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# **Study on the Use of Force by Law Enforcement Officials in Africa**





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## IN MEMORIAM



**Prof. Christof Heyns (1959-2021)**

Professor of Law at the University of Pretoria; Director of the Institute for International and Comparative Law in Africa and formerly Director of the Centre for Human Rights and Dean of the Faculty; UN Special Rapporteur on extrajudicial, summary or arbitrary executions (2010-2016); Member of the UN Human Rights Committee (2017-2020); and Expert Member of the African Commission's Working Group on the Death Penalty, Extrajudicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa. Having dedicated several of his reports as Special Rapporteur to the UN to the subject of the use of force by law enforcement, and having established a number of research projects at the University of Pretoria investigating the same, Prof. Heyns played an important role in the conception and early drafting of this Study. His sudden death in March 2021 shocked and saddened the human rights community in Africa and around the world

## PREFACE



In few words I would like to remind you of the history that led to the instrument we now have in our hands, which I believe will be of great value so that our law enforcement officers can effectively work with the necessary balance between respect for human rights and the guarantee of public order and tranquillity.

In 2020, at its 27th Extraordinary Session, the ACHPR adopted Resolution 437, which called for an assessment of the excessive use of force by law enforcement agencies in our African countries.

There was concern that there were often episodes of excessive or disproportionate use of force, especially lethal weapons, by police forces to replace other deterrent forces. This flagrantly violated the greater good, which is life.

To this end, it indicated 3 Mechanisms, namely the Death Penalty, Extrajudicial, Summary or Arbitrary Executions and Enforced Disappearances, the Defenders of Human Rights Defenders and and Focal Point on Reprisals in Africa as well as Prisons, Conditions of Detention and Policing in Africa.

The study received support of the Committee for the Prevention of Torture in Africa, which contributed to its success.

The Centre for Human Rights of the University of Pretoria coordinated the study and provided technical assistance to the Commission for that purpose.

I would like to take this opportunity to pay tribute to the great Professor Christof Heyns, who left us too soon. We discussed the details of the study, its purpose and scope with him before he passed away.

However, I recognise that his team did not fall short of expectations and today we have the pleasure of honouring him with the publication of this study.

This study was conducted over a period of three years, involving partners and experts from various backgrounds, including representatives of States parties, national human rights institutions, NGOs and independent experts, working on issues related to the physical and psychological consequences of the use of lethal force by law enforcement officials, which led to passionate discussions on a range of topics, including determining the specific roles of law enforcement officials.

The first meeting was held virtually in December 2020, after the dark period known as the Covid-19 pandemic, which compelled the African Commission on Human and Peoples' Rights to change its modus operandi. This first meeting was followed by two others in Pretoria and Lusaka in 2022.

At the beginning of this study, the Commission sent a request to several countries appealing for their input in the preparation of the same. In the process, three basic questions were asked, with the aim of consolidating an overview of the subject. Two countries responded to the request and provided valuable information.

We would also like to acknowledge the support of other States parties, who kindly made their senior officials available to discuss certain technical aspects, as without their input we would not have reached the excellent conclusions we did.

During the second phase of the study, we received contributions from three NGOs, which drew the Commission's attention to specific issues, such as the mental health of law enforcement officers and its impact on the use of force.

A training tool for law enforcement and policing officials has been proposed to complement this study, but due to the technical nature of the said document, it has not yet been finalised.

In conclusion, I would like to thank the people and institutions that have consistently and persistently contributed to the success of this work:

My gratitude to former Commissioners Zainabo Sylvie Kayitesi and Maya Sahli Fadel, chairs of the working group on the death penalty, extrajudicial, summary or arbitrary executions and enforced disappearances in Africa.

To the commissioners, Rémy Ngoy Lumbu, our chairperson, Hatem Essaïem and Idrissa Sow, for their dedication in bringing this study to a successful conclusion.

Many thanks to the various actors involved in the various stages of this study, in particular

The members of the relevant AU organs; the members of the UN working group on the death penalty and the UNODC.

Police Commissioner Lassina Traoré and Deputy Police Commissioner Edmond Tapsoba of Burkina Faso.

Professor Stuart Malsen, Honorary Professor at the Centre for Human Rights at the University of Pretoria, Mr Bartolomeu Milton of Pro-Bono Angola, Mr Peter Kiama of the Independent Forensic Unit, the African Forum for Civilian Oversight of Law Enforcement (APCOF), the Danish Institute for Human Rights, Mr Victor Mhango of the Centre for Human Rights and Democracy in Africa and UNODC. Victor Mhango from the Centre for Human Rights Education, Advice and Assistance (CHREEA), Cédric Picarat and Joel Gbegan from the ICRC and Eva Nudd from the NGO DIGNITY.

I would particularly like to thank Mr Thomas Probert for his availability and his rigour in conducting and drafting this study.

To Ms Josiane Tapsoba Koné, Mr Maulo Nfinda Dombaxi, Mr Mohamed Youssef, Ms Anita Bagona, Ms Estelle Nkounkou, Ms Fatou Faal and Mr Etwell Karikoga for their invaluable help, without which this study would not have been possible.

To all the other partners who, at one time or another, collaborated directly or indirectly in the success of this work, my most sincere thanks.

Maria Teresa Manuela

Commissioner

Special Rapporteur on prisons, detention conditions and policing in Africa

## Resolution on the Need to Prepare a Study on the Use of Force by Law Enforcement Officials in Africa -ACHPR/Res437(ETX.OS/XXVII)2020

*The African Commission on Human and Peoples' Rights (the Commission), meeting at its 27th Extraordinary Session, held from 19 February to 04 March 2020, in Banjul, The Gambia:*

**Recalling** its mandate to promote and protect human and peoples' rights in Africa under the African Charter on Human and Peoples' Rights (the African Charter);

**Considering** Article 45(1)(a) of the African Charter which mandates the Commission to "collect documents, undertake studies and researches on African problems in the field of human and peoples' rights;"

**Considering** Article 4 of the African Charter which enshrines the right to life and prohibits the arbitrary deprivation of life;

**Reaffirming** Article 6 of the African Charter which enshrines the right to personal liberty and security of the person;

**Further** reaffirming Article 11 of the African Charter which guarantees the right to freedom of assembly;

**Recalling** General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), adopted during its 57th Ordinary Session, held from 4 to 18 November 2015, which provides that States must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents;

**Further recalling** the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, adopted during the 21st Extra-Ordinary Session, held from 23 February to 04 March 2017;

**Bearing in mind** the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Cuba, from 27 August to 07 September 1990;

**Recalling** its Resolution ACHPR/Res.79 (XXXVIII) 05 on the Composition and Operationalization of the Working Group on the Death Penalty, and Resolution ACHPR/Res.227 (LII) 2012 on the Expansion of the Mandate of the Working Group on Death Penalty in Africa, to include Extra-Judicial, Summary or Arbitrary Killings in Africa;

**Further recalling** its decision to appoint a Special Rapporteur on Prisons and Conditions of Detention in Africa at its 20th Ordinary Session held from 21 to 31 October 1996, as well as Resolution ACHPR/Res.306 (EXT.OS/ XVIII) 2015 Expanding the Mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa to include issues relating to policing and human rights;

**Conscious** of the need to prepare a study on the use of force by law enforcement officials in Africa;

The Commission:

- **Decides** to conduct a Study on the Use of Force by Law Enforcement Officials in Africa;
- **Decides** that the Study will be conducted by the Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa, the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, and the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa; and
- **Calls on** State and non-State actors to contribute to the conduct of the Study.

Done in Banjul, Republic of The Gambia, on 04 March 2020

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## Introduction

[1] The importance of building peaceful societies, in which people are safe and feel safe, have access to and confidence in the criminal justice system, and can rely upon effective state institutions, is widely accepted globally and on the African continent.<sup>1</sup> In order to achieve this goal, a police force which is trusted by the population to use force if and only to the extent it is required, plays an indispensable role. All too often, excessive force is used by law enforcement officials, for example in the contexts of arrest, the management of demonstrations, enforcement of lockdown regulations, or the pursuit of the political or private objectives by those who hold power. This undermines not only the protection of human rights but also the rule of law.

[2] Much of the work of the African Commission on Human and Peoples' Rights centres on the challenges raised by the excessive use of force by law enforcement officials. The African Charter requires States to ensure to every individual the enjoyment of all rights in the Charter (article 2), including the rights most directly affected by the excessive use of force, such as the right against torture and ill-treatment (article 5), security of the person (article 6), and, in extreme cases, the right to life (article 4). Moreover, other rights such as the right to equality and the equal protection of the law (article 3), freedom of expression and information (article 9), and freedom of assembly (article 11) may be affected. The Commission has also responded to allegations of human rights violations as a result of police brutality in a number of specific contexts.<sup>2</sup>

[3] The Commission has, moreover, dealt with the norms on the police use of force in a number of soft-law instruments, such as the "Robben Island Guidelines" for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); the "Luanda Guidelines" on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2014); General Comment No. 3 on the Right to Life (2015); Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (2015); and Guidelines on Policing Assemblies by Law Enforcement Officials in Africa (2017).<sup>3</sup> These instruments will be described in more detail below.

[4] One of the reasons that police violence remains a perennial problem in Africa, as it does in other regions, is the inadequacy of the domestic legal systems in this area. Laws governing police use of force are often not in line with international standards, or, when they do reflect these standards, the laws are in many instances not given effect because of inadequate investigative and oversight mechanisms, contributing to impunity. Some of the laws have remained unamended from colonial days. The first line of defence against the excessive use of force—also given the irreversible nature of the damage that can be caused by such force—is the domestic legal system of the country concerned. It should thus be a key priority for all concerned to bring the domestic safeguards against abuses of force in all African States more closely in line with the international standards, and to ensure that they are better enforced.

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<sup>1</sup> These developmental priorities are found most explicitly in Aspiration 3 of Agenda 2063 and in Goal 16 of the United Nations (UN) Sustainable Development Goals.

<sup>2</sup> For example, in November 2006, the African Commission adopted a Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, *ACHPR/Res.103a(XXXX)06*. In its Resolution on the Human Rights Situation in Senegal adopted in February/March of 2012, the Commission expressed deep concerns about generalised police brutality and the use of force by law enforcement officers who were firing live bullets at peaceful demonstrators, resulting in significant loss of life. African Commission on Human and Peoples' Rights, *ACHPR/Res.208 (EXT.OS/XI)12*. See also the Resolution on the Human Rights Situation in the Democratic Republic of the Congo, *ACHPR/Res.241(EXT.OS/XIV)13*; the Resolution on the Human Rights Situation in Gabonese Republic, *ACHPR/Res.359(LIX)16*; the Resolution on the Human Rights Situation in Burundi, *ACHPR/Res. 412 (LXIII)18*; and the Resolution on the Human Rights Situation in the Republic of Kenya, *ACHPR/Res. 445 (LXVI) 2020*. See also *Noah Kazingachire [and others] v Zimbabwe*, Communication 295/04 of 2 May 2012. Recently, in its *Report of the Panel Discussion on the Implementation of the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa* (2018), available at: <https://bit.ly/3sHLMQ9>, the Commission indicated its regret that the force and firearms are not only used as a measure of last resort.

<sup>3</sup> This is in addition instruments adopted by other AU bodies, such as the Model Law on Policing adopted by the Pan African Parliament in 2019.



[5] In line with its ongoing focus in this area, the Commission decided on 4 March 2020 “to conduct a Study on the Use of Force by Law Enforcement Officials in Africa”, by means of Resolution 437.<sup>4</sup> The current Study was prepared in response to this resolution.

[6] According to the resolution, three of the Commission’s special procedures would collectively conduct the Study: The Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa; the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa; and the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa. The resolution also called on State and non-State actors to contribute to the conduct of the Study.

[7] In undertaking the research, the three named mandates agreed that the Study would focus primarily on the current legal framework (global, regional and domestic) applicable to the use of force (non-lethal and lethal) by law enforcement officials, accountability mechanisms, and on proposals for reforms and interventions that can secure the better protection of the applicable rights, including the right to life.

[8] The current Study is thus primarily focused on the applicable legal framework, and ways to ensure that domestic legal systems conform with the international standards on the (substantive) question when force may be used, and mechanisms of accountability to ensure that these standards are observed (the procedural aspect). The strong legal focus of the current Study leaves open the possibility that other aspects of ensuring better implementation may be addressed subsequently. The highly uneven protections afforded by domestic legal frameworks across the continent and the weak systems of documentation and accountability for use of force—detailed in the present Study—make broader comparative analysis extremely challenging. The necessary processes for implementation of this Study’s recommendations will require but also facilitate greater attention to be paid to this important subject.

