistency which is not acknowledged or explained in the report.

<sup>20</sup> See for instance the case of the female constable alleged to have killed her constable boyfriend and a SAPS captain in report 21 of Annexure A. Current evidence does not point to intimate partner killings in homosexual relationships being a particularly prominent contributor to the homicide rate in South Africa.

<sup>21</sup> Alpert, 1997: 549.

paragraph. A further example would be the case of civilians who are shot by police in situations where they are mistakenly identified as suspects. An apparent example of this kind of shooting was the killing of a young woman Olga Kekana in October 2009 (report 11 in Annexure A) when the car she was travelling in was apparently wrongly identified by police as a vehicle which had just been stolen in a hijacking incident.<sup>22</sup> It is not clear for instance whether this would be classified as a shooting in one of the first four categories or for instance as the killing of a 'bystander'. In the Kekana case the latter category would arguably be inappropriate as the victim was not a 'bystander' who was killed while police were shooting at a suspect but, it appears, was believed to be the legitimate target of a police shooting due to the fact that she was travelling in a car which they at the time (wrongly) believed had been hijacked.

**FIGURE 2: Deaths as a result of police action in each province, April 1997 – March 2004**

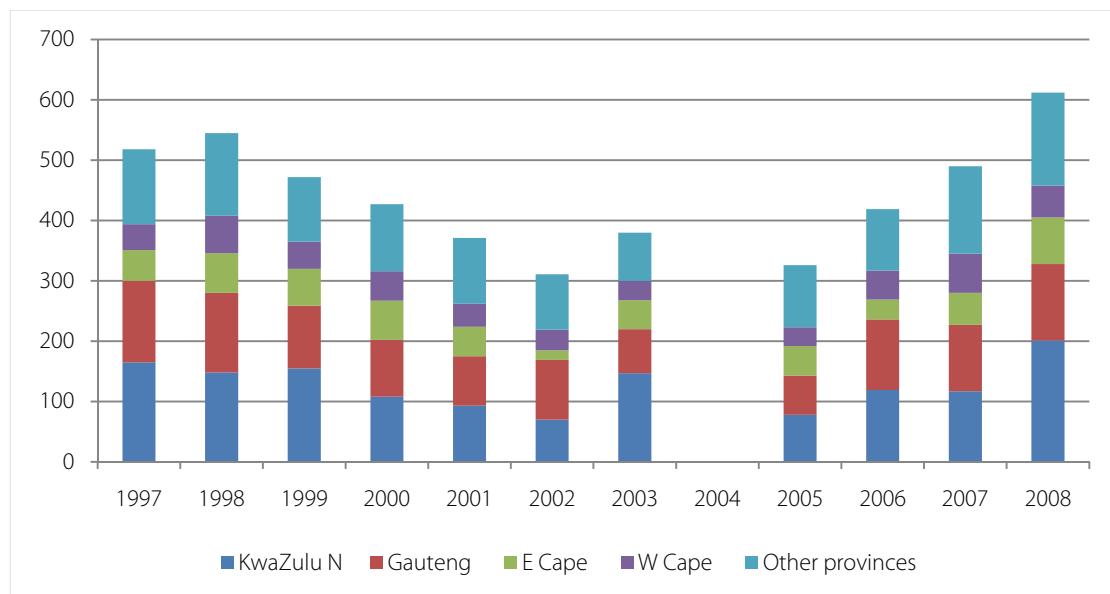


Figure 2 provides statistics from the ICD on the provincial distribution of deaths as a result of police action for all years since the ICD was established in 1997 with the focus on the four provinces recording the highest number of these deaths (no statistics on the provincial breakdown of these deaths were provided in 2004-05). Gauteng and KwaZulu-Natal are the two most populous provinces in South Africa which between them account for roughly 40% of South Africa's population. Partly related to this they are the provinces which record the highest number of deaths as a result of police action accounting for 52% of these deaths during the eleven years for which data is provided in this Table.

<sup>22</sup> The case of Olga Kekana also brings to the fore the question of the gender profile of victims of deaths as a result of police action. Data from the two most recent ICD annual reports on the gender of victims relative to the 'circumstances' of death (as discussed in relation to Figure 1). indicates that, in the last two years, women have accounted for between 8 and 11 percent of victims of deaths as a result of police action, and, in both years, 8% of victims of police shootings. A very large proportion of shootings in which women are victims (76% in 2007-08; 50% in 2008-09) are in the 'other off duty/domestic violence' category. A substantial number of victims of police vehicle accidents (in the region of 33%) are also women. Nevertheless male victims make up the majority of victims in all of the 'circumstance' categories accounting for 98% of victims in the four 'crime related' categories of shootings which allegedly involve the shooting of criminal suspects or people involved in violence against police.

Particularly noticeable is the very high proportion of deaths occurring in KwaZulu-Natal with this province accounting for 29% of deaths as a result of police action in South Africa compared to the 23% recorded in Gauteng notwithstanding the fact that both provinces are roughly commensurate in terms of their share of the national population. Also noticeable is the dramatic increase in number of deaths recorded in KwaZulu-Natal in 2008-09 with these having increased by 71% on the previous year.

**TABLE 2: Circumstances of death in Gauteng and KwaZulu-Natal**

	Gauteng						KwaZulu-Natal					
	2005-06	2006-07	2007-08	2008-09	Total	%	2005-06	2006-07	2007-08	2008-09	Total	%
Suspect victims	54	92	87	113	<b>346</b>	<b>83</b>	60	90	104	173	<b>427</b>	<b>83</b>
Bystander victims	1	2	2	6	<b>11</b>	<b>3</b>	1	1	1	12	<b>15</b>	<b>3</b>
Other off-duty	2	18	16	2	<b>38</b>	<b>9</b>	0	13	2	9	<b>24</b>	<b>5</b>
Negligent handling of a firearm	4	1	1	3	<b>9</b>	<b>2</b>	14	11	0	3	<b>28</b>	<b>5</b>
<b>Sub-total: shooting deaths</b>	<b>61</b>	<b>113</b>	<b>106</b>	<b>124</b>	<b>404</b>	<b>96</b>	<b>75</b>	<b>115</b>	<b>107</b>	<b>197</b>	<b>494</b>	<b>96</b>
Vehicle accident	3	4	4	3	<b>14</b>	<b>3</b>	3	4	10	4	<b>21</b>	<b>4</b>
Assault	1	0	0	0	<b>1</b>	<b>0</b>	0	0	0	0	<b>0</b>	<b>0</b>
<b>TOTAL</b>	<b>65</b>	<b>117</b>	<b>110</b>	<b>127</b>	<b>419</b>	<b>100</b>	<b>78</b>	<b>119</b>	<b>117</b>	<b>201</b>	<b>515</b>	<b>100</b>

Table 2 records the circumstances of deaths in Gauteng and KwaZulu-Natal as reported in the four most recent ICD annual reports. Interestingly in this period both provinces recorded the same proportion of deaths in the categories of 'suspect victims' (83%). Shooting deaths in both provinces also accounted for 96% of all deaths as a result of police action, related to which these two provinces accounted for 55% of all shooting related deaths as a result of police action during this four year period.<sup>23</sup>

As reflected in Table 2 the dramatic increase in deaths as a result of police action in KwaZulu-Natal in 2008-09:

- was exclusively the product of an increase in shootings with these having in fact increased by 84 % (from 107 to 197) in the previous year.

<sup>23</sup> In the other 7 provinces shootings accounted for a substantially smaller 82% (746 out of 912) of deaths as a result of police action with a far more substantial contribution being made by vehicle accidents.

- accounts for 61% (90 out of 148) of the increase of shooting deaths recorded nationally in 2008-09 (discussed in relation to Table 1 above).

By contrast in Gauteng shooting deaths increased by 16% (from 106 to 124) on the previous year, accounting for 12% of the increase of 148. The 197 shooting deaths in KwaZulu-Natal were 35% (34.7%) of all shooting deaths in 2008-09 while the 12 killings of bystanders were 38% (37.5%) of killings of bystanders in that year. The 124 shooting deaths in Gauteng were 22% of all shooting deaths, while the 6 recorded cases were 19% of deaths of bystanders in the 2008-09 year. Between them KwaZulu-Natal and Gauteng accounted for 56% of the deaths of bystanders in 2008-09.

**FIGURE 3: Rank of 'subject officers' connected to deaths as a result of police action, 2001/02–2008/09<sup>24</sup> (%)**

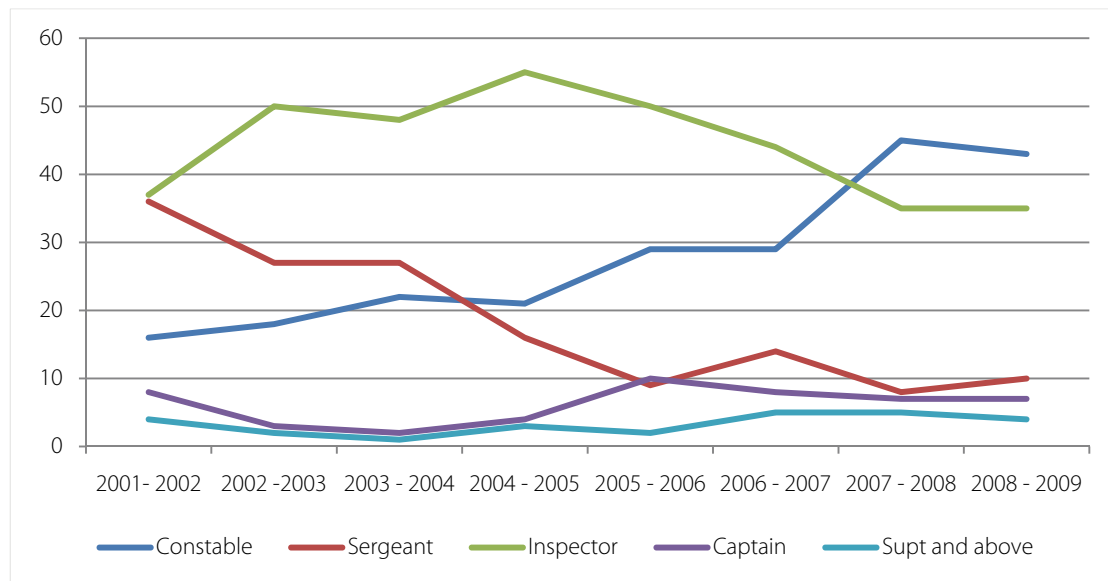


Figure 3 uses data from ICD reports for the eight most recent years dealing with the ranks of police officers linked to deaths as a result of police action. The ranks of Captain and 'Superintendent and above' have consistently made a relatively small contribution to the total number of deaths as a result of police action. Sergeants initially accounted for a substantial proportion of deaths (36%) but thereafter their contribution declined fairly dramatically. Up until 2006-07 ICD data indicate that it was the rank of Inspector which made the greatest contribution to the overall number of deaths after which there was a sudden increase in the contribution of the Constable rank, so that in the last two years it has been police officers at this rank who have made the greatest contribution to the total number of deaths.

What this change would have involved in terms of raw figures was something like the following. After reaching a high point of roughly 200 cases in 2004-05 the number of Inspectors linked to deaths as a result of police action declined slightly in 2005-06 (163), 2006-07 (184) and 2007-08

<sup>24</sup> All columns do not necessarily add up to exactly 100% due to rounding. Figures are adapted from figures provided in the respective ICD reports. Figures for 'Not applicable' which are included in ICD reports in some years are excluded as these relate to deaths in custody and not deaths as a result of police action. In 2004/05 a figure is also provided for 'unknown' and this has been excluded from the calculation of percentages. In 2002/03 and 2003/04 the figures apply specifically to shootings and apparently exclude other deaths as a result of police action. The majority of 'other' deaths are related to vehicle accidents.

(169). However associated with the increase in 2008-09, this number would have increased to roughly 215. As compared with 2007-08 this would have been an increase of roughly 46 cases. The trend in relation to the involvement of Constables has been dramatically different. Constables contributed to a relatively small proportion of deaths in 2001-02 (58) and this number would have increased slightly by 2004-05 to roughly 75. After this the number of deaths linked to constables started to increase dramatically so that the total number recorded in 2007-08 (220) was three times greater than the number recorded three years earlier in 2004-05. In 2008-09 Constables would have accounted for roughly 263 deaths, an increase of 43 on the 220 deaths to which they were linked in the previous year. This suggests that police at the rank of Inspector and Constable made a roughly equivalent contribution to the dramatic increase in deaths recorded in 2008-09.