[9] While the international standards are fairly well known and the relevant instruments are not hard to locate, the main contribution of the Study is to make the domestic laws of the different African countries accessible in one document, and to provide the Commission, States, and other interested parties, such as civil society organisations and researchers, with the opportunity to compare the international and domestic standards, to observe patterns, and to identify the main areas where improvement is required to bring legal standards in line with international ones. The Study also provides the Commission and other similar human rights bodies with ready access to these different standards, allowing them during interactions with the States, for example during the consideration of State reports, to take up improvements that may be required.

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<sup>4</sup> In the Resolution the Commission recalled article 45(1)(a) of the African Charter on Human and Peoples’ Rights, which mandates the Commission to “... collect documents, [and] undertake studies and researches of African problems in the field of human and peoples’ rights.”

## Part I: International Standards on the Use of Force in Law Enforcement

[10] This part of the study addresses international standards on the use of force in law enforcement. The first section looks at the scope of application of the standards: the circumstances in which the standards apply and the entities addressed by them – the duty bearers. The second section describes the content of the standards, which are mostly of a customary law nature, meaning that they apply to all nations across the continent, irrespective of whether they have adhered to all relevant treaties.<sup>5</sup> These law enforcement standards also serve to interpret fundamental human rights, in particular the right to freedom from torture and cruel, inhuman, or degrading punishment and treatment,<sup>6</sup> and the right to life.<sup>7</sup> The duties to protect life and bodily integrity are fundamental to policing.

### Scope of Application of International Standards on the Use of Force in Law Enforcement

[11] Law enforcement involves the prevention and detection of crime, the arrest and prosecution of suspected offenders, maintain law and order, serving the community and protecting the public.<sup>8</sup> Once duly convicted by a court of law, criminals may be incarcerated following a sentence for a term of imprisonment. Law enforcement also encompasses the treatment of suspected and convicted offenders in a detention facility, whether in police cells (ideally only for a short period before trial) or in a custodial facility.<sup>9</sup> Law enforcement pertains both to criminal offences set forth in a penal code or in dedicated legislation, including terrorist offences or crimes under international law.

[12] Anyone exercising powers of law enforcement (or “policing powers”), whether appointed or elected, is a law enforcement official.<sup>10</sup> Law enforcement officials include immigration officers. The prevention of crimes against wildlife is a law enforcement activity and hence wildlife rangers and others formally entrusted with counter-poaching mandates are law enforcement officials. The term applies equally to those acting on the national territory or extraterritorially.<sup>11</sup> The Commission and other human rights bodies have previously made clear that the military should not routinely be involved in law enforcement, but have recognised that, in certain exceptional circumstances and where strictly necessary, they may be called upon to provide assistance. When and for as long as they are doing so, those military personnel are law enforcement officials.<sup>12</sup> The same would apply to intelligence officials who might exercise law enforcement powers on an exceptional basis.

[13] The international standards on the use of force in law enforcement are legally binding on all African States, including with respect to the actions of their police forces and other security forces. Where private security providers are engaged by the State to carry out law enforcement, they act as agents of the State.

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<sup>5</sup> Every African Union State is party to the African Charter on Human and Peoples’ Rights except for Morocco. African Charter on Human and Peoples’ Rights; adopted at Banjul, 27 June 1981; entered into force, 21 October 1986 (hereinafter, Banjul Charter). A total of 173 of 197 States recognised by the UN Secretary-General are party to the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights; adopted at New York, 16 December 1966; entered into force, 23 March 1976 (hereinafter, ICCPR). Among African states, only Comoros and South Sudan are not parties.

<sup>6</sup> Art. 5, Banjul Charter.

<sup>7</sup> Art. 4, Banjul Charter.

<sup>8</sup> Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly Resolution 34/169 of 17 December 1979, at: <http://bit.ly/3bHsEIX> (hereinafter, 1979 UN Code of Conduct for Law Enforcement Officials), Article 1.

<sup>9</sup> African Commission on Human and Peoples’ Rights, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*, 2016.

<sup>10</sup> 1979 UN Code of Conduct for Law Enforcement Officials, commentary (a) on Article 1.

<sup>11</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, OHCHR, New York/Geneva, 2020, p. 44.

<sup>12</sup> See African Commission on Human and Peoples’ Rights, “General Comment No. 3 on the African Charter on Human and Peoples’ Rights: Article 4, the Right to Life”, adopted in November 2015, at: <https://bit.ly/1JCH8Mc> (hereinafter, African Commission General Comment on the right to life), para. 29.

[14] Collectively such actors, when engaged in law enforcement are described as law enforcement agencies. This includes all and any agencies involved in special joint operations. A law enforcement agency is defined in the following terms:

Any entity or body that is entrusted or contracted by a State with the prevention, detection and investigation of crime and the arrest and detention of criminal suspects and offenders; this includes immigration and other border control agencies. Law enforcement agencies may work at the local, provincial, national or supranational level. The body or unit of the military or of other security forces will be considered a law enforcement agency when it is conducting law enforcement tasks, whether domestically or in another jurisdiction.<sup>13</sup>

[15] The actions of all law enforcement agencies and law enforcement officials amount to conduct of “organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State” and are attributable to the State at the international level, with the State’s responsibility engaged for violations of international law its agents commit.<sup>14</sup>

[16] The State is also required to regulate the actions of private security service providers operating privately, that is to say, on behalf of a private individual or company and not at the direction of the State. When so acting, private security service providers and their contracted personnel will not be considered as agents of the State. But a legal framework regulating the conduct of all private security service providers must be in place at domestic level and must be enforced. Should those providers or their personnel act unlawfully, the State’s responsibility will be engaged if it fails to respond with due diligence to ensure the investigation of such acts and the prosecution of the offenders.<sup>15</sup>

[17] The State is also responsible for the actions of informal “self-defence” or vigilante groups using force when they act under its direction or with its approval, support or acquiescence.<sup>16</sup> The State is also responsible under international law if it fails to exercise due diligence to prevent unlawful uses of force by such groups or individuals, and in all cases where the unlawful use of force has occurred it has the duty to ensure accountability.

### **Core International Standards**

[18] The use of force for the purpose of law enforcement should be exceptional.<sup>17</sup> The notion of force under international law includes both the use of weapons and the application of physical force by a law enforcement official to a person. Six fundamental principles constrain and limit any such use of force when it is legitimate. Two of the principles—legality and precaution—generally apply prior to any use of force by a law enforcement agency. A further three principles—non-discrimination, necessity, and proportionality—apply to the use of force at the time and in the prevailing circumstances of its use. The final principle—accountability—applies after force has been used. These six principles are cumulative, meaning that all six must be adhered to for any use of force to be considered lawful under international standards. These principles, which all represent customary rules, are discussed in turn.

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<sup>13</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, Office of the UN High Commissioner for Human Rights (OHCHR), New York/Geneva, 2020, at: <http://bit.ly/367c0ac>, p. 44.

<sup>14</sup> Commentary, para. 2, on Chap. II: Attribution of Conduct to a State, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001; Text adopted by the International Law Commission (ILC) at its fifty-third session, in 2001, and submitted to the United Nations (UN) General Assembly as a part of the Commission’s report covering the work of that session, in UN doc. A/56/10, at: <https://bit.ly/32A30cT>.

<sup>15</sup> African Commission General Comment on the right to life, paras. 18, 27, and 38.

<sup>16</sup> *Ibid.*, para.9,

<sup>17</sup> Commentary para (a) on Article 3, 1979 UN Code of Conduct for Law Enforcement Officials.

## Legality

[19] There are four aspects to the principle of legality. First, there must be a basis in domestic law for the use of force in law enforcement. Second, that domestic legal basis must comply with the applicable international legal standards for the use of force and, for example, must not authorise the use of prohibited weapons. Consequently, as the UN Human Rights Committee has recalled, a deprivation of life may be authorised by domestic law but still be arbitrary<sup>18</sup> (and therefore a violation of the right to life), where the domestic law does not meet international legal standards.<sup>19</sup> Third, what constitute the legitimate aims of law enforcement should be clearly delineated. Fourth, the State must make laws governing use of force by law enforcement officials publicly known.

[20] To comply with the principle of legality, domestic laws on use of force for law enforcement purposes must be in place that reflect the key principles of policing, in particular of necessity, proportionality, and non-discrimination. As the African Commission recalls in its 2015 General Comment on the right to life, “States must adopt a clear legislative framework for the use of force by law enforcement and other actors that complies with international standards, including the principles of necessity and proportionality.”<sup>20</sup> This includes, in particular, regulation of the use of firearms<sup>21</sup> and other weapons likely to kill, which may never be used purely to protect property or to apprehend an escaping thief.<sup>22</sup> Detailed regulation on the use of less-lethal weapons may be set out in subsidiary legislation or regulations and standing operating procedures. These subsidiary guidelines should be coordinated with training curricula and internal accountability processes to ensure that they can give practical effect to the legal principles established in primary legislation.

[21] Domestic law may not authorise the use of any weapon prohibited for law enforcement. This covers weapons such as spiked batons and lasers designed to cause permanent blindness.<sup>23</sup> States Parties to the 1997 Anti-Personnel Mine Ban Convention may never under any circumstances use anti-personnel mines.<sup>24</sup> States not party to the Convention should never use anti-personnel mines in law enforcement operations, including in counterterrorism operations.

## Precaution

[22] International human rights law imposes a duty of precaution upon the planning and conduct of law enforcement operations. This means that law enforcement actions must be planned in a manner consistent with the need to minimise damage and injury, and to respect and preserve human life.<sup>25</sup> Thus, for example, the Commission’s Guidelines on Policing Assemblies stipulate that:

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<sup>18</sup> Human Rights Committee, “General Comment No. 36: Article 6: right to life”, UN doc. CCPR/C/GC/36, 3 September 2019, at: <http://bit.ly/2LWhbE9> (hereinafter, Human Rights Committee, General Comment 36 on the right to life), para. 12.

<sup>19</sup> Art. 6(1), International Covenant on Civil and Political Rights; adopted at New York, 16 December 1966; entered into force, 23 March 1976; Art. 4, Banjul Charter.

<sup>20</sup> African Commission General Comment on the right to life, para. 27. See also on this issue Human Rights Committee, General Comment 36 on the right to life, para. 13. Also see ACHPR Principles and Guideline on the Right to a Fair Trial and Legal Assistance in Africa, especially §M(1)(c)-(d).

<sup>21</sup> European Court of Human Rights, *Nachova v. Bulgaria*, Judgment (Grand Chamber), 6 July 2005, paras. 99, 100.

<sup>22</sup> In Botswana, for instance, the use of firearms is still potentially lawful under its domestic legal regime in order purely to protect property. See entry for Botswana on the Law on Police Use of Force Worldwide website, at: <https://bit.ly/2Mqf72Z>.

<sup>23</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, para. 5.1.

<sup>24</sup> Art. 1(1)(a), Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; adopted at Oslo, 18 September 1997; entered into force, 1 March 1999. As of 1 January 2021, 51 African States, including every nation in Sub-Saharan Africa, were party to this Convention. States not party were Egypt, Libya, and Morocco. The Sahrawi Arab Democratic Republic is not considered a State by the depositary of the Convention, the UN Secretary-General. In 2005, however, the Polisario Front decided to ban anti-personnel mines by signing Geneva Call’s Deed of Commitment on the prohibition of anti-personnel mines. Geneva Call, “Western Sahara: the Polisario Front destroys stockpiles of anti-personnel mines”, 31 March 2015, at: <https://bit.ly/39BND7e>.

<sup>25</sup> Human Rights Committee, General Comment 36 on the right to life, para.13; Principle 5(b), Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; adopted by the Eighth UN Congress on the Prevention of Crime

In the planning, preparation and conduct of an assembly operation, tactical and other measures must be taken to avoid the use of force and, where force is unavoidable, to minimise the harmful consequences of the use of force. If the use of force is necessary and proportionate, but the need for force could reasonably have been prevented from arising in the first place by exercising all precautions in planning and preparation for an assembly operation, operational commanders must be held accountable.<sup>26</sup>

[23] Accordingly, the State must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including, ‘wherever possible, careful planning of individual operations’.<sup>27</sup> “Shoot to kill” operations are therefore generally unlawful.<sup>28</sup> Likewise, a general policy of “no retreat”, that precludes tactical decision-making by officers on the ground, would violate the principle of precaution.

[24] All law enforcement agencies should be provided with appropriate less-lethal weapons and related equipment, and appropriate training must be provided on the rules governing use of force and their practical respect.

[25] There is also a duty to consider whether a planned operation can be delayed or its details revised to reduce the risks of violence occurring.<sup>29</sup> Moreover, where a use of force is unavoidable or is thought likely, appropriate planning and provision of medical assistance is essential.<sup>30</sup> Contingency plans for public order management should ensure the appropriate provision of essential services, including emergency services and medical services.<sup>31</sup>

[26] When the State deprives an individual of liberty, its control of the situation yields a heightened level of responsibility to protect that individual’s rights.<sup>32</sup> The Commission has previously noted that this includes a positive obligation to protect all detained persons from violence or other life-threatening emergencies, as well as to provide the necessary conditions of a dignified life, including food, water, adequate ventilation, an environment free from disease, and the provision of adequate healthcare.<sup>33</sup> With respect to the use of force the same heightened level of responsibility includes precautionary steps to avoid the recourse to force, or to minimise its impact.

### **Non-discrimination**

[27] In performing their duties, law enforcement officials shall not discriminate against any person on the basis of race, ethnicity, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, disability, property or birth, or other similar criteria.<sup>34</sup> In its General Comment on the right to life, the Commission stated that: “Any deprivation of life resulting from a violation of the procedural or substantive safeguards in the African Charter, including on the basis of discriminatory grounds or practices, is arbitrary and as a result unlawful.”<sup>35</sup>

[28] With respect to women, the 2003 Maputo Protocol obligates States Parties to take all appropriate measures “to ensure that law enforcement organs at all levels are equipped to

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and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, at: <http://bit.ly/2MZDrOu> (hereinafter, 1990 UN Basic Principles on the Use of Force and Firearms).

<sup>26</sup> African Commission on Human and Peoples’ Rights, *Guidelines on Policing Assemblies*, para.21.2.1.

<sup>27</sup> African Commission General Comment on the right to life, para. 27.

<sup>28</sup> European Court of Human Rights, *Yukhymovych v. Ukraine*, Judgment (Fifth Section), 17 December 2020, paras.73, 86, 87.

<sup>29</sup> European Court of Human Rights, *Shchiborshch and Kuzmina v. Russia*, Judgment (First Section), 16 January 2014, paras. 233, 240.

<sup>30</sup> Principle 5(c), 1990 UN Basic Principles on the Use of Force and Firearms.

<sup>31</sup> Pan-African Parliament Model Police Law for Africa, adopted by the Plenary Session of the Pan-African Parliament on 13 October 2019, at: <https://bit.ly/3psO6HX>, §9(f)(iv)(1).

<sup>32</sup> African Commission General Comment on the right to life, para. 36.

<sup>33</sup> *Ibid.*

<sup>34</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, para.2.1.1; Art.2, 1979 UN Code of Conduct for Law Enforcement Officials, and associated commentary.

<sup>35</sup> African Commission General Comment on the right to life, para.12.

effectively interpret and enforce gender equality rights”.<sup>36</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, once in force, will obligate its States Parties to take effective and appropriate measures to ensure protection, respect for life and the dignity of persons with disabilities, on an equal basis with others.<sup>37</sup> The Protocol also obligates the training “at all levels” of all law enforcement and justice personnel “to effectively engage with and ensure the rights of persons with disabilities”.<sup>38</sup> The preamble to the Protocol on the Rights of Persons with Disabilities in Africa notes the particular alarm of States Parties at “the maiming or killing of persons with albinism in many parts of the continent”.

[29] The UN Special Rapporteur on the Rights of Persons with Disabilities has reported on cases of persons with disabilities being arbitrarily detained on unfounded presumptions of “risk to self or others” and, in some instances, even being killed in the hands of law enforcement officials.<sup>39</sup> Persons with certain forms of disabilities such as, for example, epilepsy, psychosocial disabilities, and hearing impairment may be criminalised because police officers mistake them as “non-compliant” or unruly.<sup>40</sup>

[30] The prohibition of racial discrimination is a peremptory norm of international law.<sup>41</sup> Where racially-motivated or gender-based killings perpetrated by State agents, including law enforcement officials, are widespread or systematic, crimes against humanity may have occurred.<sup>42</sup>

### **Necessity**

[31] Law enforcement officials may use force only when strictly necessary.<sup>43</sup> The principle of necessity comprises three main aspects. First, only minimum necessary force be used (if force is required at all in the circumstances).<sup>44</sup> Second, any force must be in pursuit of a legitimate law enforcement purpose. Third, once the need for any force has passed, application of further force will be unlawful.

[32] The use of force by law enforcement officials should be exceptional,<sup>45</sup> with all reasonable effort being made to assure compliance with the law by non-violent means.<sup>46</sup> Such non-violent means may include verbal persuasion, the presence and authority of a police officer, and positive body language.<sup>47</sup> Officials should be taught and should employ techniques to minimise conflict, including use of basic negotiation and mediation skills.<sup>48</sup> Routine inquiries by law enforcement officials should not normally give rise to a necessity for the use of force.<sup>49</sup> The provision of

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<sup>36</sup> Art. 8(d), Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; adopted at Maputo, 11 July 2003; entered into force, 25 November 2005. As of 1 January 2021, 42 States were party to the Protocol and another 10 States were signatories.

<sup>37</sup> Art. 8(2)(a), Protocol on the Rights of Persons with Disabilities in Africa; adopted at Addis Ababa, 29 January 2018; not yet entered into force. As of 1 January 2021, nine States had signed the Protocol but none had yet ratified it. The Protocol will enter into force following the 15<sup>th</sup> ratification.

<sup>38</sup> Art. 13(3), Protocol on the Rights of Persons with Disabilities in Africa.

<sup>39</sup> Report of the Special Rapporteur on the rights of persons with disabilities, UN doc. A/HRC/40/54, 11 January 2019, para. 34.

<sup>40</sup> *Ibid.*

<sup>41</sup> Text of the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the Commission at second reading, in UN doc. A/77/10, 2022.

<sup>42</sup> For the elements of the international crime see Art. 7, Rome Statute of the International Criminal Court; adopted at Rome, 17 July 1998; entered into force, 1 July 2002.

<sup>43</sup> African Commission on Human and Peoples’ Rights, The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (“Luanda Guidelines”); adopted by the Commission during its 55<sup>th</sup> Ordinary Session in Luanda, 28 April to 12 May 2014, §3(c); Art. 3, 1979 UN Code of Conduct for Law Enforcement Officials.

<sup>44</sup> Luanda Guidelines, §3(c)(i).

<sup>45</sup> Commentary, para. (a), on Art. 3, 1979 UN Code of Conduct for Law Enforcement Officials.

<sup>46</sup> Pan-African Parliament Model Police Law for Africa, §8(c); Principle 4, 1990 UN Basic Principles on the Use of Force and Firearms.

<sup>47</sup> See UN Office on Drugs and Crime (UNODC) and OHCHR, *Resource Book on the Use of Force and Firearms in Law Enforcement*, UN, New York, 2017, <https://bit.ly/3rxEKmx>, p. 64.

<sup>48</sup> See, for example, Pan-African Parliament Model Police Law for Africa, Schedule 2, §9(e).

<sup>49</sup> European Court of Human Rights, *Rachwalski and Ferenc v. Poland*, Judgment (Fourth Section), 28 July 2009, paras. 55, 58.



appropriate personal protective equipment may also decrease the need for law enforcement officials to use weapons of any kind.<sup>50</sup>

[33] Minimum necessary force is the use of that force, and no more, that prevents a crime being committed, ensures that a suspect can be arrested safely, or enables an escaping suspect or convict to be apprehended by a law enforcement official. Officials shall always exercise restraint in the use of force and act in proportion to the seriousness of the offence and the legitimate objective to be achieved.<sup>51</sup> With a view to de-escalating a situation of potential violence, where appropriate, the suspension of operations or tactical withdrawal may be integral to effective law enforcement. Any recourse to physical force which has not been made strictly necessary by a person's own conduct diminishes human dignity and is, in principle, an infringement of the right to freedom from ill-treatment.<sup>52</sup>

[34] Law enforcement officials may use force only to the extent required for the performance of their duty.<sup>53</sup> Thus, force may only be lawful where it is used for a legitimate law enforcement purpose. Such a purpose includes the lawful arrest of a suspected criminal or the prevention of crime. Arrests shall only be carried out by police or by other competent officials or authorities authorised by the state for this purpose, and shall only be carried out pursuant to a warrant or on reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence.<sup>54</sup> Use of force as a result of racial animus is unlawful,<sup>55</sup> as is any punitive or intimidatory use of force.<sup>56</sup>

[35] Once the need for force has passed, such as when a suspect is handcuffed and is not, or is no longer, resisting arrest and is not seeking to escape, the application of further force will be unlawful.<sup>57</sup>

### **Proportionality**

[36] Whenever the lawful use of force is unavoidable, law enforcement officers must act "in proportion to the seriousness of the offence and the legitimate objective to be achieved".<sup>58</sup> In addition, at all times, law enforcement officials should consider and minimise the possible incidental impact of their use of force on bystanders, passers-by, medical personnel and journalists. They shall not direct force against such persons, and any incidental impact must be strictly proportionate to the legitimate objective to be achieved.<sup>59</sup>

[37] The principle of proportionality sets an upper limit on when minimum necessary force may be lawful, based on a comparison of the threat posed and the harm inflicted on life or limb and to property by the actions taken to repel the threat.<sup>60</sup> For example, force that is likely to result in injury may not be used simply to obtain compliance with an order by a person who is only passively resisting.<sup>61</sup>

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<sup>50</sup> Human Rights Council Resolution 38/11, adopted without a vote on 6 July 2018, para.15.

<sup>51</sup> Principle 5(a), 1990 UN Basic Principles on the Use of Force and Firearms.

<sup>52</sup> European Court of Human Rights, *Bouyid v. Belgium*, Judgment (Grand Chamber), 28 September 2015, paras. 88, 100.

<sup>53</sup> Art. 3, 1979 UN Code of Conduct for Law Enforcement Officials.

<sup>54</sup> Luanda Guidelines, §3(a). This is without prejudice to the right of an ordinary citizen who, under many national jurisdictions, may conduct an arrest in certain circumstances and in accordance with specified conditions.

<sup>55</sup> Art. 2, Banjul Charter; and see European Court of Human Rights, *Nachova v. Bulgaria*, Judgment (Grand Chamber), 6 July 2005, paras.126, 145.

<sup>56</sup> European Court of Human Rights, *Kukhalashvili v. Georgia*, Judgment (Fifth Section), 2 April 2020, para.151.

<sup>57</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN doc. A/HRC/26/36, 2014, para. 60. See also African Commission on Human and Peoples' Rights, *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi v. Zimbabwe*, Decision (Comm. 295/04), 2012, para. 118.

<sup>58</sup> Principle 5(a), 1990 UN Basic Principles on the Use of Force and Firearms.

<sup>59</sup> *Ibid.*

<sup>60</sup> Principle 5(a), 1990 UN Basic Principles on the Use of Force and Firearms. See further S. Casey-Maslen, *The Right to Life under International Law: An Interpretive Manual*, Cambridge University Press, September 2021, para.7.28.

<sup>61</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, para. 2.10.

[38] The most significant restrictions resulting from the principle of proportionality occur with respect to the use of firearms<sup>62</sup> or other means of deadly force (addressed in more detail below).<sup>63</sup> In a 2012 decision, the African Commission held that: “Proportionality requires that the rights of the person threatened (police officers in this case) are measured against those of the deceased persons ... in an objective way, in the light of the prevailing circumstances at the time when the final decision on the use of lethal force is made. The potential taking of life ... is placed on one side of the scale, and, since the right to life is at stake, only the protection of life (that of the police officials) will carry any weight, on the other”.<sup>64</sup>

### **Accountability**

[39] States are under an obligation to ensure that law enforcement officials are held accountable for their actions, including any decision to use force.<sup>65</sup> As law enforcement officials are required to protect the public, in certain circumstances States are also obliged to hold them accountable for a negligent failure to protect members of the public against a serious threat.<sup>66</sup> Effective systems and legal processes for police accountability should be established where they are not in place.<sup>67</sup> To ensure effective accountability, law enforcement agencies must establish independent and effective internal accountability mechanisms, and States should establish an adequately resourced and independent external oversight body.<sup>68</sup> National Human Rights Institutions can make valuable contributions to broader accountability of law enforcement, including with respect to their use of force.

[40] Monitoring, reporting, and transparency are essential components of accountability. Law enforcement officials should generally be identifiable, for example by wearing clearly-visible nametags or individually-assigned service numbers.<sup>69</sup> All weapons and, where feasible, all ammunition, batons, and projectiles, should be uniquely marked.<sup>70</sup>

[41] In the event of injury following the use of force by a law enforcement official, or in the event of the discharge of a firearm, a report must be compiled.<sup>71</sup> The failure to compile and file such a report through appropriate channels should be an offence both for the officer involved and their commanding officer.<sup>72</sup> The report should contain sufficient information to establish whether the use of force was necessary and proportionate, and should set out the details of the incident, including the circumstances; the characteristics of the victim; the measures taken to avoid the use of force and to de-escalate the situation; the type and manner of force employed, including specific weaponry; the reasons for the use of force, and its effectiveness; and the consequences. The report should conclude whether the use of force was lawful and, in any event, should identify any lessons learned from the incident.<sup>73</sup> The reporting system should be designed to allow for the analysis of

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<sup>62</sup> Under international law, firearms are defined broadly to encompass handguns, rifles, shotguns, submachine guns, light machine guns, and hand-held grenade launchers. See Art. 3(a), Protocol Against The Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime; adopted at New York, 31 May 2001; entered into force, 3 July 2005. See also Art. 1(2), Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region; signed at Blantyre, 14 August 2001; entered into force, 8 November 2004.