One of the factors which helps one to make sense of the increasing role of Constables in deaths as a result of police action would be the *en masse* recruitment policies implemented by the SAPS since roughly 2003. In the six year period from April 2003 to March 2009 the SAPS has recruited a total of 78 489 new members of staff, though as a result of attrition (retirements, deaths, dismissals etc) the total increase in the number of SAPS personnel in this period has been 51 185. As a result the lower ranks of the SAPS have swelled considerably during this period with the number of non-commissioned officers having increased by 36 000 from 87 643 to 123 643, an increase of 41%. These ranks include police members at the rank of Inspector, Sergeant and Constable, with most of the increase presumably reflected at the Constable level at which new recruits start their policing careers. Processes of *en masse* recruitment may not only contribute to the greater involvement of lower ranking members in shooting incidents because of the greater number of personnel at this level. They are also likely to be associated with a deterioration in the rigour of selection procedures and the quality of training programmes as well as declining levels of management control particularly in a police agency such as the SAPS where systems of management and supervision are already highly uneven.<sup>25</sup>

In summary then, according to ICD statistics, deaths as a result of shootings by the police reached their lowest levels since 1997-08 in 2005-06. In the three years since then there has been a dramatic rise in the number of these deaths with the total number having increased by over 100% (102%) from 281 to 568, the highest figure recorded by the ICD since it started operating. The province which has made the greatest contribution to the increase of shooting deaths in this period has been KwaZulu-Natal in which deaths have increased by 162% (from 75 to 197) in this period. KwaZulu-Natal is followed by Gauteng which has recorded an increase of 103% (61 to 124).<sup>26</sup> The increase in police shooting fatalities has been most pronounced in the 2008-09 year with 51% of the increase since 2005-06 (148 out of 287) having taken place in this year alone. KwaZulu-Natal accounted for 61% of the increase (90 out of 148) in this year. This included 12 of the 32 (38%) of the deaths of innocent bystanders. A major contributor to this increase has been the increasing role of Constables in fatal shootings with Constables now contributing to roughly three times as many deaths as they did in 2005-06 and in the last two years accounting for nearly half (45% and 43%) of all deaths as a result of police action.

<sup>25</sup> Bruce, Newham and Masuku, 2007.

<sup>26</sup> The province recording the third greatest increase was the Eastern Cape which recorded an increase of 76% from 42 to 74.

**FIGURE 4: Rate of fatal shootings by South African Police Service relative to selected indicators<sup>27</sup>**

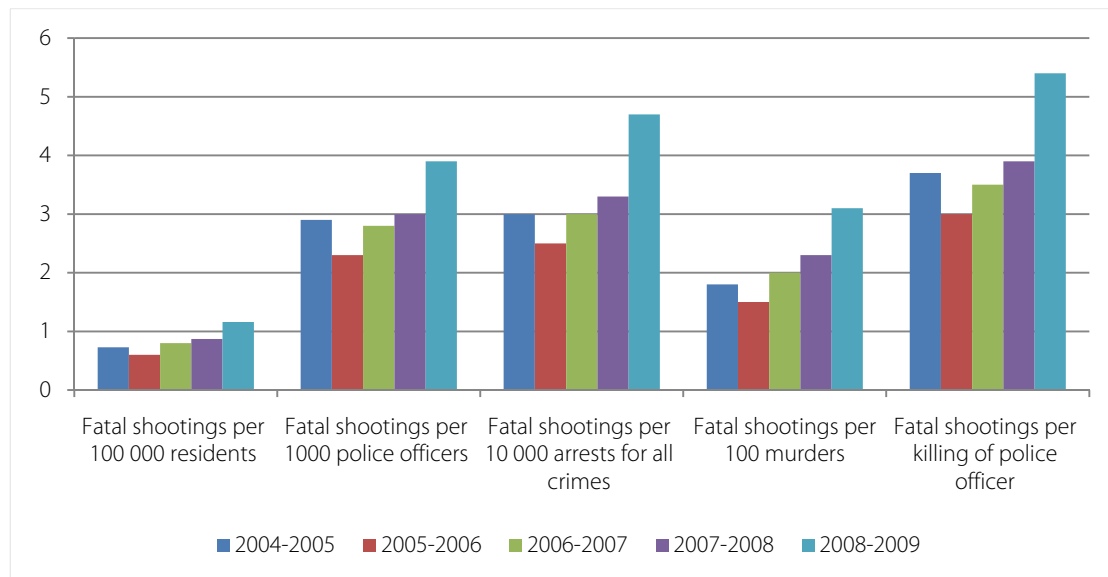


Figure 4 compares figures on fatal shootings by members of the SAPS<sup>28</sup> to a number of other figures which often have some correlation with statistics on fatal shootings. As is apparent from this Figure, subsequent to 2005-06, fatal shootings have increased at a rate much greater than rates of population growth and the increase in the number of police officers. The trend in fatal shootings also appears to be independent of trends in arrests the overall number of which has fluctuated during this period. Fatal shootings have also increased relative to the total number of murders which have remained relatively stable during this period. Though there was a significant increase in the number of killings of police between 2005-06 and 2006-07, the numbers of these killings have remained fairly stable in the two subsequent years while fatal shootings by police have increased in each year relative to the number of killings of police. This therefore suggests that these increases are not merely a product of changing rates of violent crime or violence against police and are driven by other factors.

Table 3 provides figures on the correspondence between population numbers, murders and killings of police in each province and fatal shootings by police in 2008-09. The exceptionally high number of killings by police in KwaZulu-Natal emerges from this table as exceptional relative to population figures but not quite so exceptional relative to rates of murder (in relation to which Limpopo and Mpumalanga record higher ratios), and also relative to killings of police officers (in relation to which North West and Mpumalanga record higher ratios and the Eastern Cape records a ratio only slightly lower than that in KwaZulu-Natal).

<sup>27</sup> Note that the figures on fatal shootings for each year may include a number of shooting deaths at the hands of members of metropolitan police services. ICD reports only provide an overall figure for 'deaths as a result of police action' for metro police services and it is not clear what proportion of these are shooting deaths as they may also include deaths in vehicle accidents. In so far as they may be shooting deaths they would have the greatest impact in 2007-08 (when 13 deaths at the hands of metropolitan police were recorded) and the least impact in 2008-09 (when 4 such deaths were recorded).

<sup>28</sup> See the points made in the previous footnote.

**TABLE 3: Rate of fatal shootings by South African Police Service in 2008–09 relative to provincial indicators**

	No of fatal shootings by police	Population	Fatal shootings per 100 000 residents	Murders	Fatal shootings per 100 murders	Killings of SAPS members <sup>29</sup>	Fatal shootings per killing of police officer
Gauteng	124	10 450 000	1.19	3884	3.1	21	5.9
Limpopo	37	5 270 000	0.70	751	4.9	7	5.2
North West	22	3 430 000	0.64	937	2.3	3	7.3
Mpumulanga	44	3 590 000	1.22	902	4.9	6	7.3
KwaZulu-Natal	197	10 110 000	1.95	4747	4.1	28	7.0
Free State	29	2 880 000	1.00	910	3.2	6	4.8
E Cape	74	6 580 000	1.12	3260	2.3	11	6.7
W Cape	38	5 260 000	0.72	2346	1.6	11	3.5
N Cape	3	1 130 000	0.27	411	0.7	2	1.5
<b>Total</b>	<b>568</b>	<b>48 687 000</b>	<b>1.16</b>	<b>18148</b>	<b>3.1</b>	<b>95</b>	<b>6.0</b>

Is it possible then that high levels of police violence in KwaZulu-Natal should be understood as primarily a response to high levels of violence in the province (manifested in the high homicide rate) and high levels of killings of police? These factors may be part of the answer. However it should be noted that looked at in per capita terms the murder rate in KwaZulu-Natal has never been the highest in South Africa. During the five years from 2003-04 to 2007-08 the Western Cape was the province recording the highest murder rates with KwaZulu-Natal sometimes recording the second highest, and sometimes the third after the Eastern Cape. In 2008-09 the Eastern Cape in fact became the province recording the highest per-capita murder rate, with KwaZulu-Natal recording the second highest rates, and the Western Cape the third highest, according to SAPS calculations. But overall levels of violence as reflected in the murder rate do not necessarily translate directly into violence against the police. The murder rate is largely driven by violence related to arguments often between people who are known to each other. These violent situations may not translate into high levels of fatal violence against the police, though police interventions in these situations are not without their risks.

It might be expected that rates of aggravated (armed) robbery, particularly in so far as these are committed with firearms, are more strongly correlated with violence against the police, as police attempts to intervene in robberies in progress or arrest armed robbers, are sometimes extremely hazardous if press reports are anything to go by. For instance Gauteng, though consistently recording lower levels of murder than KwaZulu-Natal, has consistently recorded a very high proportion of cases of armed robbery, and consistent with this has in most recent year (all years since 2003-04 except for 2004-05 and 2008-09) recorded higher levels of killings of police than KwaZulu-Natal. KwaZulu-Natal therefore does not consistently record higher levels of violence

<sup>29</sup> Note that the SAPS data on killings of police also contains a 10<sup>th</sup> row in the 2008-09 year for 'Head Office' relative to which 10 deaths are recorded making up the 2008-09 total of 105 deaths. It would be helpful if more explanation was given for this though some of the deaths here might be those of members of units such as the National Intervention Unit or Special Task Force.

against police than does Gauteng. It does however consistently record higher levels of violence by police as reflected in statistics on deaths as a result of police action which have been higher than those recorded in Gauteng in all years since the ICD was established except for 2002-03 (see Figure 2). KwaZulu-Natal therefore records high levels of violence by police even in years when violence against police is relatively low (by South African standards) It would therefore appear that high levels of police violence in KwaZulu-Natal are not merely a response to the high levels of violence in the environment which they work in. An alternative explanation may therefore be that KwaZulu-Natal may be characterised by a culture of violence, involving the normative acceptance of violence, in a way which is to some degree more accentuated than many other parts of South Africa. This translates not only into high levels of murder but also into high levels of violence by police, suggesting that in KwaZulu-Natal this normative acceptance of violence also intrudes into and permeates official culture.

### 3. Review of selected press reports on the use of lethal force

Annexure A carries summaries of 25 press reports from the 15 month period February 2009 to April 2010.<sup>30</sup> It should be emphasised that this is not a comprehensive collection of press articles relating to incidents involving police officers and the use of firearms by them or against them during this period. They are merely articles which have been collected by the author of this paper as being of interest in relation to the issue of the use of lethal force partly as they appear to illustrate problematic aspects thereof.<sup>31</sup> In particular it should be noted here that the articles exclude all articles relating to the use of force by the police against crowds of people involved in demonstrations of which there were a large number during this period. Most of the articles in Annexure A deal with incidents which included at least one fatality. Though there have been allegations of police (including the SAPS and municipal police) using unnecessary and excessive force in response to demonstrations this use of force has at the most been connected to fatalities in isolated instances during the time period covered by these reports.<sup>32</sup>

Though this is not a comprehensive collection of press articles on the use of lethal force from this period, it nevertheless is of interest as it paints a picture of the types of incidents which tend to attract press coverage including incidents which receive front page coverage in newspapers. The press reports which are reflected in Annexure A therefore partly are of interest in terms of what they tell us about what makes incidents of the use of force 'newsworthy'.<sup>33</sup>

The most obvious point here is that in so far as press coverage is given to incidents involving the use of lethal force this tends to deal with incidents in which there are fatalities (though it may be noted that the articles represented in Annexure A do not have a good representation of articles dealing with non-fatal uses of lethal force by police such as where suspects were arrested by police after shootouts). The degree to which this misrepresents the profile of incidents in which firearms are used by police is suggested by a report dealing with police shooting incident data in three South African provinces during the years 1996-1998. This indicated that incidents in which people were killed accounted for 6.5% of the total number of shooting incidents. Incidents in which people

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<sup>30</sup> Note that the annexure in fact covers 23 reports. However two of these have been treated as separate reports (see 6 and 7, and 24 and 25).

<sup>31</sup> They therefore also partly reflect the coverage given to the issue by newspapers which the author has most exposure to.

<sup>32</sup> A fellow researcher reported seeing a story to the effect that one person had been killed by police in a demonstration some time during April 2010 though it has not been possible to clarify the details of this. Though deaths as a result of police action have been recorded, the policing of demonstrations in South Africa in the post-apartheid period has largely been carried out without fatalities. See Bruce, Newham and Masuku, 2007:31-32.

<sup>33</sup> A number of the articles were front page articles or otherwise prominently displayed in the newspapers which carried them indicating that they were regarded as being particularly newsworthy. At least the following were front page press reports: 3, 6, 11, 17, 19, 20. Report 8 was carried on page 2 of the newspaper.

were wounded accounted for 18% of incidents and incidents in which someone was arrested accounted for 47% of shooting incidents. No-one was killed or wounded in 76% of shooting incidents, and no-one killed, wounded or arrested in 43% of shooting incidents.<sup>34</sup>

But even amongst fatal incidents it also appears likely that the vast majority of incidents in which individual (sometimes also two or three) suspects are killed do not obtain much in the way of media attention. Though the articles in Annexure A are not fully representative of press coverage of killings by police it is unlikely that most of the incidents which accounted for the 568 killings by police in 2008-2009 for instance, received press coverage. But killings by police are not unusual in this respect. The vast majority of deaths as a result of violence which take place in South Africa in any year do not receive media coverage.

Press reports nevertheless provide more 'qualitative' colour and detail to the statistics provided by the ICD on deaths as a result of police action as well as highlight various aspects of the phenomenon which are not illustrated by ICD statistics. Thus for instance, though it may be assumed that most fatal incidents involve the killing of a single suspect there are also incidents in which multiple suspects are killed. Of the 25 articles 15 deal with incidents which might be understood as shootings of supposed suspects in the course of police duties. In these reports a total of 39 'suspects' were killed related to the fact that 5 of the reports (2, 3, 8, 18, 23) deal with incidents in which multiple suspects were killed. In the case of report 2 this is a series of 6 apparently related incidents in which a police officer and eight other people were killed. The highest number of fatalities in a single incident is recorded in report 18 which deals with an incident in Polokwane in November 2009 where 7 suspects were killed.<sup>35</sup>

Where individual suspects were killed this was rarely in itself sufficient justification for the incident to receive press coverage and appears to have been primarily related to additional details of the incident which, it may be presumed, were seen to make the report newsworthy. In two of the reports (5 and 6) the coverage was related to the fact that the suspect had killed one or more police officers, and/or that police had also been killed in that incident or in other incidents on that day. One of these reports (6) also involved the death of a bystander though it should be emphasised that it is not clear from this report whether the fatal bullet was fired by police or by their assailants. Three other reports (4, 10 and 13) deal with incidents in which police were killed. Two reports (7 and 19) dealing with incidents where individual suspects were killed include additional details which might have been regarded as making the events described particularly interesting as 'crime stories'.

Though it must be constantly borne in mind that they should not be seen to provide a 'representative sample' press reports can be seen as a source of information which complements crime statistics and may therefore be drawn on to enrich our understanding of issues to do with the use of lethal force. However in doing so it should be emphasised that *the veracity of the information in these press reports cannot be taken for granted*. In many of the cases the basic outline of the incidents which is reported has not been disputed though where conflicting versions of events are provided these are reported in the summaries in Annexure A. However, related to the fact that the cases discussed are virtually all cases which have taken place in the recent past only one of the cases (that discussed in report 1) have been the subject of a court hearing or judgment. It is possible that

<sup>34</sup> Bruce & O'Malley, 2001: pp 26-27.

<sup>35</sup> The incident in which the largest number of people killed by police in South Africa in recent years was an incident in Hammanskraal north of Pretoria on December 11 2007 in which 11 cash-in transit robbers described as 'heavily armed' were killed by police (Zero Tolerance – Police kill 11 heist robbers, Sowetan, 12 December 2007).

through such a process entirely different perspectives would emerge in relation to some of the cases. In so far as the cases purport to document apparently unlawful or inappropriate uses of force, it should therefore be acknowledged that the press reports amount to allegations which cannot be taken to have been proven. The press reports are discussed here on the basis of the underlying issues which they point to rather than on the assumption that the way in it has been reported in the press represents the 'final truth' of any individual report.

In the following three sections the press reports in Annexure A are drawn on to inform discussion of three specific issues which are of concern in relation to the use of force by the SAPS and other police in South Africa. These are:

- Unlawful killings by police in the course of police duties.
- The problem of error and of shootings which are arguably unnecessary or inappropriate from a professional policing perspective.
- Questions to do with killings by, and risks to, police officers when they are off duty.

## 4. Possible unlawful killings by police related to the performance of police duties

In addition to the apparent newsworthiness of reports of incidents in which a number of individuals are killed or wounded, or of incidents in which police officers are killed, another factor which leads to articles being regarded as newsworthy is where police shootings are of doubtful legality. Of the reports included in Annexure A the one which raises the most serious concerns in this regard, pointing to the possibility of police malfeasance in the form of a series of extra-judicial executions, is one of the stories in which a number of individuals were killed by police. The information provided in the press report summarised as report 2 in Annexure A points to the possibility of a series of deliberate and pre-planned killings by police in retribution for the killing of a senior police officer. It is of course not the job of the police to impose punishment, and the death penalty has been declared unconstitutional. But if it is true that these were extra-judicial executions it is also not known to what degree the police may, or may not, have had clear and concrete evidence linking the individuals involved to the killing of the police officer. If these were extra-judicial executions it is therefore possible that some or all of the individuals were innocent of the crime for which they may have been killed.

The prominent coverage given to some reports appears to have been related to indications that the individuals who had been killed by police had been wrongly identified as suspects (11, and 24), or wrongly identified as pointing a gun at the police officer (17). Particularly in report 11 (the killing by police of a young woman, Olga Kekana), report 17 (a three-year-old boy, Atlegang Phahlane), and in report 24 (a 15 year-old boy, Kwasi Ndlovu) the identity of the victim appears both to have contributed to the certainty amongst journalists that shooting had been in error, and amplified the newsworthiness of these stories for the press.<sup>36</sup>

The information provided in some of the press reports (reports 11 and 24) also suggests that, in some cases, police actions may have been illegal even in the absence of the apparent mistakes about the identity of the people that they were shooting at. In these cases the press reports suggest that police might have been able to arrest the individuals concerned without using lethal force but that recourse was made to the use of lethal force despite other options being reasonably available to them. If this is true the latter killings would also fall within a pattern of extra-judicial executions, though the factor of advance planning may not be present in all cases. In report 12, in addition to the indications that the people who had been the target of the shooting were innocent, there are also questions about the justification for the shooting and why they could not be apprehended without the use of lethal force, though fortunately in this case there were no fatalities.

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<sup>36</sup> Both the stories reflected in report 11 and 17 were carried as major front page stories by some newspapers.

In report 14, the press report indicates that the victim was suspected of involvement in a crime, but also suggests that the police actions may have been unjustified as the individual who was shot was relatively harmless and it appears that it would have been possible to arrest him without the use of lethal force. But even if it had not been possible to arrest him there are questions about whether there was legal justification for the use of lethal force, as he was apparently not suspected of a serious crime and, according to some of the witnesses quoted by the press, was fleeing from the police rather than violently resisting them. Report 25 is similar to this though the victim was apparently being physically restrained by the police when he was killed.<sup>37</sup> In report 22 the press coverage indicates that there are discrepancies in accounts of the shooting with some of these suggesting that police acted inappropriately. (Apparent police malfeasance of a slightly different kind is also the obvious motivation for publication of the press 'brief' dealing with the police officer alleged to have been involved in an armed robbery which is summarised in report 9.)

Alongside questions about the legality of shootings one of the issues raised by the Olga Kekana killing (report 11) concerns the level of adherence by police to legislative provisions which require that police report fatalities in shooting incidents and other deaths as a result of police action to the ICD.<sup>38</sup> The press reports suggest that, immediately following the incident, the police fled from the scene, possibly because they recognized that they had shot the wrong people. Had the driver of the vehicle not survived the shooting, and reported that it had been members of the SAPS who had killed Kekana, it appears possible that the shooting might not ever have been linked to the police, and might have been put down for instance to a 'botched hijacking'. It might therefore be reasonable to make the inference that deaths as a result of police action are likely to be reported if (i) the police involved are sure of being exonerated for any criminal liability for the death, or (ii) there are survivors or civilian witnesses who have identified the perpetrators as police officers. However beyond this point it is a matter of speculation as to whether deaths as a result of police action reported to the ICD, reflect all of (or even the vast majority of) deaths relating to the use of lethal force by police in South Africa.<sup>39</sup>

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<sup>37</sup> A particular focus of report 25 was also that a police officer was also injured by a gunshot directed at the suspect.

<sup>38</sup> In terms of Section 53(8) of the SAPS Act police are supposed to report all deaths in custody or as a result of police action to the ICD. In relation to deaths in police custody see footnote 6.

<sup>39</sup> A related issue concerns a longstanding controversy between the ICD and SAPS as to whether killings by police when off duty (unrelated to the fulfillment of police duties) constitute 'deaths as a result of police action' and whether police are obliged to report such deaths to the ICD. It may also be the case that deaths in this category are sometimes not reported to the ICD.

**TABLE 4: Criminal convictions obtained by the ICD, 2002–2009 (6 years)<sup>40</sup>**

	2002 –03	2003 –04	2005 –06	2006 –07	2007 –08	2008 –09	Total (6 years)
Murder	11	8	12	10	13	9	63
Attempted murder	1	5		2	5	2	15
Culpable homicide	11	1	4	1	3	8	28
Assault GBH	1	2	2	3	7	3	18
Common assault	1		3	1	5	2	12
Rape					3	2	5
Negligent handling of a firearm						1	1
Malicious damage to property		1					1
Crimen injuria		1					1
Armed robbery		1					1
Drunken/reckless and negligent driving			1	1			2
Perjury			1	1			2
Defeating the ends of justice			1				1
Breaking and entering			1				1
Housebreaking with intent to commit murder and assault	1						1
Corruption/Extortion				4		1	3
Aiding a prisoner to escape					1		1
Failure to Assist Complainant (Domestic Violence Act)				1			1
<b>TOTAL convictions</b>	<b>26</b>	<b>19</b>	<b>25</b>	<b>24</b>	<b>37</b>	<b>28</b>	<b>159</b>
Murder convictions as % of total	42	42	48	42	35	32	40
Culpable homicide convictions as % of total	42	5	16	4	8	29	18
Murder and culpable homicide convictions as % of total	84	47	64	46	43	61	58

Whether deaths are generally reported to the ICD may therefore be linked to the degree to which such deaths are the result of lawful police actions. Putting aside the question of deaths which may not be reported, it seems reasonable to assume that a large majority of killings by the SAPS which

<sup>40</sup> Figures are from ICD annual report for the financial year 1 April – 31 March. The table provides statistics on the main count for which a person is charged. For instance if a person is convicted of murder and attempted murder or 2 different counts of murder, this will only be recorded as a single case of murder in the above table. Note that in some cases there was also a conviction on one or more additional charges. No figures were provided for convictions in the 2004–05 ICD annual report.

are recorded in ICD statistics are related to the performance of police duties and not deliberate unlawful killings. Whilst this seems to be a reasonable assumption at the same time the degree to which recorded deaths are linked to unlawful police actions cannot be ascertained with any precision. In the six most recent years for which figures are available (see Table 4), convictions were obtained against police (all or virtually all members of the SAPS) in 63 cases of murder and 28 cases of culpable homicide, as a result of ICD investigations reflecting the fact that ICD resources are heavily focused on the investigation of deaths (including deaths as a result of police action and in custody) almost 60% of the convictions emerging from ICD investigations were convictions in cases of deaths, with two thirds of these being murder convictions and a third culpable homicide convictions.

The total number of convictions obtained for murder or culpable homicide over the six years in question represents roughly 4% (3.6%) of deaths during those six years.<sup>41</sup> But statistics on convictions cannot be taken as an accurate indicator of the overall level of unlawful killings by police. Partly related to the resource and capacity constraints which they face the ICD has not always been able to attend all death scenes and even where it attends such scenes only 'takes over' the investigation from the SAPS when there are overt reasons for suspicion. Though legal provisions require SAPS cooperation with the ICD, this does not extend to an obligation on police members who have been involved in a shooting to provide a statement to the ICD on the circumstances or justification for the use of lethal force as police are also protected by the right to remain silent.<sup>42</sup> Partly because of its dependence on the SAPS for cooperation in various forms<sup>43</sup> the ICD has to ensure that it projects itself to the SAPS as 'reasonable' constraining it against carrying out more probing investigations in some cases. This is particularly the case in relation to killings by elite units<sup>44</sup> where informal status considerations are an additional obstacle to the ICD. Where ICD investigators do attend the scenes at which shootings have taken place this is often after having travelled a substantial distance with the result that there is a considerable delay between the killing and the time at which the investigator gets to the scene. In practice the police also have discretion as to when exactly to call the ICD to the scene. Not only is there a factor of delay but police also in general, by virtue of their occupation, have the know-how on how to manipulate evidence in order to cover up unlawful shootings if they wish to.

In this regard the killing of Kwazi Ndlovu (case 14) raises the question of to what degree there may be a practice of depositing 'drop guns'<sup>45</sup> or 'throw-down weapons'<sup>46</sup> at scenes at which people have been shot in order to back up police assertions that they were forced to use lethal force in self-defence. Police in many countries have been known to resort to the fabrication of evidence by planting such weapons on or near the bodies of those shot by police to justify the recourse to lethal

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<sup>41</sup> This is 91 as a percentage of 2538. Note that cases take anything between 1 and 6 years to finalise. Most convictions are for cases which occurred more than 2 years previously. This is therefore not a precise figure for ICD conviction rates. To calculate these one would need to take all cases recorded in a single year and establish which ones of these cases resulted in convictions. It is possible that this method would generate a rate which is a few percentage points higher than this statistic.

<sup>42</sup> Bruce, Savage and De Waal, 2000.

<sup>43</sup> The actual 'crime scene' investigation at the scene of a death is done by a crime scene expert from the Local Criminal Records Centre (LCRC) and the ICD also mostly uses SAPS ballistics experts, on occasions where such experts are called to the scene and send evidence to SAPS labs for ballistic and other forensic tests. Police also carry out arrests for the ICD in some cases.

<sup>44</sup> Such as the members of the National Intervention Unit involved in the killing of Bongani Mkhize referred to in report 2 or the Special Task Force which was apparently involved, with the , Hi-tech Projects Unit and the Pretoria Bank Robbery Reaction Unit, in the killing of six gunmen described in report 8.

<sup>45</sup> These are weapons carried by an officer and used to frame a suspect for assaulting the officer with a deadly weapon. Geller and Scott, 1992:193.