<sup>63</sup> See, e.g., ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials; adopted at Abuja, 14 June 2006; entered into force, 29 September 2009.

<sup>64</sup> *Noah Kazingachire, John Chitsenga, Elias Chemvura, and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, Decision, 2012, para. 116. In this decision as elsewhere, the Commission relies upon Principle 9, 1990 UN Basic Principles on the Use of Force and Firearms.

<sup>65</sup> African Commission on Human and Peoples’ Rights, General Comment No.4 on The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 2017, para.46.

<sup>66</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, para. 3.1.

<sup>67</sup> African Commission General Comment on the right to life, para. 16.

<sup>68</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, para. 3.1.

<sup>69</sup> See, e.g., Pan-African Parliament Model Police Law for Africa, §9(g)(iii).

<sup>70</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, para. 3.3.

<sup>71</sup> ACHPR Guidelines on policing assemblies, s.21.3.5. Also see ACHPR Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa (2015), s.2(B)(ii)

<sup>72</sup> Principles 24 & 26, 1990 UN Basic Principles on the Use of Force and Firearms.

<sup>73</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, para. 3.4.



trends and patterns regarding the use of force, including information about whom force was used against. The information should include data disaggregated by race, ethnicity, nationality, gender, and religion. This data should be anonymized and made available to oversight bodies and published to further enhance transparency.<sup>74</sup>

[42] In the event of a death resulting from the use of force by a law enforcement official, a prompt, impartial, thorough and transparent investigation must be conducted: a failure to undertake such an investigation (regardless of whether the circumstances of the use of force appear *prima facie* lawful) will itself amount to a violation of the right to life.<sup>75</sup> The same duty applies *mutatis mutandis* to alleged torture or other ill treatment<sup>76</sup> or enforced disappearance.<sup>77</sup>

[43] Where criminal wrongdoing by a law enforcement official is identified by an investigation, the perpetrators must be prosecuted. This is without prejudice to other disciplinary or administrative sanctions that may be imposed.<sup>78</sup> An unreasonable failure to prosecute gives rise to impunity. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful order. The law applies to commanders as it does to their subordinates.

### **The use of weapons in law enforcement**

[44] Law enforcement officials across the continent are equipped in different ways. In some jurisdictions, almost all officers will be authorised to carry firearms, whereas in others this will be the dedicated remit of only specialised units. In some jurisdictions, specialised “public order” units may have access to a wider range of weapons and equipment designed for use in policing assemblies. Others will not. Law enforcement officials should not be deployed without an alternative weapon to a firearm.

[45] In this section the Study outlines the specific rules concerning the use of firearms, and the range of important issues to be considered when providing law enforcement agencies with other equipment, including so-called “less-lethal weapons”. In taking decisions about the weapons and equipment provided to law enforcement officials, States must at all times respect the six core principles discussed above, as well as the potential implications of the weapon for the protection of human rights.<sup>79</sup>

### **Specific rules on the use of firearms**

[46] International standards generally limit the use of firearms to a situation where it is necessary to confront an imminent threat of death or serious injury.<sup>80</sup> As noted above, the defence of property for example does not entitle a law enforcement official to discharge a firearm. In truly exceptional circumstances, where a grave and ongoing threat exists to life and no other means are reasonably available to confront that threat, a law enforcement official may use a firearm to prevent a criminal

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<sup>74</sup> Ibid., para.4.3.2. See also ACHPR Guidelines on policing assemblies, s.8.5.

<sup>75</sup> African Commission, General Comment on the right to life, para. 15. See also ACHPR *Gabriel Shumba v. Republic of Zimbabwe* (Comm. 288/2004, May 2012), para.136. A full discussion of the necessary standards for an investigation into a potential unlawful death is in the *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, United Nations, 2017, at: <https://bit.ly/3aH8Yh7>.

<sup>76</sup> Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), Istanbul, 1999, at: <https://bit.ly/3sfPHK2>, para. 74.

<sup>77</sup> *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 2.

<sup>78</sup> Ibid., para. 8.

<sup>79</sup> This applies, for example, to consideration of whether or not unmanned systems should be considered appropriate for law enforcement, especially unmanned systems capable of delivering force.

<sup>80</sup> Principle 9, 1990 UN Basic Principles on the Use of Force and Firearms; Human Rights Committee, General Comment 36 on the right to life, para. 12; and Human Rights Council Resolution 46/15, March 2021, para. 14.

suspect from perpetrating a homicide.<sup>81</sup> But discharging a firearm to prevent the escape of a convicted criminal who does not represent either an imminent threat of serious injury or a grave and ongoing threat to life is unlawful.

[47] A heightened standard exists to constrain shooting with intent to kill. As the African Commission has previously stated: “The intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life (making it proportionate) and all other means are insufficient to achieve that objective (making it necessary).”<sup>82</sup> The use of firearms in fully automatic mode in law enforcement is never lawful as they are indiscriminate in effect and place the public at too great a risk.<sup>83</sup> Incidental harm caused to other persons who are not presenting a threat is an unacceptable outcome in law enforcement.

### **The availability and use of “less-lethal weapons”**

[48] Particular attention should be paid to ensuring the availability and use of weapons less likely to cause death or serious injury than are firearms.<sup>84</sup> Accordingly, in situations where force is justified but the use of firearms would be unlawful, law enforcement officials may use appropriate less-lethal weapons, but still subject to the principles on the use of force outlined above, including strict requirements of necessity and proportionality, in situations in which other less harmful measures have proven to be or clearly are ineffective to address the threat.<sup>85</sup> While preferable to more lethal weapons, States should ensure that less-lethal weapons are subject to strict independent testing and evaluate and monitor the impact on fundamental human rights, including the right to life.<sup>86</sup> “Less-lethal” does not mean “non-lethal” since such weapons can still cause death.<sup>87</sup>

[49] Detailed guidance on less-lethal weapons has been set out in the 2020 United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement. This includes direction on the lawful and unlawful design and use of the following weapons: police batons; hand-held chemical irritants such as pepper spray; tear gas; conducted electrical weapons (“Tasers”), plastic bullets, and water cannon. This Guidance can serve as the basis for the development of specific regulations and standing operating procedures on the domestic level in Africa. Rubber-coated metal bullets should not be used in law enforcement.<sup>88</sup>

[50] The most common weapon provided to law enforcement officials in Africa is the baton or truncheon. When the use of a baton by a law enforcement official is lawful, such as to defend a police officer against a violent assault, baton strikes should be targeted against the arms or legs of an assailant.<sup>89</sup> Over-arm strikes on bones and joints have a heightened risk of resulting in fractures or dislocations.<sup>90</sup> Officials should also avoid baton strikes to sensitive areas of the body, such as the head, neck and throat, spine, kidneys and abdomen. Neck-holds using batons should not be employed as they present an especially high risk of death or serious injury as a result of large blood-vessel or airway compression.<sup>91</sup> Jabs or driving strikes with a baton at the thorax, neck or head should be avoided because of the risk of injury to vital organs.<sup>92</sup> Batons may not be used

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<sup>81</sup> Principle 9, 1990 UN Basic Principles on the Use of Force and Firearms.

<sup>82</sup> African Commission General Comment on the right to life, para. 27.

<sup>83</sup> Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province, 31 March 2015, p. 258. Also see UNODC/OHCHR, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p.103.

<sup>84</sup> African Commission General Comment on the right to life, para. 30.

<sup>85</sup> Human Rights Committee, General Comment on the right to life, para. 14.

<sup>86</sup> *Ibid.*

<sup>87</sup> Thus, for example, the UN Human Rights Guidance does not use the term “non-lethal” given that “the use of any weapon can have fatal consequences”. *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, p. v, note 4.

<sup>88</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, para. 7.5.8.

<sup>89</sup> *Ibid.*, para. 7.1.3.

<sup>90</sup> M. M. Stark (ed.), *Clinical Forensic Medicine: A Physician’s Guide*, Humana Press, 2005, p. 198.

<sup>91</sup> *United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement*, para. 7.1.5.

<sup>92</sup> *Ibid.*, para. 7.1.4.

against a person who is neither engaged in causing, nor threatening, violent behaviour. Such use is likely to amount to cruel, inhuman or degrading treatment, or even torture.<sup>93</sup> Similarly, the carrying of weapons whose use is either exclusively or primarily punitive, such as whips, is unlawful since these weapons cannot be used appropriately for a legitimate law enforcement purpose.<sup>94</sup>

## **The use of force in specific situations**

### **The use of force during assemblies**

[51] Detailed guidance on the policing of assemblies was adopted by the African Commission on Human and Peoples' Rights in 2017.<sup>95</sup> The primary role of law enforcement officials in policing assemblies is to ensure the safety of the public and to safeguard human rights of all persons.<sup>96</sup>

[52] If assembly participants are generally behaving peacefully, law enforcement officials must avoid the use of force and should not generally seek to disperse the assembly.<sup>97</sup> Law enforcement officials should be trained to differentiate between individual and group behaviour, and to identify and remove specific persons identified as acting in an unlawful or violent manner while continuing to facilitate the enjoyment of the right to assemble freely with others for all other persons.<sup>98</sup> "Violence" in this context typically entails the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property; mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to "violence".<sup>99</sup> In any event, the use of force to disperse an assembly is a measure of last resort.<sup>100</sup> Where force is deemed to be a lawful and proportionate response, law enforcement officials must only use the minimum level of force necessary.<sup>101</sup>

[53] Firearms may never be used to disperse an assembly.<sup>102</sup> Less-lethal weapons are therefore especially important in the context of assemblies. In such situations, less-lethal weapons that can be individually aimed shall target only individuals engaged in acts of violence.<sup>103</sup> Great care must be taken when using less-lethal weapons that cover areas and incapacitate groups of people, such as is the case with tear gas. A stampede may result when tear gas is used against a crowd in an enclosed area, such as a football stadium.<sup>104</sup>

### **Custodial settings**

[54] The ultimate goal of imprisonment is rehabilitation and return of people deprived of liberty to the community. This requires a particular management approach in which maintenance of good order, trust, and fair treatment of detainees are key. While skills for the prevention, negotiation, and peaceful resolution of conflict are recommended for all law enforcement officials,<sup>105</sup> such abilities are essential competences of custodial officials. In a confined and monitored space,

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<sup>93</sup> Ibid., para. 7.1.5.

<sup>94</sup> Ibid., para. 2.4; UNODC/OHCHR, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p.17.

<sup>95</sup> African Commission on Human and Peoples' Rights, *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*, 2017.

<sup>96</sup> Ibid., §3.3.

<sup>97</sup> Ibid., §22.2.

<sup>98</sup> Ibid., §20.3. Also see Human Rights Committee, General Comment No.37, paras.17 and 86.

<sup>99</sup> Ibid., para.15.

<sup>100</sup> African Commission on Human and Peoples' Rights, *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*, §22.1.

<sup>101</sup> Ibid., §22.2.

<sup>102</sup> Ibid., §22.6; African Commission General Comment on the right to life, para. 28; Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (article 21), UN doc. CCPR/C/GC/37, 17 September 2020, at: <http://bit.ly/3nKSnfB>, para. 88.

<sup>103</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, para. 6.3.4.

<sup>104</sup> Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, UN doc. S/2009/693, at: <http://bit.ly/3nMHev4>, annex, para. 62.

<sup>105</sup> Principle 20, 1990 UN Basic Principles on the Use of Force and Firearms.

frontline staff need to be capable of sensing and detecting signs of trouble and of containing a situation before it deteriorates.<sup>106</sup> The precautionary principle applies to addressing chronic problems within the custodial system such as over-crowding, deteriorating physical infrastructure, and under-staffing, all of which can contribute toward such deteriorations being more likely and more dangerous.

[55] Force may not be used against persons in detention except when strictly necessary in the following circumstances: as justifiable self-defence when there is an immediate threat of physical violence to the law enforcement official or someone else; when there is an attempt to escape; or if detainees refuse (actively or passively) to comply with lawful orders.<sup>107</sup> Less-lethal weapons such as batons may only be used when other methods have failed, and if the targeted person is showing violent behaviour likely to result in injury, or even death, to the law enforcement official or a third party. Passive refusal to comply with an order can never justify a use of force—whether or not it involves a weapon—that is likely to result in moderate or severe injury, or which involves the deliberate infliction of pain.<sup>108</sup>

[56] While external law enforcement officers may be called in in case of exceptional emergencies, it is generally good practice to limit their intervention to perimeter security: they are not familiar with the premises and the detainees, and therefore more likely to use excessive force to control a situation. Finally, the methods that can be used outside (such as the use of certain less-lethal weapons, including tear gas) are not necessarily adaptable to confined and overcrowded environments.