<sup>46</sup> Waddington, 1999:161.

force.<sup>47</sup> The report on the Ndlovu killing suggests that police prevented family members from being able to see the body of their son, and this raises questions about whether this might have been done in order to enable them to 'doctor' the scene. When his mother, who had been made to wait outside, finally got to see the body there was allegedly a firearm lying next to it. Ndlovu's father and his friends<sup>48</sup> were adamant that Ndlovu did not own a gun.

In addition to planting weapons at the scene of an incident police who have been present may collude in ensuring that all give a uniform account of the shooting incident in which the shooting is portrayed as legally justified.<sup>49</sup> These factors create impediments not only to the investigation but also the prosecution of cases where there is evidence of police malfeasance. Acquittals are of course a standard feature of the criminal justice process, due to the fact that the standard of proof of 'beyond a reasonable doubt' is difficult to meet. Some of those who are acquitted might be innocent but in other cases it may merely be that the prosecution fails to adduce sufficient and relevant evidence to secure a conviction. In the three years 2002-03, 2003-04 and 2005-06 during which ICD cases resulted in 31 murder and 16 culpable homicide convictions, courts also reached a not-guilty verdict in 15 cases of murder and one of culpable homicide which had been investigated by the ICD. In 2008-09, a year in which cases investigated by the ICD resulted in nine convictions for murder and eight for culpable homicide, courts reached a not-guilty verdict in 12 cases of murder.<sup>50</sup> A further limitation on the ability of a body such as the ICD to achieve prosecutions against police officials implicated in acts of criminality is that prosecutors generally work quite closely with police members, particularly those involved in special units, and, related to this, may be inclined to soft-peddle prosecutions against some SAPS members.<sup>51</sup>

As yet there has been no full evaluation of ICD investigative systems and it is not clear how these perform. Nevertheless it is certainly true that some of the cases in which the ICD manages to achieve convictions relate to wrongful killings which take place in the course of police duties. For instance the ICD 2007-08 report provides details of a case involving SAPS members from 'Pomeroy and Public Order Policing from Ulundi' who

were conducting raids for illegal firearms at Pomeroy. Upon arriving at a certain homestead, they knocked at a hut where after the deceased came out running. One of the members allegedly fired a shot at the fleeing suspect thus fatally wounding him. The deceased was unarmed and no firearm was found in the whole homestead. After investigation the ICD recommended that the member be charged with murder.<sup>52</sup>

In the ICD 2008-09 report the data on convictions indicates that one of the convictions obtained was in this case and that the police officer involved was sentenced to 6 years' imprisonment

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<sup>47</sup> Ibid: 161-162.

<sup>48</sup> Ndlovu never had a gun, say friends. IOL, 6 April 2010.

<sup>49</sup> Several ICD investigators whom the author has spoken to have indicated that they believe that these practices including deliberate delay in the reporting of shooting incidents, planting weapons at locations where people have been killed by police, and the 'homogenisation' of statements by those police who were present are not uncommon.

<sup>50</sup> In 2006-07 and 2007-08 no data was provided on acquittals in ICD annual reports.

<sup>51</sup> In the conversations referred to in footnote 49 ICD investigators also made reference to this being a persistent problem. Some prosecutors will take steps to ensure that the prosecution is carried out impartially by for instance referring the case to another court where they have an established relationship with police who have been charged. However in other cases, particularly those involving specialised units, the responsible members of the National Prosecuting Authority will for instance suppress the case by avoiding making a decision on whether to proceed with a prosecution once the docket has been submitted to them.

<sup>52</sup> ICD, 2008:32.

suspended for 5 years.<sup>53</sup> However it would seem that a significant proportion of the convictions which the ICD obtains for cases of the use of lethal force relate to the category of killings by police classified by the ICD as 'domestic violence and other off-duty killings' which involve killings unrelated to the performance of police duties.<sup>54</sup> In these cases the question of whether or not police have acted wrongfully is usually much easier to answer making these cases altogether more straightforward to investigate. They often involve police acting individually and there is less likely to be collusion in covering them up and obstructing the ICD investigation. Often there are witnesses to these types of cases who are willing to come forward and testify in court.

On the other hand, partly for the reasons outlined, cases of killings by police which take place in the line of duty are in general far more difficult to investigate. In so far as there are witnesses these are often police officers who are reluctant to testify against colleagues, associates of the deceased who, linked to the fact that they are part of the underclass, are unlikely to be regarded as credible witnesses, or other witnesses who are intimidated against giving evidence against police. In so far as there may be a systematic problem of unlawful or unjustified killings by police related to the performance of their duties therefore, there are substantial constraints on the ICD in being able to investigate them.

It is apparent that press coverage of cases where innocent victims have apparently been killed by the police is often premised on specific aspects of the identity of the victims (their age or sex) which creates the confidence on the part of news-agencies that these are indeed innocent victims. The age or sex of the victim also motivates for the stories to be given prominent coverage due to the potential that these killings will provoke anger and public sympathy (and therefore contribute to creating the interest in these stories which sells newspapers). But while in these cases the identity of the victim serves as proof that the person is indeed an innocent victim, most people who are killed by police are young black men. Where there is a presumption in favour of believing police assertions that these were people killed whilst in the process of attacking police or were criminals linked to acts of serious violence. Stories which apparently indicate that there have been incidents where women or children have been killed in error by police also suggest the probability that there are a significant number of other killings by SAPS members in the line of duty that are also related to an element of error. Such killings on the basis of 'mistaken identity' would not necessarily be recognised as such by ICD investigations.

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<sup>53</sup> ICD, 2009: 88.

<sup>54</sup> It is difficult and perhaps not possible to clarify the question of what type of cases the ICD usually achieves convictions in using data provided in ICD annual reports. Each year a number of cases are profiled under the report of the investigations programme. Even if identifying information such as dates or case numbers is provided it may not be possible to link these cases to data on convictions or acquittals provided in subsequent reports as the latter cases are often different from those profiled.

## 5. Understandable error or unnecessary force?

Even though it appears that error also played a role in some of the cases discussed above (see discussion of reports 11 and 24), these cases are therefore further clouded by the possibility that they also may have involved deliberate use of excessive lethal force by police. On the other hand in the case of Atlegang Phalane (report 17) it appears possible that the death might have been the result of error in the absence of a deliberate intention to violate the law. In this case it appears possible that the police officer who shot the young child may have wrongly but genuinely believed that his own life was in danger.

Another case of apparent 'innocent error' which received prominent media attention was a case which took place late in August 2008<sup>55</sup> in Alberton where police responding to a report of a crime in progress opened fire on a vehicle after it had reversed at speed out of the driveway of the house at which the crime had been reported. In so doing they seriously injured the husband and wife whose home it was, who had been returning from a holiday and had reversed out of the driveway after coming under fire from robbers inside their property.<sup>56</sup> The ordinary person might imagine that, if they had been faced with an identical set of circumstances, they too might have made the same mistake. For instance the police decision to shoot at the occupants of the car was apparently motivated by the fact that they thought that they were being shot at by the car's occupants. In fact the gunfire which they heard was being directed by the robbers at the couple in the car. This incident, as with the killing of Atlegang Phalane, highlights the fact that one of the consequences of arming police with firearms is a major risk of errors of one kind or another with potentially tragic consequences.

But are errors of this kind simply an inevitable by-product of the arming of police or are there steps that can be taken to minimise them? For instance focusing on the press accounts of the killing of Atlegang Phalane it appears reasonable to raise questions about the manner in which the police officer is reported to have approached the vehicle. Is it possible that this might have enhanced the potential for violence including the possibility that he would have killed, or been killed by, the suspect, or, as is reported to have happened, killed a helpless and innocent child? One of the key insights that have emerged from research on police is the importance of the manner in which police approach potentially violent situations.

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<sup>55</sup> Annexure A uses January 2009 as a cut-off date for press reports which are included.

<sup>56</sup> 'Innocent couple shot by cops on the mend', The Star, 1 September 2008. In this case the robbers also raped the couple's daughter and assaulted their son.

A common theme in many violence-reduction and officer survival training programs is to help officers devise safe ways of approaching the scenes of possible confrontations, making maximum possible use of cover, concealment, communication skills, and other tactics. [Related to this it has been] hypothesized that reductions in violence between the police and civilians will come primarily from improvements in officers' *approaches* to (i.e. entry into) potentially violent encounters, rather than from any changes in the officers' actions during the encounter. By focusing on officer decisions made prior to arrival in the immediate presence of the subject, trainers and analysts have begun over recent years helpfully to debunk the myth of the 'split-second decision'. This myth, or as Fyfe has called it, the 'split second syndrome' holds that the only key decisions within the control of most police officers in most potentially violent confrontations will be those that can be made in an instant.<sup>57</sup>

The potential hazards for police of unnecessarily hasty approaches to potentially violent encounters include not only unnecessary killings by police but also the killings of police officials an issue highlighted in the 'Jeppestown massacre' in which four police officers and eight other people were killed in June 2006.<sup>58</sup>

Incidents of questionable police violence in South Africa may therefore not merely be a manifestation of deliberate unlawful use of violence by the police in South Africa but may also be understood as a manifestation of the problem of 'unnecessary force' defined as 'the use of force more than a highly skilled police officer would find necessary to use in that particular situation'.<sup>59</sup> Thus in relation to the apparent circumstances of the killing of Atlegang Phalane the question which presents itself is whether a more experienced or better trained police officer might have dealt with the incident differently such as by approaching the car in which the child was seated in a different way with a view not only to ensuring his own safety but also that he was able to engage with the occupants of the car without precipitating a situation which required the use of force. The likelihood of incidents of this kind has probably been exacerbated in South Africa, firstly by rhetoric from leaders which may be understood to have encouraged a 'cowboy' type approach to the use of lethal force, as well as by the policy of en masse recruitment and the related fact that many of the police officers involved in the use of force are young recruits who are often 'relatively immature, inexperienced, hot-headed and/or afraid'.<sup>60</sup>

A further factor which increases the likelihood of incidents of unnecessary force is the lack of clear direction provided by the SAPS around several issues pertinent to the use of lethal force. Much more could therefore be done to ensure that the use of firearms by police in South Africa is consistent with standards of professional policing which includes avoiding ill-advised uses of lethal force. In so far as the envisaged amendment to Section 49 of the Criminal Procedure Act contributes to ensuring that the law relating to the use of lethal force is both clearer than the current legal provision and informed by appropriate principles it may be beneficial in this regard. But the legal amendment will not clarify numerous issues around which there is currently confusion

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<sup>57</sup> Geller and Toch, 1996:312. The reference to Fyfe is to the late J J Fyfe a former police officer and expert on the use of lethal force by police whose works included a 1989 article called 'The split-second syndrome and other determinants of police violence'.

<sup>58</sup> Discussed in Bruce, Newham and Masuku, 2007:167.

<sup>59</sup> Klockars, 1996:8. Note that in the work cited here this is provided as a definition of 'excessive force'.

<sup>60</sup> Bruce, 2010.

and which contribute not only to unreasonable or unjustified shootings but to placing members of the public, and police officers, in danger.

The approach followed by the SAPS to guiding members in relation to the use of force is one which almost exclusively relies on the training process. This notwithstanding the fact that, after basic training, opportunities for SAPS members to attend 'in-service' training, intended to refresh or improve their knowledge or skills, are few and far between.<sup>61</sup> An example which could usefully be followed in South Africa is one applied by many police departments in the United States which have introduced use of force policies which provide ongoing guidance to members on the standards that are expected of them in relation to their use of force.<sup>62</sup> For instance on the issue of preventing unnecessary violence the Portland Police Bureau (PPB) policy advises members that they 'should ensure their actions do not precipitate the use of deadly force by placing themselves or others in jeopardy by engaging in actions that are inconsistent with training the member has received with regard to acceptable training principles and tactics.'<sup>63</sup> Other issues which are often addressed in these kinds of policies include:

### **The safety of bystanders**

It needs to be emphasised to police officers that the interest in preventing dangerous suspects from fleeing does not take precedence over the need to protect innocent members of the public from harm. This applies not only to the use of firearms but also to the use of police vehicles to pursue fleeing suspects in vehicle chases. Examples of how these issues might be addressed in a use of force policy are for instance provided by the lethal force policy of the Metropolitan Police Department in Washington, D.C which, in addressing the circumstances in which lethal force may be used against a fleeing suspect states, inter alia, that this will only be justified if 'the lives of innocent persons will not be endangered.'<sup>64</sup> The policy of the New York Police Department (NYPD) states that 'Police officers shall not discharge their firearms when doing so shall unnecessarily endanger innocent persons.'<sup>65</sup> Many US police departments also have formal policies on vehicle pursuits which also embody similar principles.

### **Warning shots**

Statements made by the President and the Commissioner of Police during 2009 have alluded to the issue of warning shots but unfortunately have not contributed to clarity around when, if at all, they should be used. For instance in a meeting with police station commanders at Voortrekkerhoogte on 29 September last year (2009) President Zuma is reported to have said, amongst other things that: 'Police are expected to fire a warning shot first, but criminals don't operate by that rule. ...The reality is that when a criminal takes out a gun, his intention is clear - it is to kill, and he is going to shoot. ... Police must then act to protect themselves and the innocents... If a criminal pulls out a gun he has

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<sup>61</sup> Bruce, 2000: 90-91.

<sup>62</sup> Note that this paper makes use at some length of literature from the US relating to the use of lethal force and related to this draws quite extensively on US examples of efforts that have been made to control the use of lethal force. The US is one of a number of countries where, as in South Africa, there is fairly widespread ownership of firearms by members of the public and, to some degree related to this, something of a reliance on the use of lethal force in policing. However the US is distinguished from most other countries of this kind, firstly in that many policing and other agencies have pursued creative initiatives to control the use of lethal force, but also in that there is an extensive official and academic literature on the use of force and on efforts to control it.

<sup>63</sup> PARC, 2005 Appendix: 12.

<sup>64</sup> PARC, 2003:35.

<sup>65</sup> PARC, 2005 Appendix: 65

one intention ... Police have no time to fire warning shots ... If they do (fire warning shots), we will be burying a lot of police officers.<sup>66</sup>

While some appear to have seen these statements as encouraging inappropriate use of force, police are not in fact required or expected to fire warning shots in situations where their lives are in danger. The circumstances in which some might think it appropriate to fire warning shots are where it may be justified to use lethal force to prevent a person from fleeing. Here the understanding is that the warning shot should be used to discourage the individual from continuing to flee. In fact in the US many police agencies forbid the use of warning shots on the basis of the danger which these pose to members of the public. For instance the Los Angeles Police Department Policy (LAPD) on the use of lethal force states that '[g]enerally warning shots should not be fired'<sup>67</sup>, while the NYPD and PPB policies both state that police officers should not fire warning shots.<sup>68</sup>

### Verbal warnings

The issue of warning shots should not be confused with the issue of verbal warnings. In situations where police officers are legally justified in using lethal force against a fleeing suspect police officers should where possible give a verbal warning to fleeing suspects prior to the use of lethal force against them. For instance the deadly force policy of the NYPD states that '[w]here feasible, and consistent with personal safety, some warning such as 'Police – Don't Move' should be given'.<sup>69</sup> Likewise the Alaska Department of Public Safety states that '[w]here practical, a verbal warning should be given before using force, to communicate that force will be used if the officer's orders are not obeyed'.<sup>70</sup>

### Shooting at or from moving vehicles

Both the Alberton case referred to above and the press reports on the Olga Kekana case (report 11) raise questions about the advisability of shooting both at, and from, moving vehicles (note that reports 7 and 12 in Annexure A also apparently deal with a shooting by police in circumstances of this nature with the latter also dealing with a shooting which is alleged to have been unjustified). The risks here include not only the danger highlighted in these cases, that the inhabitants of the vehicle may be wholly innocent but also that, even where a vehicle is in fact occupied by people who have been linked to a serious violent offence, others in the vehicle might not in fact be willingly involved. Furthermore

Gunfire is generally ineffective as a means of bringing a vehicle to a halt. Whether shots are fired with the intention of disabling a vehicle itself, or of incapacitating the driver, the most likely outcome of such a shooting is that a vehicle will continue moving for some distance before stopping. And once shots have been fired, a vehicle is unlikely to be under control and may injure or kill people before coming to a halt. In circumstances where a vehicle is being driven at officers in order to cause them harm, the ideal response by the officers is to move out of the vehicle's path if at all possible.<sup>71</sup>

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<sup>66</sup> 'Police have no time to fire warning shots' The Star, September 30, 2009. Also on [www.iol.co.za](http://www.iol.co.za).

<sup>67</sup> PARC, 2005, Appendix: 64

<sup>68</sup> PARC, 2005 Appendix: 13 and 65.

<sup>69</sup> PARC, 2005 Appendix: 65

<sup>70</sup> PARC, 2005 Appendix: 49.

<sup>71</sup> Police Assessment Resource Centre, 2003:191-192.

Not only is shooting at a moving vehicle potentially likely to exacerbate any harm which may be caused but shooting from a moving vehicle is known to be highly inaccurate. A number of police or governmental agencies therefore also address this issue in their use of lethal force policies. For instance the New Jersey Attorney General's Use of Force Policy states that

While any discharge of a firearm entails some risk, discharging a firearm at or from a moving vehicle entails an even greater risk of death or serious injury to innocent persons. The safety of innocent people is jeopardized when a fleeing suspect is disabled and loses control of his or her vehicle. There is also a substantial risk of harm to occupants of the suspect vehicle who may not be involved, or [are] involved to a lesser extent, in the actions which necessitated the use of deadly force.

- a. Due to this greater risk, and considering that firearms are not generally effective in bringing moving vehicles to a rapid halt, officers shall not fire from a moving vehicle, or at the driver or occupant of a moving vehicle unless the officer reasonably believes:
  - (1) there exists an imminent danger of death or serious bodily harm to the officer or another person; and
  - (2) no other means are available at that time to avert or eliminate the danger.
- b. A law enforcement officer shall not fire a weapon solely to disable moving vehicles.<sup>72</sup>

#### Reporting and investigation of shooting incidents

The SAPS has a standing order (Standing Order 251) which requires members to report all shooting incidents and that these incidents be investigated by a member of the SAPS of officer rank. However this standing order has fallen into disuse or at least is inconsistently applied. The result is that, other than in the case of fatal shootings, which are supposed to be investigated by the ICD, there is frequently no oversight over the use of lethal force by police. In the US many police departments also address the issue of the investigation of shooting incidents in their lethal force policies. Related to the issue of police non-cooperation with these investigations, highlighted earlier as a problem in South Africa, some of these policies set out in detail the rights and obligations of police officers who are involved in shooting incidents. For instance the PPB directive indicates that 'involved members' must notify the supervisor attending the scene of the incident that they are an involved member but otherwise 'will be afforded all rights guaranteed' under the US and state constitutions as well as any related benefits of 'current collective bargaining agreements'. They will be provided with time to discuss the incident with their immediate supervisor, union representative and private attorney. They will also be 'asked, but not required, to voluntarily discuss the incident with Detectives in order to ensure the prompt and accurate processing of the scene'. On the other hand 'witness members' 'if requested, are required to give an on-scene briefing to detectives in order to ensure that the scene is processed properly.'<sup>73</sup>

The envisaged amendment to Section 49<sup>74</sup> therefore may be of value in providing greater clarity to police in relation to the legal principles which should shape the use of lethal force. But it will not clarify a number of related issues around which there is currently confusion and which not only

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<sup>72</sup> Attorney General of New Jersey, 2000:6.

<sup>73</sup> PARC, 2005 Appendix: 16.

<sup>74</sup> As indicated in footnote 13 the questions of legal principle relating to the amendment of Section 49 of the Criminal Procedure Act are not discussed in this paper. The footnote also provides references to documents in which these issues are discussed.

increase the likelihood of unreasonable or unjustified shootings which place members of the public in danger and undermine the safety of police officers, but also reduce their accountability.

In so far as these issues are currently addressed in standing orders or any statements of policy by the SAPS these are buried deep in SAPS files containing countless other regulations. Considering the extreme consequences which the use of lethal force has for the safety of members of the public it is important for the SAPS in particular to develop a visible and accessible statement of policy which guides and informs SAPS members in relation to questions to do with the use of lethal force. Such a policy would be supplementary to the code of conduct which, while it says that SAPS members should uphold human rights, does not directly address issues relating to the use of lethal force.

A policy of this kind should not merely provide guidelines to police relating to when the use of firearms may be appropriate or other procedures but foreground issues of values relating to the use of lethal force. In so doing such policies will clarify for SAPS or other police officers that the police organisations which they work for are ethics based organisations which gives pre-eminence to the protection of human life. This implies prioritising the safety of police officers and members of the public and firmly discouraging unjustified and unnecessary use of lethal force. For instance the deadly force policy of the NYPD states that

The New York Police Department recognises the value of all human life and is committed to respecting the dignity of every individual. The primary duty of all members of the service is to preserve human life.

The most serious act in which a police officer can engage is the use of deadly force. The power to carry and use firearms in the course of public service is an awesome responsibility. Respect for human life requires that, in all cases, firearms be used as a last resort, and then only to protect life. Uniformed members of the service should use only the minimal amount of force necessary to protect human life. ... Above all, the safety of the public and ... members of the service must be the overriding concern whenever the use of firearms is considered.<sup>75</sup>

Likewise under the heading 'Sanctity of Life' the PPB directive on deadly force states that

The Portland Police Bureau recognises and respects the integrity and value of human life, and that the decision to use deadly force is the most important decision that a member will make in the course of his/her career. The use of deadly force will emotionally, physically and psychologically impact the member involved, the subject the deadly force was directed at, and the family and friends of both and can impact the community as well.

The 1987 deadly force policy of the Houston Police Department also states, inter alia, that '[t]he Houston Police Department places its highest value on the life and safety of its officers and the public'. Consistent with this the policy provides a number of rules including that '[p]olice officers shall not discharge their firearms except to protect themselves or another person from imminent death or serious bodily harm'.<sup>76</sup>

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<sup>75</sup> PARC, 2005 Appendix: 65.

<sup>76</sup> Quoted in Geller and Scott, 1993: 597-98.

Many police departments in the US, including those in New York, Los Angeles, Houston and Portland have therefore adopted internal policies which define the circumstances in which police may use lethal force in a manner which is narrower than the framework provided by the leading US Supreme Court judgment on the matter. The latter authorises the use of lethal force against a person who is reasonably believed to have committed a crime of serious violence, where there are no other means of arresting him or her.<sup>77</sup> On the other hand these police departments have sought to define their policies in a manner which they believe better upholds the need to respect and value human life and which recognises the high risk of fatal, and therefore irreversible, error related to the use of lethal force. Policing in the US, like that in South Africa, is characterised by a relatively high level of the use of lethal force. But as police agencies in a democratic country these departments have been highly responsive to the fact that police carry the lives of members of the public in their hands and have given high priority to the concern that killings by police should be kept to a minimum.

Much of the recent coverage given by news media to the controversy around the use of lethal force has been carried under the label 'shoot to kill'. Though this does not appear to have been a slogan which has generally been used by state officials, the prominence of the term may be seen to have exacerbated confusion amongst police officers about the expectations from political and police leaders in relation to the use of force and in relation to the purpose of the use of lethal force.<sup>78</sup> Part and parcel of clarifying questions to do with the values which should inform SAPS members in relation to their use of lethal force may therefore involve clarifying questions about the purpose of the use of lethal force.

Lethal force is force which has the potential to cause death or serious bodily harm. Where lethal force is used for defence its purpose will be to bring an end to the threat which is posed by the assailant. In arrest situations the purpose of the use of lethal force is to prevent the suspect's flight. In neither of these situations is it correct to say that the purpose of the use of lethal force is to kill the person whom the use of force is directed at. Laws which govern the use of lethal force are therefore not 'shoot to kill' laws. This is emphasised by the policy of the LAPD which states that "[a]n officer does not shoot with the intent to kill; the officer shoots when it is necessary to prevent the individual from completing what he is attempting".<sup>79</sup>

However contrary to the common notion that police training involves techniques for wounding rather than killing people, police training in South Africa and in countries like the United States and Canada directs police officers to aim for the chest area or what is known as the 'centre of mass'. This is partly motivated by experience and research on the accuracy of police shooting which 'overwhelmingly debunks the Hollywood myth of police officers as sharp shooters who can wing suspects in the shoulder or leg or shoot weapons out of suspects' hands'.<sup>80</sup>

The unpleasant truth is that where police shooters who aim for the 'centre of mass' are on target there will be a good chance that their bullets will be fatal. Though this is not their purpose, the laws which authorise the use of lethal force are therefore laws which authorise police (and in fact civilians) to kill other people. Of course in all situations where there are reasonable alternatives to

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<sup>77</sup> *Tennessee v Garner*, 471 U.S. 1 (1985).

<sup>78</sup> It is not clear that any of the official statements used the term 'shoot to kill' though the label is not necessarily a complete misnomer as some of these statements did indeed encourage police to kill.

<sup>79</sup> PARC, 2005: appendix: 64.

<sup>80</sup> White, M, 2006. 303.

the use of lethal force police are required to make use of these alternatives. The LAPD policy therefore goes on to note that though

In the extreme stress of a shooting situation, an officer may not have the opportunity or ability to direct his shot to a nonfatal area. To require him/her to do so, in every instance, could increase the risk of harm to him/herself or others. However in keeping with the philosophy that the minimum force that is necessary should be used, officers should be aware that, even in the rare cases where the use of firearms reasonably appears necessary, the risk of death to any person should be minimised.<sup>81</sup>

The example of specially formulated use of force policies set by many police departments in the US should clearly be followed by police in South Africa. The process of developing such a policy would firstly be valuable in clarifying many of the issues on which South African policy urgently need greater direction in order to be appropriately informed on how to deal with potential use of force incidents. In addition such policy would serve as a useful instrument, enabling supervisors and commanders to more authoritatively provide direction to members on how they should exercise their authority to use their firearms. The adoption of policies on the use of lethal force would therefore enable the SAPS and metro police agencies to better support their members as well as providing greater clarity on a leadership level as to how to engage with questions relating to the use of lethal force.

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<sup>81</sup> PARC, 2005 Appendix:64.