[57] States are obligated to establish, and make known, internal and independent complaints mechanisms for persons in police custody and pre-trial detention.<sup>109</sup> Access to complaints mechanisms shall be guaranteed for all persons in police custody and pre-trial detention, without fear of reprisals or punishment.<sup>110</sup>

[58] The use of force in a custodial setting must be reported immediately to the director of the institution or to an individual of equivalent authority, as appropriate.<sup>111</sup> There shall be thorough, prompt and impartial investigations of all complaints of unlawful use of force and, where they are well-founded, appropriate remedial action shall be taken without delay.<sup>112</sup>

[59] There is a presumption of State responsibility for a death that occurs in a custodial setting.<sup>113</sup> The obligation upon the State to offer reparation to victims exists irrespective of whether a successful criminal prosecution can or has been brought.<sup>114</sup> Any use of force to prevent an escape must be both necessary and proportionate in the circumstances. Any recourse to the use of firearms, which must be truly exceptional, may only occur where a grave and ongoing threat exists to life or an imminent threat exists of serious injury and no other means are reasonably available to confront that threat.<sup>115</sup>

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<sup>106</sup> Rules 75 & 76, UN Standard Minimum Rules for the Treatment of Prisoners (“the Nelson Mandela Rules”), adopted without a vote by the General Assembly in its Resolution 70/175 of 17 December 2015.

<sup>107</sup> Principle 15, 1990 UN Basic Principles on the Use of Force and Firearms; Rule 82(1), Nelson Mandela Rules.

<sup>108</sup> *United Nations Human Rights Guidance on the Use of Less-Lethal Weapons in Law Enforcement*, paras. 2.10 and 7.4.11.

<sup>109</sup> *Ibid.*, §37(a).

<sup>110</sup> *Ibid.*, §37(b).

<sup>111</sup> Rule 82(1), Nelson Mandela Rules.

<sup>112</sup> Luanda Guidelines, §37(d).

<sup>113</sup> African Commission General Comment on the right to life, para. 37. See similarly Human Rights Committee, *Sanjeevan v. Sri Lanka*, Views, 8 July 2008, para. 6.2.

<sup>114</sup> Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (“The Robben Island Guidelines”), adopted by the African Commission on Human and Peoples’ Rights in October 2002 and approved by the Conference of Heads of State and Government of the African Union in Maputo, July 2003, §49.

<sup>115</sup> Luanda Guidelines, §25(c); Principle 16, 1990 UN Basic Principles on the Use of Force and Firearms.

### **Use of force and especially vulnerable persons or groups**

[60] Certain persons or groups of persons are especially vulnerable to use of force by law enforcement officials. Persons with certain physical or intellectual disabilities may not hear or understand instructions or questions from law enforcement officials, leading those officials to mistakenly believe they are being wilfully ignored.<sup>116</sup> This risk can be minimised through effective sensitisation and training.

[61] Use of force against children or older persons must be carefully circumscribed because of the disproportionate harm that may be occasioned. As the Luanda Guidelines provide: “Contact between law enforcement agencies and child suspects shall be managed in such a way as to respect the legal status of the child and promote his or her well-being.”<sup>117</sup> The 2016 Protocol on the Rights of Older Persons in Africa provides that States Parties shall ensure that “law enforcement organs at all levels are trained to effectively interpret and enforce policies and legislation to protect the rights of Older Persons”.<sup>118</sup>

[62] Other groups of persons may also be especially vulnerable to use of force by law enforcement officials. These include, but are not limited to, minorities, LGBTI persons, and migrants.<sup>119</sup> Discriminatory use of force is always unlawful.

### **Use of force in situations of emergency**

[63] Law enforcement continues in situations of emergency, including during natural disasters, public health emergencies, and armed conflicts. Fundamental human rights, including the right to life and to freedom from torture, must be respected and protected at all times. The same basic rules apply to and regulate the acts of all law enforcement agencies during situations of emergency.<sup>120</sup>

[64] While governments may respond to emergencies with the passage of new legislation, and potentially the temporary creation of new criminal offences (as has recently been evident in the response to the COVID-19 pandemic), the existence of a state of emergency has no impact on the standards that apply to the use of force by law enforcement officials in giving effect to those laws.

[65] The existence of an armed conflict within the territory of a state does not mean that law enforcement rules no longer apply. Care must be taken to distinguish between situations of conduct of hostilities to which the conduct of hostilities rules for the use of force under international humanitarian law would apply, and situations of law enforcement to which the international standards for the use of force by law enforcement officials apply.

[66] Counterterrorism operations fall within the realm of law enforcement and are subject to the international standards for the use of force by law enforcement, except where the activities of the particular terrorists targeted reach the threshold of an armed conflict and fall within the conduct of hostilities. Outside the narrow confines of the battlefield, law enforcement rules—and the duty of precaution—continue to apply.

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<sup>116</sup> Rights of persons with disabilities, Report of the Special Rapporteur on the rights of persons with disabilities, UN doc. A/HRC/40/54, 11 January 2019, para. 34.

<sup>117</sup> Luanda Guidelines, §31(h).

<sup>118</sup> Art. 4(3), Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons; adopted at Addis Ababa, 31 January 2016; not yet in force.

<sup>119</sup> See for example ACHPR Resolution 398 on mixed migratory flows, the challenges of protecting migrants and the prohibition of trafficking in persons and all forms of violence in North and Sub-Saharan Africa (May 2018). See also the Commission’s *Pilot Study on Migration and Respect for Human Rights: Focus on the Responses Provided by Niger* (2019).

<sup>120</sup> Principle 8, 1990 UN Basic Principles on the Use of Force and Firearms. The Commission has also made clear that “Derogation from the right to life is not permissible in a time of emergency, including a situation of armed conflict, or in response to threats such as terrorism”, see African Commission General Comment on the right to life, para. 7.

## Training on Use of Force and Human Rights

### General observation on police training

[67] The African Commission has frequently drawn attention to the importance of training for law enforcement officials as an opportunity to promote a culture of professionalism and respect for human rights.<sup>121</sup> International standards are clear that States must ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force.<sup>122</sup>

[68] In its specific guidance around the policing of assemblies the Commission has laid out minimum standards of the training that ought to be provided to all officers in anticipation of their being involved in the policing of assemblies, as well as highlighting the need for specialised training for dedicated units.<sup>123</sup> Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.<sup>124</sup>

[69] Around the world, police training generally takes the form of a certain period of basic recruit training in a direct fashion (whether classroom-based or practical instruction, usually in combination), followed by another period of “on the job” training during which a recruit shadows a more experienced officer in order to apply what they have learned during basic training in the real world. The total duration of the training varies, and is usually in the range of 6 to 18 months.

[70] In order to be effective, training must be built on clear organisational policies, procedures and SOPs, such as those discussed in detail in the next section. Basic Principle 20 states that “law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents”. An important function of national oversight and accountability mechanisms, described above and below, is to provide insight into training curricula based upon lessons learned. Authorities should facilitate the periodic review of training curricular by national oversight mechanisms.

[71] Human rights training should be integrated and streamlined through all training modules, rather than treated as a stand-alone subject, divorced from the day-to-day practice of policing. A trainer can present on the international standards concerning the right to life—as laid out in the previous sections—but it will be far more effective to ensure that the examples and scenarios used for training on de-escalation during encounters, planning of complex operations are guided by those standards,<sup>125</sup>

[72] Therefore, in addition to familiarity with the norms and principles of human rights, use-of-force training should be scenario-based, with emphasis on those scenarios that a new recruit is most likely to encounter in practice. By working on these real-world scenarios, the recruit learns to assess a situation and to identify options for how to solve it. Within these scenarios, recruits should learn how to handle conflict situations in ways other than through use of force. They should learn how to de-escalate tension, make use of communication skills such as mediation and negotiation, and understand different tactics they might deploy. Moreover, law enforcement officials should learn that not every situation requires action (and that it may be the recommended course of action to walk away from a situation if no negative will result, or if the situation can be better handled by other agencies with more effective responses). If the situation needs action, officials should learn to consider non-violent means first, and only consider using force when non-violent means remain ineffective or have no likelihood of succeeding. Training must also include principles of accountability, including the internal and external mechanisms to which officials are answerable,

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<sup>121</sup> See, for example, Resolution 259 (LIV) on Police and human rights (November 2013) and, more recently, Resolution 474 (EOS XXXI) on Prohibition of excessive force by law enforcement officers in African States (February 2021).

<sup>122</sup> Principle 19, 1990 UN Basic Principles on the Use of Force and Firearms.

<sup>123</sup> ACHPR Guidelines on policing assemblies, s.7.2.

<sup>124</sup> Principle 19, 1990 UN Basic Principles on the Use of Force and Firearms.

<sup>125</sup> UNODC/OHCHR, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p.54.

and the obligations of a law enforcement official to report conduct by colleagues that is excessive, arbitrary or otherwise in violation of law.<sup>126</sup>

[73] Training should mainstream considerations of personal safety, which may help reduce the sense of threat in a given situation and hence the likelihood that an officer resorts to force. For example, in Somaliland, a Comprehensive Education Programme (developed with assistance from UNODC) designed to be offered to all ranks of police officers, includes a module on self-defence, involving conflict management, communication, non-lethal control and restraint, as well as prisoner transportation.<sup>127</sup> Those responsible for police training should design curricula and training environment that is supportive to officers' needs, including aspects of mental health and stress management.<sup>128</sup>

[74] Principle 19 of the Basic Principles on Use of Force and Firearms states that governments and law enforcement agencies "shall ensure that all law enforcement officials are (...) tested in accordance with appropriate proficiency standards in the use of force". Recruits must demonstrate that they can apply what they have learned in practice, preferably in the context of realistic scenarios. Moreover, the norms and standards governing law enforcement work should be reinforced in all subsequent training and refresher courses. As emphasised in Basic Principle 18, law enforcement agencies are obliged to provide "continuous and thorough professional training".

### **Training on the use of firearms**

[75] While basic accuracy in the use of firearms must clearly be a component of training and certification of those officers who will be authorised to carry firearms, it is not sufficient in order to prepare officers to use force in a way that complies with international standards. In addition to demonstrating proficiency with fixed paper targets, officers should undergo dynamic scenario-based training about when to shoot and when not to shoot.

[76] Firearms officers must also be trained on the importance that every round fired must be justified and justifiable.

[77] Principle 19 also states that "those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use". To be authorized to use a firearm, the recruit should be certified for that particular instrument, meaning they should regularly be re-tested and lose their licence or certification or have it suspended when they fail a test. In such cases, law enforcement officials should be required to hand in the respective instrument. This may also benefit from being extended to certain other "less lethal" weapons.

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<sup>126</sup> African Commission on Human and Peoples' Rights, *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa*, §7.2.10.

<sup>127</sup> UNODC/OHCHR, *Resource Book on the Use of Force and Firearms in Law Enforcement*, p.56.

<sup>128</sup> In a 2021 report, the Independent Police Oversight Authority in Kenya raised concerns that insufficient attention to these issues can foster a training culture that 'converts the officers into "hardy, ruthless, callous and somehow obstinate people.'" See IPOA, *Murders and Suicides in the National Police Service: An Analysis on Causes and Prevention Strategies* (October 2021) p.15, available at: <https://ipoa.news/wp-content/uploads/2022/05/murders-and-suicides-report-2022.pdf>.

## PART II: Domestic Legal Regimes Concerning the Use of Force

[78] This part of the Study reviews available information about the domestic legal regimes of each African State concerning the use of force by law enforcement officials, highlights a number of recurring themes and issues of concern, and lays out available mechanisms for investigation and or remedy of abuses at the national level. [In certain instances, reference may be made to particular events involving the use of force by law enforcement officials in the recent past, especially where this has prompted legal reform, or where it illustrates a protection gap, but this is not a systematic survey of use of force across the continent.]

### Survey of legislation on the use of force and accountability mechanisms

[79] This section of the Study surveys the whole continent, by AU sub-region, documenting the existence of relevant legal regimes governing the use of force by law enforcement officials, including any particular legislation on the use of lethal force, i.e. the regulation of the use of firearms, as well as highlighting the various mechanisms in place to ensure accountability. Issues of concern across many countries are an overly permissive authorisation to use force or firearms, the power to use “all force necessary” to disperse gatherings deemed unlawful, and, in some cases, the existence of *de jure* impunity for law enforcement officials who use force in the course of their duties.

### Central Africa

[80] In **Burundi**, the 2017 law on the police stipulates that the Police may only use force where necessary for a legitimate law enforcement objective. All use of force must be “reasonable and proportionate to the objective being sought”.<sup>129</sup>

[81] The law does not specifically regulate the use of firearms. Police use of firearms is instead governed by an Ordinance which stipulates that firearms may be used where necessary, *inter alia*, to defend positions and items under their protection.<sup>130</sup> This is more permissive than international law allows.

[82] In **Burundi**, an Inspectorate General of Public Security (IGSP) was formed in 2009 and is nominally the body tasked with independent oversight, control and investigation of all the activities conducted under the auspices of the Ministry of Public Security as well as the documentation of complaints against the police.<sup>131</sup> Numerous international bodies have expressed concerns about the lack of effective oversight of the security sector in Burundi. For example, the UN Independent Investigation on Burundi included among its recommendations that ‘Effective civilian oversight mechanisms must be established over the security sector. These mechanisms should be multi-level and dispersed, so that oversight does not become a tool for the executive political control of the security sector.’<sup>132</sup> The UN Committee Against Torture has similarly urged the establishment of an effective National Preventative Mechanism.<sup>133</sup>

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<sup>129</sup> Loi organique No.1/03 du 20 février 2017 portant missions, organisation, composition et fonctionnement de la police nationale du Burundi, art.13.

<sup>130</sup> Ordinance No.215/891 of 9 July 2009 on the Code of Ethics of the Burundi National Police.

<sup>131</sup> Envisioned by Décret n° 100-005 du 11 janvier 2005, art. 2. See also Décret 100/298 du 21 novembre 2011, especially art.15.

<sup>132</sup> Report of the UN Independent Investigation on Burundi (UNIIB) established pursuant to Human Rights Council resolution S-24/1, A/HRC/33/37, 20 September 2016, para.144

<sup>133</sup> Committee against Torture, Concluding observations on the second periodic report of Burundi, CAT/C/BDI/CO/2, 12 December 2014, para.19; Committee against Torture, Concluding observations of the Committee on the special report of Burundi requested under article 19 (1) *in fine* of the Convention, CAT/C/BDI/CO/2/Add.1, 9 September 2016, para.13(e).



[83] According to the 2005 Code of Criminal Procedure in **Cameroon**, a law enforcement official may use “reasonable force necessary” to effect an arrest.<sup>134</sup> Under the Penal Code, any police officer who uses unlawful force against a person is subject to a term of imprisonment.<sup>135</sup> A 1990 Law authorises the administrative authorities to use firearms when serious and widespread violence occurs or when firearms are used against law enforcement officials. The use of firearms is allowed only if law enforcement officials cannot otherwise defend themselves and only after several warnings have been made, for instance by means of a loudhailer.<sup>136</sup> These rules are more permissive than international law allows, as they suggest that firearms may be used other than to confront an imminent threat to life or of serious injury.

[84] In Cameroon, while there is no external oversight, an internal section exists within the national police, the Special Division for Service Oversight, which was established in 2005.<sup>137</sup>

[85] The **Central African Republic** does not appear to have any existing legislation governing use of force by law enforcement officials. In 2016, a report of the UN Stabilisation Mission (MINUSCA) highlighted the need for legislative and policy frameworks as part of broader security sector reform: “Notwithstanding the development of a draft national security policy by the transitional authorities, the roles and responsibilities of the armed forces and internal security institutions have yet to be delineated [...] Overall, policy frameworks are non-existent or anachronistic, while democratic civilian oversight of security agencies is weak. The absence of a dedicated civilian oversight authority to regulate weapons and ammunition management and activities has also contributed to the illicit flow of weapons.”<sup>138</sup> MINUSCA’s National Security Forces have established a collaborative five-year plan of capacity building to address this deficit, but no results are yet apparent in the public record.<sup>139</sup>

[86] **Chad** has few domestic legal provisions governing use of force by law enforcement officials. A 1962 Ordinance governs the right of peaceful assembly, allowing the police to use force to disperse an unauthorised gathering but without imposing restrictions on that use of force.

[87] Chad does not appear specifically to regulate the use of firearms by law enforcement officials in its domestic law.

[88] The **Republic of Congo** does not appear to have any existing legislation governing use of force by law enforcement officials.

[89] In the **Democratic Republic of Congo**, a 2011 Police Law stipulates that the Congolese Police may only use force “in case of absolute necessity and only in order to achieve a legitimate objective” and “in, any circumstances, the use of force must respect the principle of proportionality and progressivity”.<sup>140</sup>

[90] The 2011 law provides that, in the exercise of their duties, the police may, “in case of absolute necessity”, use knives or firearms “when there is no other way for them to defend the place they occupy, the facilities, stations or persons that are under their responsibility” or when violence is or is about to be used against them or others.<sup>141</sup> In allowing for the use of lethal force to defend property, this is more permissive than international law allows.

[91] The Committee against Torture in 2019 expressed its concern about the manifestly excessive and disproportionate use of force by officers of the National Police and the armed forces, who used

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<sup>134</sup> Code of Criminal Procedure, [2005] s.30(2).

<sup>135</sup> Penal Code [2016], s.132(1).

<sup>136</sup> Law No.90/054 of 19 December 1990 relating to Maintenance of Law and Order, art.4.

<sup>137</sup> Décret n° 2005/065 du 23 février 2005 portant organisation et fonctionnement de la division spéciale de contrôle des services.

<sup>138</sup> Special Report of the Secretary-General on the strategic review of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic, S/2016/565, 22 June 2016, para.20

<sup>139</sup> MINUSCA, “Police”, <https://bit.ly/2OgcTJo>.

<sup>140</sup> Organic Law 11/013 of 11 August 2011 on the organization and functioning of the Congolese National Police, art.8.

<sup>141</sup> Organic Law 11/013 of 11 August 2011, art.9.

live ammunition during the demonstrations that took place across the country in 2017 and 2018, and urged the government to ‘develop and implement clear guidelines on the use of force and weapons, incorporating the principles of lawfulness, necessity and proportionality, and the precautionary principle, and bring the laws and regulations governing the use of force into line with international standards.’<sup>142</sup>

[92] A General Inspectorate of the Congolese National Police was established in 2016, tasked *inter alia* with assessing ‘the respect of fundamental rights, human rights and the protection of individual and collective freedoms, by the national police’s personnel in the exercise of the police function.’<sup>143</sup> By virtue of an earlier statute, a police officer having been found guilty of having “abused his authority or his position in order to commit acts of rape, torture, barbarism or having infringed the respect due to the human person” or “used his weapon in circumstances not provided for by the Law and Regulations or self-defence” is liable to dismissal.<sup>144</sup>

[93] In **Equatorial Guinea**, national legislation governing police use of force is contained in a 2019 law on maintaining public order. The law authorises security forces to use firearms for purposes other than to confront an imminent threat of death or serious injury.<sup>145</sup>

[94] The UN Human Rights Committee has expressed its concern about the lack of information concerning specific provisions regarding the appropriate use of force and firearms by law enforcement personnel and security forces, and called on the government to adopt ‘appropriate laws and policies to control the use of lethal force by law enforcement officials.’<sup>146</sup>

[95] With respect to accountability, the police are overseen by the Security and Civilian Protection Ministry, but there are many concerns about the lack of investigation into many cases of excessive use of force, both with respect to cases associated with the 2015 elections and to cases occurring before and since.<sup>147</sup>

[96] In **Gabon**, under the 1963 Penal Code, the police can use force to disperse an unlawful assembly if they are assaulted or if they cannot otherwise defend the ground they occupy.<sup>148</sup> Gabon does not appear specifically to regulate the use of firearms by law enforcement officials in its domestic law.

[97] In **Sao Tomé and Príncipe**, the 2017 Internal Security Law allows use of force by the security forces in self-defence or the defence of others or to overcome resistance to a police officer executing his duties.<sup>149</sup> There do not appear to be specific legal provisions governing the use of firearms, although the 2017 Law refers to the need for a diploma for any law enforcement official before he or she is authorised to use one.<sup>150</sup>

[98] It is unclear what kind of accountability mechanisms exist to oversee and investigate the use of force by the police in Sao Tomé and Príncipe.

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<sup>142</sup> Committee against Torture, Concluding observations on the second periodic report of the Democratic Republic of the Congo, CAT/C/COD/CO/2, 3 June 2019, paras.28, 29(f).

<sup>143</sup> Décret no. 15/026 du 9 décembre 2015 déterminant l’organisation et le fonctionnement de l’Inspection Générale de la Police Nationale Congolaise, s.5

<sup>144</sup> Law 13/013 of 1 June 2013 on the status of the professional personnel of the National Police, art.185.

<sup>145</sup> Human Rights Watch, “Guinée: Une nouvelle loi pourrait protéger les membres de la police contre toute éventuelle poursuite en justice”, 4 July 2019, available at: <https://bit.ly/3wm5xW7>.

<sup>146</sup> Human Rights Committee, Concluding observations on Equatorial Guinea in the absence of its initial report, CCPR/C/GNQ/CO/1, 22 August 2019, paras.36-37.

<sup>147</sup> See, for example, Human Rights Watch, “Guinea: Deaths, Criminality in Post-Election Violence”, 24 July 2018, available at: <http://bit.ly/3uoyl9R>.

<sup>148</sup> Law No.21/63 of 31 May 1963, art.80.

<sup>149</sup> Lei de Segurança Interna, No.16/2017, art.32(1).

<sup>150</sup> Lei de Segurança Interna, No.16/2017, art.32(2).

## Eastern Africa

[99] **Comoros** has few domestic legal provisions governing use of force by law enforcement officials. Under the Penal Code, the police or other law enforcement agencies may use force to disperse an unlawful assembly if violence is used against them or if they cannot defend by other means the area they occupy or for which they are responsible.<sup>151</sup> The amount of force that may be used is not restricted.

[100] Comoros does not appear to regulate the use of firearms by law enforcement officials in its domestic law.

[101] According to Article 15 of **Djibouti's** 1995 Decree on the National Police Force, police officers may only use force when necessary and within the framework of laws and regulations and refrain from any act of gratuitous violence.<sup>152</sup> The Penal Code gives the police the right to disperse an unlawful gathering after two warnings, without specifying the level of force that may be used to do so.<sup>153</sup>

[102] The 1995 Decree stipulates that all police officers are, in principle, equipped with a firearm. Its use is only possible "within the strict framework of the law"<sup>154</sup> but there do not appear to be specific legal rules applicable to police use of firearms.

[103] **Eritrea** has few domestic legal provisions governing use of force by law enforcement officials. Under the 2015 Penal Code, it is an offence for a law enforcement official to use physical or mental torture during arrest or custody of a person.<sup>155</sup>

[104] Eritrea does not appear to regulate the use of firearms by law enforcement officials in its domestic law.

[105] In **Ethiopia**, under the federal Code of Criminal Procedure, when making an arrest, if a criminal suspect resists or attempts to evade the arrest, a police officer "may use all means proportionate to the circumstances to effect the arrest".<sup>156</sup> As of early 2021, the Code was in the process of being revised. The draft text of the procedure to effect arrest stipulates that if a suspect "forcibly resists or attempts to evade the arrest, the investigating police officer may use proportionate force warranted by the circumstances to effect the arrest".<sup>157</sup> In its comments on the draft legislation, the Ethiopian Human Rights Commission has highlighted that in addition to the principle of proportionality, the law ought also include the principles of precaution, legality, necessity, and non-discrimination.<sup>158</sup>

[106] A 2011 Proclamation establishing the Ethiopian Federal Police Commission stipulated that in exercising police functions, it is prohibited to "commit any inhuman or degrading treatment or act"; or to discriminate on the grounds of race, nationality, colour, gender, language, religion, political outlook, social background, wealth, birth or any other grounds.<sup>159</sup> However, according to a 2012 Regulation, a police officer could use firearms to apprehend "a dangerous criminal suspect

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<sup>151</sup> Penal Code (1981, as amended), art.91.

<sup>152</sup> Loi n° 72/AN/94/3e L portant unification des services de police et Statut de la Force Nationale de Police, fait le 24 janvier 1995, art.15.

<sup>153</sup> Penal Code (1995), art.179.

<sup>154</sup> Loi n° 72/AN/94/3e L portant unification des services de police et Statut de la Force Nationale de Police, fait le 24 janvier 1995, art.19.

<sup>155</sup> Penal Code (2015), art.149.

<sup>156</sup> Code of Criminal Procedure (1961), art.56(4).

<sup>157</sup> Draft text of a revised Code of Criminal Procedure, art.114(4).