## 6. Killings by and of police officers while off-duty

Another issue which urgently calls for attention concerns the use by police officers of firearms while off-duty. As reflected above the category of deaths which the ICD has defined as 'domestic violence related and off-duty deaths', and which mostly concerns killings which take place when police are off duty, accounted for 10% of deaths in the last four years for which ICD statistics are available (see Figure 1). While the ICD prefers to regard all off-duty killings by police as deaths as a result of police action this has been contested by the SAPS who have argued that the ICD mandate excludes deaths which are not carried out when the person is not 'acting in his or her capacity as a member of the service'.<sup>82</sup> Related to this there may be specific issues of non-reporting of deaths of this kind to the ICD in terms of the obligations imposed on the SAPS by Section 53(8) of the SAPS Act. However in principle the motivation for ICD investigation of deaths, which is that police are often reticent to investigate their own colleagues, also applies in relation to off-duty deaths.

In Annexure A five of the stories (1, 15, 16, 20 and 22) deal with 7 incidents in which 6 police officers and 9 other people were killed. Apparently in these cases the newsworthiness of the stories is related to the phenomenon which they often depict of police 'cracking' or breaking down under some kind of emotional strain and inflicting violence, often against intimate partners or colleagues in addition to themselves. Of the six police killed in these incidents three are reported to have killed themselves. In two of the latter cases (20 and one of those described in report 21) this was apparently a 'murder-suicide' where the police officer killed other people before killing himself. The victims in one of the murder-suicides included a police officer (report 20). In another incident described in report 21 a female police officer allegedly killed two colleagues before shooting herself though she did not die as a result of her self-inflicted wounds. In these five reports all six of the police deaths and one case of injury to a police officer were therefore apparently shootings by other police officers or suicides or suicide attempts.

As these reports therefore make clear, incidents in which police officers 'break down' and kill other people are not only a source of concern in relation to the killings of civilians but are an important contributing factor to the deaths of police officers. While there is no current data on this, in one study of the circumstances of deaths of 357 police officers which was conducted in the 1990s, 'arguments' accounted for 21% of the total number of police deaths, including 6% of deaths which took place on duty, and 29% of deaths which occurred off duty.<sup>83</sup> Many of the civilians who are killed in incidents of this kind are of course not outsiders to the policing world but are wives or

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<sup>82</sup> Proactive Research Unit, 2007, p. 3.

<sup>83</sup> Statistics from Nel and Conradie, 1998 as compiled in Bruce, 200:24.

husbands or other intimate partners of police members reinforcing the traumatic impact of these kinds of incidents on policing communities.

The problem which runs parallel with that of killings by police (including killings of intimate partners, colleagues and others) during arguments and emotional 'breakdowns' is that of police suicides. As illustrated in three of the incidents which are the subject of reports 20 and 21, incidents of this kind where police kill other people often culminate with the police officer turning the gun on him or herself. Most police suicides are not preceded by the killing of another person but merely involve a police officer taking his or her own life, usually with his or her service pistol. The SAPS has refused to disclose information on the number of police suicides for some years and it is not clear how many suicides there are currently. During the 2005-2006 period it appears that suicides were occurring at a rate of roughly 3 per 10 000 SAPS personnel<sup>84</sup> implying that the total number of suicides during this period was in the region of 90 per year, considerably lower than the 518 (roughly 170 per year) recorded during the three year 1994-1996<sup>85</sup> period. This reduction in suicides appears in part to reflect the impact of the SAPS's own suicide prevention strategy. Nevertheless it remains clear that suicides (sometimes in the form of murder-suicides) are an enduring problem in the SAPS and that the possession of service pistols by SAPS members when they are off duty is a big part of the explanation for the ease with which these are accomplished.<sup>86</sup>

The dangers which police face while they are off-duty are of course not restricted to attacks by their colleagues and suicides. For many years the consistent pattern has been that the majority of killings of police officers take place while police are off-duty. This has been the pattern in South Africa for some time though it would appear that, notwithstanding the fact that they still constitute the majority of these killings, the proportion of killings which occur off-duty has declined somewhat. As illustrated in Table 5, 53% of SAPS members who were killed during the last three years, were killed when 'off duty'. By comparison incidents off duty accounted for 63% of killings of police during the 1991 -2001 period.<sup>87</sup>

**TABLE 5: Killings of SAPS members, 2006–2009**

Year	Total number killed	Number killed on Duty	Number killed off duty	% off duty
2006/07	108	52	56	52
2007/08	107	49	58	54
2008/09	95	44	51	54
<b>Total</b>	<b>310</b>	<b>145</b>	<b>165</b>	<b>53%</b>

While lethal attacks in arguments with colleagues or others are one explanation for the large number of these deaths which occur off-duty an additional, and perhaps more significant explanation for this is that many killings in response to police intervention may take place where they are off duty and 'place themselves on duty'.<sup>88</sup> In South Africa, as in many other countries, there

<sup>84</sup> Business Day, 12 March 2007.

<sup>85</sup> Figure from SAPS Crime Information Management Services, August 2007 quoted in Bruce, 2000: 28.

<sup>86</sup> The statement that 'the availability of a service weapon motivates suicide is a myth' (Watson and Bokaba, 2010) may be true. The principle motivators for police suicides relate to stresses, trauma and conflict related to their occupational roles, financial situation and personal relationships, with alcohol often also being a factor. However their access to firearms contributes to the ease with which police are able to commit suicide so that firearms are a facilitator of, rather than a motive for, suicide.

<sup>87</sup> For statistics on preceding years see Bruce, Newham and Masuku, 2007:167-169, and Bruce, 2002.

<sup>88</sup> This explanation was given by a senior police officer at a meeting of the Portfolio committee of Safety and Security on 11 August 2009. See also SAPS, 2009:92.

appears to be a generalised expectation that off-duty police members will 'place themselves on duty' when they encounter a crime in progress. The South African situation appears to resemble that documented in the US some years ago in terms of which: '[p]olice officers traditionally have considered their responsibility for off-duty action to include aggressive-intervention (termination of crime and arrest of suspects) and not just careful observation and notification of on-duty police. The arming of off-duty police ... facilitates such aggressive action'.<sup>89</sup>

According to SAPS annual reports the reasons for the high level of fatalities off duty is due to the fact that police are additionally vulnerable 'because they usually do not wear bullet proof vests, do not enjoy the protection afforded by being in the company of colleagues and are less vigilant than when they are on duty'.<sup>90</sup> The reasons for vulnerability of police in these situations however go beyond this.

But police frequently are at a tactical disadvantage while off duty, being out of radio communication with other officers, equipped with fewer lethal and less-than-lethal weapons. ... Further, while off duty an officer may see less opportunity than he or she would while on duty to plan a course of action before intervening; the off-duty officer typically is 'mobilized' by finding him or herself in the middle of trouble, whereas the on-duty officer much more often is notified some distance from an apparent crime scene of the need for response. ... Moreover, off-duty officers who happen to be socializing in a tavern when armed robbers enter may be in no condition to outdraw the hold-up men, yet the presumed imperative to take police action may prompt an ill-advised confrontation. ... Some have argued that off-duty personnel in certain circumstances have impaired legitimacy to intervene and take police action ... and hence encounter more civilian resistance.<sup>91</sup>

Risks to police who intervene in situations which they encounter while off duty also include the possibility that they may be mistakenly identified as one of the perpetrators of a crime in progress.<sup>92</sup> As a result of the many disadvantages of these kinds of interventions many police agencies in the US for instance advise their members to take a far more prudent approach in relation to crimes which they encounter in progress. The Los Angeles County Sheriff's Department (LASD) for instance trains members 'that a tactical assessment is necessary in order to determine whether to become involved in an off-duty incident'. This assessment should include factors like the officer's personal safety and the safety of his or her family, the presence of cover or concealment, the officer's proficiency with his or her weapon, the danger to others from stray rounds, the number of suspects, the officer's ability to detain the suspect and control the situation, and the availability of support equipment, such as extra ammunition, handcuffs and radio'.<sup>93</sup> It may be assumed that, where it appears unlikely that the police officer will be able to deal with the situation, he or she should rather see his or her obligations as, where possible, to call in support. Despite the guidelines provided to them, a section of a 1997 report on the LASD draws attention to numerous instances in

<sup>89</sup> W Geller and M Scott (1992) *Deadly Force – What we know*. Washington: Police Executive Research Forum. p: 164.

<sup>90</sup> SAPS, 2009, 92.

<sup>91</sup> Geller and Scott, 1992, 164-165.

<sup>92</sup> See for instance the story 'Off-duty officer is fatally shot by police in Harlem, New York Times, 29 May 2009. [http://www.nytimes.com/2009/05/29/nyregion/29cop.html?\\_r=1](http://www.nytimes.com/2009/05/29/nyregion/29cop.html?_r=1)

<sup>93</sup> PARC, 1997: 66.

which LASD members drew their firearms in situations notwithstanding the fact that they had been drinking.<sup>94</sup>

Notwithstanding this additional vulnerability and a professed concern for police safety little has been done to clarify the expectations of police officers in these situations. A key part of the problems here concerns the vaguely defined expectation that when police who are off-duty encounter crimes in progress they should 'put themselves on duty'.<sup>95</sup> As a result of this requirement it would seem to be necessary that police should also carry their firearms while they are off duty exacerbating the risks of 'domestic violence and other off-duty' killings and suicides, and undermining the motivation to better regulate the access which police have to their service pistols when off-duty.

In the late 1990s the idea was put forward<sup>96</sup> that police should not carry their firearms while off duty though it was highly controversial and, in the end, abandoned by those putting it forward. The principle reason for this at the time was that many police felt that they needed to have their firearms with them while they are off-duty in order to protect themselves. While this is a concern which should not be dismissed it should also be remembered that the possession of firearms while they are off-duty is another source of danger to them as police are sometimes attacked specifically to rob them of their firearms.

The fact that there are conflicting considerations however should not be seen as a motivation against the need for much greater clarity to be provided to SAPS members related to their obligations, and the use of firearms by them, while off-duty. Such policy clarification should at the very least advise SAPS members that they are not required to make armed interventions in crime situations while they are off duty. If they do encounter such situations their main responsibility should be to immediately call in on-duty police officers unless on the basis of good judgment they are confident of their ability to deal with the situation. It should also at the very least indicate that they are not required to carry their firearms off-duty implying that, if they do encounter situations which call for armed intervention and are not armed, they should not intervene in these situations. This would remove the current ambiguity about whether there is an actual obligation for them to carry firearms while they are off duty. If they wish to carry firearms while off duty for self-defence this then becomes their choice rather than something they are obliged to do.

If it is true that a substantial part of the explanation for the large number of killings of SAPS members when off duty has to do with their vulnerability in situations in which they 'place themselves on duty', then this is presumably a very strong motivation for the obligations of police in these types of situations to be reviewed and clarified. The killings of police, along with off-duty killings by police of intimate partners and others, and police suicides, are then another motivation for the clarification of policy relating to the use of force. The key issues here could also usefully be addressed in a use of force policy of the kind motivated for in the previous section.

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<sup>94</sup> Ibid.

<sup>95</sup> I have asked a number of police officers about the basis for this rule. Many of them have some idea that it is provided for in Standing Orders but none have as yet been able to clarify in which Standing Order it is covered. However the rule, whether formally defined or not is not unique to South Africa or the US. See for instance the Wikipedia entry on 'police officer' which states that 'In some countries, rules and procedures dictate that a police officer is obliged to intervene in a criminal incident, even if they are off-duty. Police officers in nearly all countries retain their lawful powers, while off duty.' [http://en.wikipedia.org/wiki/Police\\_officer](http://en.wikipedia.org/wiki/Police_officer) (Accessed 27 May 2010).

<sup>96</sup> The issue was covered fairly extensively in the press at that time (for example 'Should cops carry firearms while off-duty?' Saturday Star, May 16 1998). See also Van Rensburg, 1998.

## 7. Conclusion: Towards the professional use of lethal force by police in South Africa

Studies which have sought to examine the use of force in policing in other countries indicate that the use of lethal force is a relatively rare event in the day to day lives of police. But laying emphasis on the rarity of its occurrence may be to underestimate the significance of the use of lethal force as the approach which police organisations follow in relation to the use of lethal force defines for many people the types of organisations which they are. It is imperative therefore that we move beyond a position of seeing many of the unlawful or unnecessary killings carried out by police as part of the price which South Africa must pay for addressing violent crime. In so doing we allow police to become mere cogs in the cycle of violence rather than an instrument for bringing about change. Democracy requires that policing embody the principle that all are citizens. This is nowhere more important than in relation to the standards which we apply in relation to the use of lethal force which is one of the most important ways in which the state articulates and defines whether or not it is an instrument for upholding or violating people's rights.

In a country such as South Africa where many of their 'opponents' are armed with guns and other weapons, police are at risk. It is necessary to arm them, and provide them with the authority to use their weapons, in order for them to protect themselves. It nevertheless must be acknowledged that this is in some ways a 'double edged sword' as the very fact that they are armed increases the likelihood that people who they are pursuing or others may regard it as necessary to use lethal force against them (in addition to being targets of sometimes fatal incidents of robbery of their weapons). However this is not to suggest that it would be preferable to leave police in South Africa unarmed as this would merely mean that they are powerless to exercise the authority of the state by, for instance, arresting the most violent criminals. It is a matter of necessity that the police be armed but, in addition to being optimally trained and prepared, one important way in which they can limit the degree of danger which they face is by being scrupulous in adhering to the standards of law in their use of lethal force. The degree to which police are known to consistently abide by the standards of the law in their use of lethal force is therefore in itself a factor in police safety. Where suspects have confidence that police will not administer 'street justice' they will be less likely to use violence against police to protect themselves.<sup>97</sup> It is probably not just a coincidence that KwaZulu-

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<sup>97</sup> Geller and Scott (1992: 274) have speculated about why restrictions on the use of lethal force may be followed by declines in killings of police. As they state 'notwithstanding our data on officers who would have died in recent years except for the protection afforded by their soft body armor, there is also another possible explanation for long-term downward trends in shootings of police by those they attempt to stop or arrest. It is the possibility that at least some potential police assailants have been made less afraid over the years that the police will administer 'street justice' with a nightstick or lethal weapons and hence are less likely to shoot an officer to protect themselves'. Reasonable or not, there can be little doubt that some of

Natal, the province which ICD statistics suggest has the most obvious problem of excessive levels of use of force, in some cases associated with apparently egregious violations of the law, has in the most recent year for which statistics are available also experienced the highest level of killings of SAPS members. Police violence is not only a product of and response to violence in society more generally but also may reinforce patterns of violence including violence against police.

One of the important innovations which came with the advent of democracy in South Africa was the creation of the ICD. The role of the ICD in investigating alleged or possible cases of police criminality including police violence remains an important one which contributes to discouraging the inappropriate use of lethal force by members of the SAPS. As a recent report of the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions emphasises

Without external oversight, police are essentially left to police themselves. Victims are often reluctant even to report abuse directly to police, for fear of reprisals, or simply because they do not believe a serious investigation will result. Especially in cases of intentional unlawful killings, purely internal complaint and investigation avenues make it all too easy for the police to cover up wrongdoing, to claim that killings were lawful, to fail to refer cases for criminal prosecution, or to hand down only minor disciplinary measures for serious offences. Importantly, external oversight also plays a role in increasing community trust of the police service, and can thereby increase public-police cooperation and improve the effectiveness of the police force's ability to address crime.<sup>98</sup>

Nevertheless a strategy for controlling the use of lethal force by police needs to go beyond reliance on the ICD. While the threat of legal sanctions does have an impact in discouraging inappropriate use of lethal force by police, there are constraints on the ability of the ICD to investigate killings by police. More importantly however, such investigations will not in themselves inspire police officials to aspire to the highest standards in relation to their use of lethal force.

It goes without saying that any attempt to ensure greater professionalism in the use of lethal force by police in South Africa requires the investment and backing of leadership figures. Towards this end 'the values of ... police culture need to be purposefully shaped' encouraging 'a high respect for human life among officers and encouraging responsible (but not foolhardy) restraint in the use of force'.<sup>99</sup> As motivated in this paper, a principle instrument which would be invaluable in assisting police officers to understand the type of use of lethal force which is expected of them would be a use of force policy. This would not only address issues of values but help to provide clarity on a number of crucial issues relating to the use of lethal force around which there is likely to currently be confusion. The development, adoption, and use of such a policy by the SAPS and potentially other South African police agencies would serve to foregrounding the fact that the standards which police members apply in relation to the use of force are seen to be of central importance, and that South African police agencies see their own power to take life as a matter of profound concern. However such a policy would only be of value and have the potential to impact positively on police if it is implemented with ongoing support from relevant leadership figures.<sup>100</sup>

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those who assault police do so in the belief that the officers are looking for an excuse to harm them and will do so unless prevented'.

<sup>98</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 2010:3

<sup>99</sup> Ibid: pp 405-406

<sup>100</sup> White, 2001:145-146.

## **Annexure A: Lethal force incidents – Selected press reports from the period February 2009 to April 2010.**

1. North West province, July 2007: A police reserve constable based at the Jouberton police station shot and killed his girlfriend at her home using his service pistol after an argument. Following an investigation by the Independent Complaints Directorate, the man was convicted of murder and was sentenced to 15 years in prison in November 2009.<sup>101</sup>
2. Various localities in KwaZulu-Natal, 27 August 2008 to 3 February 2009. The media report in this case deals with a series of incidents which appear all to be related to the death of a Detective Superintendent Zethembe Chonco who was killed in an ambush while escorting prisoners to the Stanger Magistrate's Court on August 27 2008.<sup>102</sup> In the exchange of gunfire a person, apparently involved in the attack on Chonco, was killed. At the time when he was killed, Chonco, who was station commissioner of Kranskop Police Station, had been appointed to head investigations into violence, including incidents of murder, related to disputes between the KwaMaphumulo Taxi Association and the Stanger Taxi Association. The following incidents all involved the killing of individuals related to the KwaMaphumulo Taxi Association:
  - On September 3, 2009, Lindelani Buthelezi was shot dead at his home. According to police he had tried to shoot at police. According to his common law wife he was unarmed and made no moves to resist arrest.
  - In the middle of September<sup>103</sup>, Magojela Ndimande and Sibusiso Thokozani Tembe are shot dead while driving on the N3 near Howick. According to police the two were fleeing from police to evade arrest and shooting at them and died when police retaliated. According to an independent ballistics expert all the windows of the vehicles were closed at the time of the shooting and there were also no indications that shots had been fired through the closed windows from the inside out.

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<sup>101</sup> 'Girlfriend killer gets 15 years – Murder: he shot her with his service weapon' The Citizen, 11 November 2009.

<sup>102</sup> Details of the series of incidents discussed here are from a number of stories and captions to pictures and illustrations in feature on the killings in the Sunday Independent, November 15 2009. These are variously headed 'Investigation into cop cop's murder now closed'; 'What really happened – taxi boss so feared police action that he obtained a court protection order'; 'Does it all point to a cover up? 'My dad was not that kind of man, says daughter'; 'Taxi Association tried to stop police violence.

<sup>103</sup> There is an inconsistency in the dates provided for this killing. The caption under an illustration gives the date as 16 September, though one of the articles dates it to the 17<sup>th</sup>.

- A few days later<sup>104</sup> Mzumeni Ntuli and Nathi Mthembu are killed after police surrounded the house in which they were living. Police said the two opened fire as the police closed in and the police shooting was in response to this.
  - On 18 October 2009 Mduduzi Mkhize is shot dead. Mkhize had been arrested at a funeral, and was in the back of a police car at the time of his death. According to police, he tried to overpower the driver and was shot in self-defence.
  - On 3 February 2009 the head of the KwaMaphumulo Taxi Association, Bongani Mkhize, was shot dead by a group of members of the National Intervention Unit, the SAPS's specialised Special Weapons and Tactics (SWAT) team, while driving alone in his car in Durban's Umgeni road. An independent pathologist said that Mkhize's body was riddled with bullets, and bullet fragments mostly from heavy calibre rifles such as R4s and R5s. However he said that Mkhize had in fact died from two shots with a 9mm in the direction of his head. In addition Mkhize's car windows were closed during the incident. Following the other killings Mkhize had applied for, and been granted, a High Court interdict forbidding the police from killing him. In his application he had offered to hand himself over for interrogation in the presence of his lawyer. His daughter said that though he had a licensed firearm he did not have it with him on the day on which he was killed. According to police Mkhize opened fire on arresting officers and was killed when they shot back. During Mkhize's court application the state denied that Mkhize was a suspect in the Chonco murder case. After his death they said that they had been looking for Mkhize in connection with another murder. They also subsequently confirmed that the murder docket on Chonco had been closed after the death of all the suspects wanted in connection with the case.
3. Vicinity of Pretoria, 24 February 2009: Four heavily armed robbers have been killed, and three others, including a policeman injured in a gunbattle after police foiled a truck hijacking and armed robbery. Three robbers were arrested.<sup>105</sup>
  4. Locations in Free State and KwaZulu-Natal, 2 April 2009,: Two [Johannesburg] police officers were shot dead while escorting a hijacking suspect, Thabang Nhlakanipho Ndebele, from Johannesburg Prison to the Ntuzuma Magistrate's Court in his hometown of KwaHlabisa. Sergeant Edwin Jada's bullet-riddled body was discovered alongside the N3 highway outside Harrismith whilst the body of his partner, Inspector Thomas Sambo, was found in the overturned police vehicle, in Nkandla, KwaZulu-Natal. Both men were members of the Booyesen's police station's vehicle identification section. Police suspect that Ndebele was able to get hold of one of the officer's R-5 rifles early yesterday while in Harrismith.<sup>106</sup>
  5. Erkuhuleni, 2 April 2009, Etwatwa: Mphiliso Ndlovu was killed in a shootout with police in Etwatwa in Erkuhuleni. Heavily armed police officer tracked down Ndlovu to a shack and surrounded it. 'Police ordered the occupants out, warning that the shack was surrounded, and called for them to surrender,' said police spokesperson Superintendent Vishnu Naidoo. 'Three people walked out of the shack but (Ndlovu) resisted and violently responded by firing shots at police.'Ndlovu had allegedly killed two policemen in Diepsloot three days earlier as well as being wanted for various other murders'.<sup>107</sup>

<sup>104</sup> There is a similar inconsistency here in the dates provided for this killing. The caption under an illustration gives the date as 18 September, though one of the articles dates it to the 21st.

<sup>105</sup> Robbers die in ambush – Waiting police foil gang in bloody shootout. The Star, 25 February, 2009.

<sup>106</sup> Bloody day for cops, crook. The Star, 3 April 2009

<sup>107</sup> Bloody day for cops, crook. The Star, 3 April 2009

6. Durban, April 28 2009: Four men, two of them police officers, were shot dead and three were wounded in various exchanges as police chased robbers who had struck at a car dealership at 11.30am on Tuesday. A stray bullet killed a truck driver, Robert Moshesh, and the fourth fatality was one of the robbers. The dead policemen have been identified as Inspector Afzal Khan, a father of four who was buried at the Kenville cemetery on Tuesday night, and Inspector Mbongiseni Maphumulo. One suspect was killed in the building, two were wounded and one was arrested. The other wounded person was a bystander. A car dealership employee, known only as Nathi, had taken cover. He was initially thought to be a suspect and attacked by a police dog.
7. Durban, 4 May 2009. A suspected criminal was shot dead during a heavy exchange of gunfire between police and robbers in Durban on Monday morning, police said. Superintendent Jay Naicker said members of the Flying Squad spotted a stolen silver Toyota RunX in Pine Street at 4.30am. The vehicle had been stolen during a house robbery in Cato Manor on Friday, he said. 'When police officials approached the vehicle, the suspects fled and police gave chase. The suspects opened fire on the police. Police fired back during the chase to Cato Manor, which is a few kilometres away from the city centre. 'Police officials managed to pull the vehicle over at Cato Manor and one suspect was killed in the exchange of gunfire.' Naicker said two other assailants managed to flee. Police suspect that one of them was injured during the shootout. Four other occupants found in the vehicle have been taken in for questioning. We also recovered a pistol on the scene.<sup>108</sup>
8. Kameelfontein and Cullinan Road intersection (vicinity of Pretoria) 14 September, 2009: Six heavily armed gunmen wielding semi-automatic assault rifles were killed and a Special Task Force officer injured in a shootout with police during an attempted cash-in-transit heist. Police are reported to have been waiting for the suspects to launch their attack on the cash-in-transit vehicle. Three of them were shot after they crashed their vehicle into a bridge and attempting to flee into a field. The other three died, ostensibly also of gunshot wounds, after they drove their vehicle through a group of officers at the intersection, and the driver lost control of the vehicle. Three other robbers escaped.<sup>109</sup>
9. Lenasia, 14 September 2009: A policeman and his accomplice were arrested for alleged armed robbery shortly after an employee of an ambulance company, who was on his way to deposit money, was held up. Police allege the two men were involved in a robbery where a bakkie rammed into the back of a car driven by an ambulance service employee. When the driver got out to investigate, two people in police uniform approached him, pointed a firearm at him, and robbed him.<sup>110</sup>
10. Pretoria, 3 October, 2009, Pretoria: Captain Charl Scheepers (39) was shot dead by a robber at a building sight. Scheepers was shot twice in the stomach after warning the robber three times to drop his gun. <sup>111</sup>

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<sup>108</sup> Suspect killed in police shootout. IOL, 4 May 2009

[http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=nw20090504092253876C255329](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20090504092253876C255329) (20 June)

<sup>109</sup> Cops ambush gang waiting to rob guards – Swift, ruthless action leads to gunning down of six robbers. Star, 15 September 2009.

<sup>110</sup> Cop and accomplice held over robbery, The Star, 15 September 2009.

<sup>111</sup> Held met 'n groot hart. Beeld, 10 June 2009.