<sup>158</sup> Recommendations from the Ethiopian Human Rights Commission (EHRC) on the Draft Procedure and Evidence Law of the Federal Democratic Republic of Ethiopia, December 2013, p.4

<sup>159</sup> Ethiopian Federal Police Commission Establishment Proclamation (No. 720/2011), s.24.

or to restrain a suspect or convicted prisoner from escaping”.<sup>160</sup> This is more permissive than international law allows.

[107] A Federal Police Complaint Hearing Organ had formerly been established as part of the Federal Police Commission in 2003 to receive complaints of the public, with a specific focus on serious police misconduct.<sup>161</sup> More recently, this body has been decentralised. In its Concluding Observations in 2015 the ACHPR commended the creation of Ethics/Discipline Committees in all Police Commissions to investigate cases of violations of human rights and take necessary administrative measures against perpetrators.<sup>162</sup> In its periodic report to the Human Rights Committee, in 2019, Ethiopia acknowledged that “The existing legal framework for the use of force and firearms in Ethiopia is inadequate and does not meet human rights standards. Accordingly, a new use of force law is being drafted by the Office of the Federal Attorney General along with a new system of police accountability.”<sup>163</sup>

[108] **Kenya’s** 2011 National Police Service Act restricts police use of force by the principles of necessity and proportionality. The 2003 Public Order Act stipulates that in public order management “the degree of force which may be so used shall not be greater than is reasonably necessary for that purpose”.<sup>164</sup>

[109] In general, firearms may only be used when less extreme means are inadequate. The 2003 Public Order Act stipulates that:

whenever the circumstances so permit without gravely jeopardizing the safety of persons and without grave risk of uncontrollable disorder, firearms shall not be used unless weapons less likely to cause death have previously been used without achieving the purpose aforesaid; and firearms and other weapons likely to cause death or serious bodily injury shall, if used, be used with all due caution and deliberation, and without recklessness or negligence.<sup>165</sup>

[110] However, the purposes for which the use of firearms may be contemplated are too widely cast. The Prisons Act allows firearms to be used against unarmed escaping prisoners.<sup>166</sup> The Sixth Schedule to the National Police Service Act underscores the principle of necessity but provides an over-inclusive list of purposes for which firearms may be used which are more permissive than international law allows. These are as follows: “(a) saving or protecting the life of the officer or other person; (b) in self-defence or in defence of other person against imminent threat of life or serious injury; (c) protection of life and property through justifiable use of force; (d) preventing a person charged with a felony from escaping lawful custody; and (e) preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.”<sup>167</sup> The last three of these purposes were added by amendment to the original 2011 Act in 2014.<sup>168</sup> Each is in tension with international human rights law.

[111] The Independent Policing Oversight Authority (IPOA) was established in 2012, with the principal functions of investigating complaints against members of the National Police Service and

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<sup>160</sup> Federal Police Officers Administration Council of Ministers Regulation No.268/2012, art.45 (Use of Force).

<sup>161</sup> Federal Police Commission Proclamation (No.313/2003) [2003] s.22.

<sup>162</sup> ACHPR, Concluding Observations and Recommendations on the 5<sup>th</sup> and 6<sup>th</sup> Periodic Report of the Federal Democratic Republic of Ethiopia, adopted at the 18<sup>th</sup> Extra-Ordinary Session held from 29 July to 7 August 2015, para.19(iv).

<sup>163</sup> Second periodic report submitted by Ethiopia under the ICCPR, UN doc. CCPR/C/ETH/2, 30 January 2020, para.57.

<sup>164</sup> Public Order Act, Cap.56 [2003], s.14(1).

<sup>165</sup> Public Order Act, Cap.56 [2003], s.14(1)

<sup>166</sup> Art. 12, 1962 Prisons Act (as amended through 2016).

<sup>167</sup> National Police Service Act, No.11a of 2011 [Rev.2016], Sixth Schedule, s.B.1.

<sup>168</sup> National Police Service (Amendment) Act, No.11 (2014) s.54. This Amendment Act was controversial at the time principally because it gave the President authority directly to appoint the Inspector General of Police, eroding his independence, though several commentators also highlighted the challenge posed by the amendment to the Sixth Schedule, see for example Human Rights Watch “Kenya: Don’t Expand Police Powers”, 12 September 2013, available at: <https://bit.ly/3fJdPS9>.

monitoring and investigating policing operations affecting members of the public.<sup>169</sup> IPOA has the authority to investigate any death or serious injury occurring or suspected of having occurred as a result of police action.<sup>170</sup> In addition, its Act requires police officers to report all deaths resulting from police actions to the Authority.<sup>171</sup>

[112] IPOA has nine offices across the country (eight regional offices and the head office in the capital). As of December 2018, IPOA had 213 members of staff.<sup>172</sup> The data are published in IPOA's annual and semi-annual performance reports, which can be accessed on its website.<sup>173</sup> However, the website has not been regularly updated. Within the Kenyan Police Service, an Internal Affairs Unit is empowered to investigate suspected police misconduct, including excessive use of force.<sup>174</sup>

[113] Police use of force in **Madagascar** is regulated by a 2012 Code of Conduct. According to the Code, force may only be used when strictly necessary and for a legitimate law enforcement purpose. When force is necessary, a police officer must not inflict cruel, inhuman, or degrading treatment on any person.<sup>175</sup>

[114] With respect to use of firearms, the police must comply with “laws and regulations in force” and only use a firearm when it is “strictly necessary and proportionate” to do so. Intentional lethal use of firearms is prohibited.<sup>176</sup>

[115] The Independent National Commission on Human Rights in **Madagascar** has a broad mandate to undertake studies or investigations into human rights issues in the country.<sup>177</sup> Though the use of force by the police is not explicitly included among the list of particular focus-areas (though abuses in custodial settings are), the Commission has undertaken studies on this thematic, such as that completed in June 2018 into a series of police killings in the Ambohimahaso district.<sup>178</sup>

[116] The 1974 Police Act in **Mauritius** allows a police officer, in effecting an arrest, to “use such force as may be necessary to ensure compliance”.<sup>179</sup> The 1988 Reform Institutions Act concerns the conduct of prison officials, which authorises the use of any weapon, including firearms, against an escaping detainee.<sup>180</sup>

[117] Mauritius does not appear to specifically regulate the use of firearms by law enforcement officials in policing. In places of detention, Standing Order 46 provides more detailed guidance on the use of various weapons by prison officials. This Standing Order predates the Reform Institutions Act discussed above, and describes revolvers and shotguns as being “intended for the personal protection of Senior Officers and their men in an extreme emergency.”<sup>181</sup> With respect to other

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<sup>169</sup> Independent Policing Oversight Authority Act, No 35 of 2011, s.6.

<sup>170</sup> Independent Policing Oversight Authority Act, No 35 of 2011, s.7(1)(a)(x).

<sup>171</sup> Independent Policing Oversight Authority Act, No 35 of 2011, s.25. This correlates with the obligation imposed by s.5 of the Sixth Schedule of the Police Service Act. However, the failure appropriately to notify the Authority remains a fundamental impediment to its effective work, see Thomas Probert, Brian Kimari & Mutuma Ruteree, “Strengthening Policing Oversight and Investigations in Kenya” (Centre for Human Rights and Policy Studies, 2020) available at: <https://bit.ly/3mjPH9Y>.

<sup>172</sup> IPOA Performance Report for July-December 2018, p. 25. Available at: <https://bit.ly/2PNm3xv>.

<sup>173</sup> Section 30 of the IPOA Act requires the Authority to submit performance reports to the Cabinet Secretary for Interior and Coordination of National Government every 6 months and to publicize the reports. Section 38 of the IPOA Act also requires the Authority to prepare and submit an annual report every financial year.

<sup>174</sup> IPOA is empowered to monitor, review and audit investigations and actions taken by the Internal Affairs Unit, see Independent Policing Oversight Authority Act, No 35 of 2011, s.6(d).

<sup>175</sup> Arrête N° 24.480/2012 portant Code de Conduite de la Police Nationale, art.38.

<sup>176</sup> Arrête N° 24.480/2012 portant Code de Conduite de la Police Nationale, art.40.

<sup>177</sup> Loi No.2014-007 portant institution de la Commission Nationale Indépendante des Droits de l'Homme, du 19 juin 2014, art.4.

<sup>178</sup> *Rapport sur des cas d'exécutions sommaires perpétrées a Ambohimahaso* (June 2018) available at: <https://bit.ly/3dz4zNF>.

<sup>179</sup> Police Act, No.19 of 1974 (as amended), s.13(E)(4).

<sup>180</sup> Reform Institutions Act, No.35 of 1988, s.12(2).

<sup>181</sup> Standing Order No.46 (1980) s.22.

weapons, the Standing Order states that baton strikes to the head "should be avoided as far as possible", but does not exclude them.<sup>182</sup> Tear gas is considered "humane" and there are no restrictions on its use in confined spaces, which means that the guidance is not consonant with international standards.<sup>183</sup>

[118] In **Mauritius** the 2012 Police Complaints Act established a Police Complaints Division of the National Commission for Human Rights, the function of which is, inter alia, to investigate any complaint made about an act, conduct or omission of a police officer or to investigate any death occurring in police custody or as a result of police action.<sup>184</sup> In 2016 this body was functionally replaced by a new Independent Police Complaints Commission.<sup>185</sup> This body became operational from April 2018.<sup>186</sup>

[119] In response to the Commission's request for information, the Government of Mauritius shared details of their police training curriculum. Basic training for an entry-level officer lasts for one year (in three phases). Officers do not routinely carry firearms, but for specific duties (cash in transit, guarding of VIPs etc.), officers do carry firearms. Training on the use of firearms consist of 30 hours of training, the first 2 of which concern the legal framework. The bulk of the remainder of the training concerns the safe handling of the weapon, and its maintenance, with live firing during the last session. Fixed paper targets are used for live firing, and thresholds of accuracy and other proficiency is required to pass such training. All serving officers undergo live firing practice twice yearly, having undergone 2 hours of refresher training.

[120] In **Rwanda**, the use of force by the Rwanda National Police is regulated under a dedicated 2010 law.<sup>187</sup> The Law requires use of force to be lawful, reasonable, and proportionate to the objective.<sup>188</sup>

[121] With respect to the use of firearms, the law allows an unarmed criminal suspect who was resisting arrest to be shot in the absence of an imminent threat to life or of serious injury.<sup>189</sup> This is more permissive than international law allows.

[122] In Rwanda, disciplinary offenses are handled by a range of Disciplinary Committees envisaged under the Police Code of Conduct,<sup>190</sup> but there is no clear provision for procedures involving complaints, or investigation of, instances of the alleged unlawful use of force.

[123] The 1955 Criminal Procedure Code of the **Seychelles** stipulates that a police officer may use all means necessary to effect an arrest as long as the force was reasonable in the circumstances.<sup>191</sup>

[124] The use of firearms by the police is regulated under the 1959 Police Force Act, which allows potentially deadly force to be used against an escaping felon or suspected felon or any person who uses force to prevent the lawful arrest of himself or of any other person. The use of firearms must as far as possible be to disable and not to kill.<sup>192</sup> This is more permissive than international law allows.

[125] A prison officer may not open fire on a prisoner unless necessary to prevent the escape of the prisoner or unless he has given a warning to the prisoner that he is about to use the weapons

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<sup>182</sup> Standing Order No.46 (1980) s.10.

<sup>183</sup> Standing Order No.46 (1980), ss.15-21.

<sup>184</sup> Police Complaints Act, No.20 of 2012, s.4.

<sup>185</sup> Independent Police Complaints Commission Act, No.14 of 2016, ss.3-4.

<sup>186</sup> "Independent Police Complaints Commission: Who we are" available at:<https://bit.ly/3dA1g93>.

<sup>187</sup> Law N° 46/2010 of 14 December 2010 Determining the Powers, Responsibilities, Organization and Functioning of the Rwanda National Police.

<sup>188</sup> Law N° 46/2010 of 14 December 2010, art.37.

<sup>189</sup> Law N° 46/2010 of 14 December 2010, art.38.

<sup>190</sup> Ministerial Instructions No.003/12 of 17/09/2012 establishing Police Code of Conduct, art.34.

<sup>191</sup> Criminal Procedure Code (1955), s.10(2).

<sup>192</sup> Police Force Act, No.13 of 1959, s.33(1).

against him.<sup>193</sup> He must also have reasonable grounds to believe that the prison officer or other person is in mortal danger or that other grievous bodily harm is likely to be caused to the prison officer or other person.<sup>194</sup>

[126] A new Seychelles Human Rights Commission was established in March 2019, empowered to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights.<sup>195</sup> In a report submitted as part of the Seychelles' Universal Periodic Review in 2015, the previous Human Rights Commission noted that a significant proportion of complaints received by the Commission related to "alleged unprofessionalism by police officers", but did not detail what proportion of these cases related to use of force.<sup>196</sup>

[127] There does not appear to be national legislation governing police use of force in **Somalia**. Certain provisions of the Penal Code relate to the conduct of a public officer, including by permitting the use of arms to avoid the escape of a person lawfully arrested or detained, which is more permissive than international law allows.<sup>197</sup>

[128] In **South Sudan**, the 2009 Southern Sudan Police Service Act allows necessary and reasonable use of force by the police 'according to the restrictions provided for by law'.<sup>198</sup> This thus implicates the Penal Code, which permits the private defence of property to extend to causing death in the case of robbery or house-breaking by night.<sup>199</sup>

[129] There does not appear to be national legislation governing police use of firearms in South Sudan.