11. Pretoria, 11 October 2009: Police shoot and kill Olga Kekana in the early hours of the morning after suspecting she and her companions were hijackers. Her friends, Sophie Kgarake and Andrew Singo were shot in the abdomen and the right hand and thigh respectively. Police were apparently looking for a vehicle which had been hijacked earlier and mistakenly identified the vehicle occupied by Kekana and her companions as the vehicle in question. The driver of the vehicle, an air force pilot, said that he was driving through a traffic circle when the shooting happened. He saw a blue light behind the vehicle and 'the next moment' the police started shooting at the vehicle. After realizing that they had shot the wrong people the police officers involved allegedly fled from the scene.<sup>112</sup>
12. Pretoria, 23 October 2009: Police chased and opened fire on occupants of a car after they mistook them for robbers. They later searched the car and assaulted the occupants. When the police realized their mistake they had the three occupants of the car locked up on trumped up charges over the weekend.<sup>113</sup>
13. Reiger Park, 24 October 2009: Inspector Marvin Flagg was killed when he questioned a motorist who had parked illegally on a road. The alleged killer was arrested.<sup>114</sup>
14. Atteridgeville, 31 October 2009: Family of a 21 year old man, Kgothatso Ndobe, who was shot dead by police, indicated that he was busy polishing his shoes when police arrived to question him and a friend. He panicked and ran away and one of the policemen, a trainee officer, allegedly shot him in the head. An eyewitness said that she had asked the police officer if it was a warning shot or aimed directly at the boy. In reply he reportedly said that he did not care because that's how they were told to operate. A police spokesperson said the Ndobe was killed because he tried to disarm the police officer.<sup>115</sup>
15. Pretoria, 2 November 2009: A fruit vendor was shot dead allegedly by two constables when he prevented them from taking his sweets without paying. The police were off duty and allegedly drunk when they attacked the Angolan vendor.<sup>116</sup>
16. Benoni, 1 November 2009: A Metro police officer was arrested for allegedly shooting dead his girlfriend. The shooting allegedly took place in front of their five-year-old child.<sup>117</sup>
17. Klipfontein View Extension 2 (north east of Johannesburg), 7 November 2009. A three year old boy Atlegang Phalane was shot dead by a police officer whilst sitting in the back of his uncle's car outside a relative's house. Police were apparently looking for the boy's father and another man in connection with various cases of murder and robbery. The police officer involved in the shooting allegedly fired into the car after rapidly approaching the car and seeing what he thought was a firearm in the car though no gun was found in the car.<sup>118</sup> A police officer was subsequently charged with murder in this case.

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<sup>112</sup> 'Shoot to kill' cops under fire, Star 12 October 2009.

<sup>113</sup> Trigger happy cops at it again, Sowetan, 29 October 2009.

<sup>114</sup> 'You touch one officer, we'll kill you' Sowetan, 30 October 2009.

<sup>115</sup> Man shot down after 'panicking' – he ran away when the police arrived at his house'. Sowetan, 2 November 2009.

<sup>116</sup> Fury over rising shoot to kill toll, Sowetan, 4 November 2009.

<sup>117</sup> Officer kills girlfriend in front of child, 2 November 2009.

<sup>118</sup> Cop shoots 3-year-old – shoot-to-kill instructions again in spotlight after killing. The Star, 10 November 2009; 'Criminal when cops shoot a child'. The Star, 11 November 2009; Shot toddler's dad arrested – father found in possession of unlicensed firearm. <http://www.sowetan.co.za/News/Article.aspx?id=1094293> (accessed 16 April 2010).

18. Polokwane, 8 November 2009. Police killed seven men, who had been caught trying to steal money from a cash depot, after a two hour shoot out.<sup>119</sup>
19. Lenasia, November 13 2009: One robber was shot dead and four others – two men and two women – arrested after police, who had been tipped off, intervened in an attempted robbery at a surgery.<sup>120</sup>
20. Cape Town, 19 January 2010: While off duty a 35 year old SAPS VIP Protection Unit officer shoots dead his wife in front of his three year old son. He then went on a rampage shooting and killing two men, including a policeman, and hijacking three cars before killing himself.<sup>121</sup> He had been arrested four days earlier for assaulting his wife though despite this he had been allowed to keep his service pistol.
21. Pretoria, 15 and 16 February 2010: In a space of 24 hours, three police officers were killed and another is recovering in an intensive care unit following an attempted suicide and will be charged with murder as soon as she recovers. The officer to be charged allegedly shot dead two colleagues, and then turned the gun on herself. Another shot his former wife's lover before shooting himself, while another succumbed to a self-inflicted bullet wound to the head, sustained last week. The police officer who shot himself after he failed to make the pre-selection phase for an elite crime fighting unit died in Unitas Hospital on Monday. The female police constable alleged to have gunned down her constable boyfriend and a SAPS captain is under police guard at a Pretoria hospital's intensive care unit after apparently shooting herself in the chest. The captain was killed after apparently intervening in the dispute. Later on Sunday night, a love-triangle shooting left one man injured and a North West police officer dead after he shot himself in the head.<sup>122</sup>
22. Lenasia, 27 February 2010: Johannesburg metro police shot dead a man, Mahindra Pehari, at his house. Police alleged that he had been driving his vehicle recklessly and had failed to stop when police signaled him to do so. After police pursued him to his house he allegedly opened fire on them. Pehari's mother however said that the police were first to shoot and that Pehari's gun was in a safe inside his house. Another witness said that an initial round of six shots was followed by a pause of two minutes after which another three shots were fired. The witness then went to the scene and saw a gun lying behind Pehari's body. The police allegedly also pointed a gun at Pehari's mother. A police spokesperson said that a only a holster was found on Pehari's body and alleged that the gun had been removed from the scene.<sup>123</sup>
23. Sydenham, Durban, 30 March 2010: Four suspected robbers were killed in a shoot-out with police.<sup>124</sup>
24. Near Empangeni, 31 March 2010: Police searching for an escaped prisoner, Sibusiso Thili Mzimela escaper stormed into a house and shot a 15 year-old schoolboy, Kwazi Ndlovu, near Empangeni in KwaZulu-Natal. The boy's father, Subusiso Ndlovu, said that after the shooting he was dragged from the passage of his house by the police and not allowed to

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<sup>119</sup> Police shoot dead 7 robbers, Sowetan, 9 November 2009.

<sup>120</sup> Bloody justice – Police rack up their third major victory in three days, Saturday Star, 14 November 2009.

<sup>121</sup> Freed VIP officer kills wife – he was allowed to keep gun despite threats to spouse. Star, 21 January 2010.

<sup>122</sup> Alarm after spate of cop killings, Pretoria News, 16 February 2010 (By Barry Bateman and Graeme Hosken) IOL

<sup>123</sup> Police shooting raises questions and doubt – stunned family say cop opened fire first. Star, 1 March 2010.

<sup>124</sup> Distaught father wants justice - Police shot my sleeping son, 15, Mercury 2 April 2010.

look at the couch where his son had been sleeping. Police then drove around with him for 45 minutes, while other officers stayed with his wife and his sons. 'The policeman who was driving kept on asking me who was that on the couch and, when I told him it was my son, his eyes became wet and he rubbed his face.,' he said. When the police finally took him home, he asked them where his son was and they told him that he was being questioned by police. 'My wife, who had been told to wait outside, ran through the police tape and told me that she had seen our son's body lying on a couch and next to him there was a gun,' he said. Ndlovu said his son did not own a gun.<sup>125</sup>

25. Thulamahashe, Mpumalanga, 14 April 2010. A 28-year-old man was shot dead with an R5 rifle by one of a group of three student constables who went to his home to arrest him on charges of burglary. According to a witness he was allegedly shot dead by one of the constables while another was holding him from the back. The fatal gun-shot apparently also injured the policeman who had been holding the man, and he was taken to hospital with a bullet wound in the waist.<sup>126</sup>

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<sup>125</sup> Distraught father wants justice - Police shot my sleeping son, 15, Mercury 2 April 2010.

<sup>126</sup> 'Killer police lied about injured colleague', Sowetan, 19 April 2010.

## Annexure B: Background data to Figures 1–4

**Table B1 (Figure 1): ICD classification of circumstances of deaths as a result of police action, 2005–2009.**

		2005- 2006	2006- 2007	2007- 2008	2008- 2009	Total	% of total	% of shooting related deaths
Shooting	During arrest	117	141	191	213	662	35.8	40.2
	During a crime	86	97	83	129	395	21.4	24.0
	During escape	25	31	34	73	163	8.8	9.9
	During investigation	9	23	43	53	128	6.9	7.8
	Other intentional shootings/domestic violence related and off-duty deaths	9	56	60	39	164	8.9	10.0
	Negligent handling of a firearm	26	23	6	29	84	4.5	5.1
	Innocent bystander	10	4	3	32	49	2.7	3.0
		45 (16)	83 (22)	69 (16)	100 (18%)			18.1
Other	Vehicle accident	30	44	70	44	188	10.2	-
	Assault by police	14	0	0	0	14	0.8	-
<b>TOTAL</b>		<b>326</b>	<b>419</b>	<b>490</b>	<b>612</b>	<b>1847</b>	<b>100</b>	<b>100</b>

**Table B2 (Figure 2): Deaths as a result of police action in each province, April 1997 – March 2004**

	1997 / 1998	1998 / 1999	1999 / 2000	2000 / 2001	2001 / 2002	2002 / 2003	2003 / 2004	2004 / 2005	2005 / 2006	2006 / 2007	2007 / 2008	2008 / 2009	Total	% of total	Provinci al percenta ge of national populati on, 2005	Provinci al percenta ge of national populati on, 2008
Total	518	545*	472	427	371	311	380	(366)	326	419	490	612	4871	100	100	100
KwaZulu-Natal	165	148	155	108	93	70	147	NR	78	119	117	201	1401	29	21	21
Gauteng	135	132	104	94	82	99	73	NR	65	117	110	127	1138	23	18	22
E Cape	51	66	61	65	49	16	48	NR	49	33	53	77	568	12	15	14
W Cape	43	62	45	49	38	34	32	NR	31	48	65	53	500	10	10	11
Mpumulang	36	37	32	38	39	28	28	NR	27	15	43	45	368	8	7	5
Limpopo	25	28	27	24	22	21	24	NR	24	33	47	39	314	6	13	11
Free State	39	34	13	17	20	27	12	NR	29	30	27	34	282	6	6	6
North West	17	25	30	24	22	15	11	NR	14	19	23	31	231	5	8	7
N Cape	7	13	5	8	6	1	5	NR	9	5	5	5	69	1	2	2

**Figure 3: Rank of 'subject officers' connected to deaths as a result of police action, 2001/02–2008/09<sup>127</sup> (%)**

	2001- 2002	2002 -2003	2003 - 2004	2004 - 2005	2005 - 2006	2006 - 2007	2007 - 2008	2008 - 2009
Constable	16	18	22	21	29	29	45	43
Sergeant	36	27	27	16	9	14	8	10
Inspector	37	50	48	55	50	44	35	35
Captain	8	3	2	4	10	8	7	7
Supt and above	4	2	1	3	2	5	5	4
	100	100	100	100	100	100	100	100

<sup>127</sup> All columns do not necessarily add up to exactly 100% due to rounding. Figures are adapted from figures provided in the respective ICD reports. Figures for 'Not applicable' which are included in ICD reports in some years are excluded as these relate to deaths in custody and not deaths as a result of police action. In 2004/05 a figure is also provided for 'unknown' and this has been excluded from the calculation of percentages. In 2002/03 and 2003/04 the figures apply specifically to shootings and apparently exclude other deaths as a result of police action. The majority of 'other' deaths are related to vehicle accidents.

**Figure 4: Rate of fatal shootings by South African Police Service relative to selected indicators**<sup>128</sup>

Year	No of fatal shootings by police	Population	Fatal shootings per 100 000 residents	No of police officers	Fatal shootings per 1000 police officers	Arrests in crime prevention operations	Fatal shootings per 10 000 arrests for all crimes	Murders	Fatal shootings per 100 murders	Killings of police officers	Fatal shootings per killing of police officer
2004-2005	<b>341</b>	46 664 771	<b>0.73</b>	115 595	<b>2.9</b>	1 148 753	<b>3</b>	18 793	<b>1.8</b>	94	<b>3.7</b>
2005-2006	<b>281</b>	47 198 469	<b>0.6</b>	121 759	<b>2.3</b>	1 132 606	<b>2.5</b>	18 528	<b>1.5</b>	95	<b>3.0</b>
2006-2007	<b>375</b>	47 390 900	<b>0.8</b>	129 869	<b>2.8</b>	1 227 751	<b>3</b>	19 202	<b>2.0</b>	108	<b>3.5</b>
2007-2008	<b>420</b>	47 849 800	<b>0.87</b>	137 709	<b>3.0</b>	1 274 602	<b>3.3</b>	18 487	<b>2.3</b>	107	<b>3.9</b>
2008-2009	<b>568</b>	48 687 000	<b>1.16</b>	145 170	<b>3.9</b>	1 223 505	<b>4.7</b>	18 148	<b>3.1</b>	105	<b>5.4</b>

<sup>128</sup> Note that the figures on fatal shootings for each year may include a number of shooting deaths at the hands of members of metropolitan police services. ICD reports only provide an overall figure for 'deaths as a result of police action' for metro police services and it is not clear what proportion of these are shooting deaths as they may also include deaths in vehicle accidents. In so far as they may be shooting deaths they would have the greatest impact in 2007-08 (when 13 deaths at the hands of metropolitan police were recorded) and the least impact in 2008-09 (when 4 such deaths were recorded).

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