[130] There are few legal provisions on police use of force in **Sudan**. According to the 2003 Code of Criminal Procedure, law enforcement agents may disperse a crowd that has ignored an order to do so with the least use of force possible. Firearms may be used to disperse the crowd, with the permission of the Prosecutor, with the caveat only that in no case should they be used with the intent to kill.<sup>200</sup> This does not comply with international standards, which clearly proscribe the use of firearms for the dispersal of any assembly.

[131] Under the Criminal Procedure Act of **Tanzania**, a police officer shall not use more force than is necessary to make an arrest.<sup>201</sup> The Act also introduces a proportionality-like provision (specifying that a police officer shall not use force likely to result in death unless they believe on reasonable grounds that doing so is necessary to protect life or to prevent serious injury), but it does not provide for the important quality of imminence of such a risk.<sup>202</sup>

[132] The Police Force and Auxiliary Act allows a police officer to use a firearm against a person escaping from lawful custody after a warning has been unheeded or where force is being used to prevent an arrest.<sup>203</sup> The Prisons Act allows firearms to be used to prevent an unarmed prisoner from escaping.<sup>204</sup> These provisions—making no reference to the threat posed by the prisoner—are more permissive than international law allows.

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<sup>193</sup> Prisons Act, No.18 of 1991, s.8(2).

<sup>194</sup> Prisons Act, No.18 of 1991, s.8(3).

<sup>195</sup> Seychelles Human Rights Act, No.7 of 2018, s.14(4).

<sup>196</sup> Report and Submission of the Seychelles National Human Rights Commission & Ombudsman to the Universal Periodic Review (2015), p.10.

<sup>197</sup> Penal Code (1962), art.35.

<sup>198</sup> Southern Sudan Police Service Act, 2009, s.8(2).

<sup>199</sup> Penal Code Act, No.9 of 2009, s.46.

<sup>200</sup> Code of Criminal Procedure (2003), art.125.

<sup>201</sup> Criminal Procedure Act, No.9 of 1985, s.21(1).

<sup>202</sup> Criminal Procedure Act, No.9 of 1985, s.21(2).

<sup>203</sup> Art. 29, 2002 Police Force and Auxiliary Act.

<sup>204</sup> Art. 13, 1967 Prisons Act.

[133] The **Tanzania Commission for Human Rights and Good Governance** has the power to inquire into abuses of power.<sup>205</sup> It has the power to investigate any human rights abuse, either on its own initiative or upon receipt of a complaint.<sup>206</sup>

[134] In **Uganda**, a police officer may use “all means necessary” to effect an arrest as long as that force was ‘reasonable in the particular circumstances’.<sup>207</sup>

[135] The Police Act allows use of firearms against a person charged with or convicted of a felony who escapes from lawful custody or who, through use of force, prevents a lawful arrest.<sup>208</sup> By making no reference to the threat posed by the person against whom the firearm may be used, these provisions are more permissive than international law allows.

[136] The **Uganda Human Rights Commission** is mandated to investigate human rights abuses, conduct inspections of places of detention, and to make recommendations to Parliament on victim compensation and human rights related matters.<sup>209</sup> The African Policing Civilian Oversight Forum (APCOF) note that “the UHRC has been commended for conducting effective external oversight of the police, which has included surprise station visits, and reductions in the number of police-related incidents of abuse and disappearance”<sup>210</sup> More recently, the adoption of the Human Rights (Enforcement) Act of 2019 has created the opportunity for more direct enforcement of judicial findings made with respect to police use of force as well as those related to other abuses.

[137] The Police Professional Standards Unit in **Uganda** receives, investigates and reports upon complaints against police officers. In 2020 it was reported that this unit registered more than 2,000 cases (though these range from mismanagement of files to torture). 133 cases of torture were registered by this unit in 2019.<sup>211</sup>

## Northern Africa

[138] **Algeria** does not have detailed legislation on police use of force as international law requires. The Penal Code allows force to be used to disperse an unlawful gathering while the Code of Criminal Procedure allows “sufficient force” to be used to effect an arrest.<sup>212</sup> A code of ethics for the police was adopted by decree in 2017.<sup>213</sup> The code stipulates that the police may only use force where necessary and in accordance with the law.<sup>214</sup> It further states that firearms may only be used where absolutely necessary or in executing tasks mandated by a higher State authority and in accordance with the law.<sup>215</sup> There appears to be no specific legislative regulation of the use of firearms by law enforcement agencies.

[139] Little is known about police oversight in **Algeria**, though concerns have been raised about a law implementing the Charter for Peace and National Reconciliation, which is said to prevent effective remedy for victims of violations committed by law enforcement personnel.<sup>216</sup>

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<sup>205</sup> The Commission for Human Rights and Good Governance was established under Article 129(1) of the Constitution of the United Republic of Tanzania of 1977 as amended by Act No. 3 of 2000.

<sup>206</sup> Commission of the Human Rights and Good Governance Act, No.7 of 2001, s.15(1).

<sup>207</sup> Criminal Procedure Code Act (1950, Ch.116), s.2.

<sup>208</sup> Police Act (1994, Ch.303), s.28(1).

<sup>209</sup> The Uganda Human Rights Commission Act (1997, Chap.24), s.7.

<sup>210</sup> At: <https://bit.ly/3dvw5ad>.

<sup>211</sup> ‘Police register 4,500 cases against their own in 2 years’ *Daily Monitor* (16 April 2020) available at: <https://bit.ly/3du8lrp>.

<sup>212</sup> Code de Procédure Pénale, art.122.

<sup>213</sup> Arrêté du 23 Rabie El Aouel 1439 correspondant au 12 décembre 2017 fixant le code de déontologie policière (Decree of 12 December 2017 on the Code of Police Ethics).

<sup>214</sup> 2017 Code of Police Ethics, art. 24.

<sup>215</sup> 2017 Code of Police Ethics, art. 25.

<sup>216</sup> Ordinance No. 06-01 of 27 February 2006, art.45.



[140] Article 102 of the 1971 Police Act in **Egypt** stipulates that firearms can only be used when strictly necessary to achieve a legitimate aim and such use is proportionate to the aim.<sup>217</sup> It explicitly permits police officers to use firearms, however, to apprehend a convicted or accused and wanted individual if they resist arrest and if their conviction or accusation can lead to a prison term exceeding three months. It also permits police officers to use firearms when they are guarding prisoners or to disperse gatherings or demonstrations of at least five people when public order is under threat and after warning the protesters to disperse.<sup>218</sup>

[141] The most relevant oversight body concerning policing in Egypt is the Human Rights Sector of the Ministry of Interior.<sup>219</sup> Official information about this Sector is hard to find, but journalistic reports suggest that its mandate includes monitoring human rights violations that may take place in police sites, in order to understand and seek to redress and eliminate their recurrence, while also announcing the results of such examinations to the public.<sup>220</sup> In 2018 the Ministry of Interior announced that every police department in Egypt would be provided with a “human rights police officer” who will be assigned to help citizens if they face problems inside a police department.<sup>221</sup>

[142] **Libya** has few domestic legal provisions governing use of force by law enforcement officials. Libya does not appear specifically to regulate the use of firearms by law enforcement officials in its domestic law.

[143] **Mauritania** has few domestic legal provisions governing use of force by law enforcement officials. Mauritania does not appear specifically to regulate the use of firearms by law enforcement officials in its domestic law.

[144] The law in **Morocco** does not specifically require that use of force by law enforcement officials be subject to the principles of necessity and proportionality. According to the 1958 law on the gendarmerie, gendarmes may use firearms when they cannot otherwise defend the ground they occupy, the posts or persons entrusted to them.<sup>222</sup> This does not comply with international law.

[145] The National Human Rights Council of Morocco was created in 2011 to replace an Advisory Council that had existed since 1990, and is mandated to protect and promote human rights. Its status was formalised by legislation in 2018.<sup>223</sup> In recent years the National Human Rights Council has been investigating the violence arising in the context of large public demonstrations in the Berber Rif region in 2016-17. This focused initially on the treatment of detainees in the aftermath of the events, including by appointing independent forensic doctors to examine detainees,<sup>224</sup> but more recently—and controversially—has extended to presenting a narrative of the origins of the violence.<sup>225</sup>

[146] There is no national legislation governing use of force by law enforcement agencies in the **Saharawi Arab Democratic Republic**.

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<sup>217</sup> Law on the Regulation of Police Authority, No.109 of 1971, art.102. See the analysis at: <https://medcraveonline.com/FRCIJ/FRCIJ-01-00030>.

<sup>218</sup> Law on the Regulation of Police Authority, No.109 of 1971, art.102.

<sup>219</sup> Established by the Minister of Interior’s Decision No.2694 of 15 November 2012.

<sup>220</sup> Arabic Network for Human Rights Information (ANHRI), Official and semi-official human rights administrations and bodies in Egypt, 1 April 2020, available at: <https://www.anhri.info/?p=15625&lang=en>.

<sup>221</sup> ‘Ministry of Interior provides police departments with “human rights officer”’ *Egypt Independent* (31 January 2018) available at: <https://bit.ly/3fJerXX>.

<sup>222</sup> Dahir n° 1-57-280 du 14 janvier 1958 - 22 jourmada II 1377 - sur le service de la Gendarmerie royale marocaine, art.61.

<sup>223</sup> Loi no.76-15 relative à la réorganisation du Conseil national des droits de l’homme.

<sup>224</sup> Human Rights Watch, ‘Morocco: King Brushes Off Evidence of Police Abuse’, 5 September 2017 available at: <https://bit.ly/3mkH3I3>.

<sup>225</sup> Kingdom of Morocco, “CNDH Presents Report on ‘Al-Hoceima Protests’”, 10 March 2020, available at: <https://bit.ly/3rHSP09>.

[147] The 2015 Penal Code in **Tunisia** generally criminalises violence against the person.<sup>226</sup> Use of unlawful violence by a public official is subject to a maximum penalty of five years' imprisonment.<sup>227</sup> The law regulating assemblies dates from 1969, and it authorises the police to, progressively, use water cannon or baton charges; fire tear gas; use firearms to fire warning shots in the air; fire warning shots above the heads of demonstrators; and then fire at their legs if they do not disperse.<sup>228</sup> If they still refuse to disperse, the police may aim for central body mass or even potentially the head. These provisions are considerably more permissive than international law allows.

[148] Legislation creating a National Body for the Prevention of Torture was passed in 2013,<sup>229</sup> though the body was not in fact established until 2016.

### **Southern Africa**

[149] **Angola** has few domestic legal provisions governing use of force by law enforcement officials. The 2010 Constitution determines that the authorities have the right to resort to legitimate force to restore peace and public order, in compliance with international law.<sup>230</sup> Legislation stipulates that "Police and security measures shall be those provided for by law and shall not be used beyond what is strictly necessary."<sup>231</sup>

[150] The use of firearms is governed by the 1996 National Police Discipline Regulations issued by the Council of Ministers, which oblige police officers not to make use of firearms, "except in the case of an imperative need to repel an attack or its imminent attempt, against themselves or against their post of service; or when the maintenance of the order so requires; or whenever their superiors so determine; and also to secure, where indispensable, any detained persons."<sup>232</sup> This is more permissive than international law allows.

[151] No independent complaints authority exists in Angola to deal with complaints about excessive use of police force, which are currently only dealt with by a police force investigator. Nonetheless, the independent Justice Provider (Ombudsperson) also conducts oversight of human rights compliance and has issued reports on public complaints on police abuse, especially regarding unlawful arrests.<sup>233</sup>

[152] **Botswana** has few domestic legal provisions governing use of force by law enforcement officials. The 1939 Criminal Procedure and Evidence Act allows law enforcement officials to use all means necessary to effect a lawful arrest as long as that force was reasonable in the circumstances.<sup>234</sup> The 1978 Police Act prohibits "unnecessary" violence against a prisoner or member of the public.<sup>235</sup>

[153] The police are authorised to carry firearms but their use is not restricted in domestic law other than by making it a disciplinary offence to discharge a firearm either negligently or 'without orders or just cause.'<sup>236</sup> The 1979 Prisons Act allows unarmed escaping prisoners to be fired upon.<sup>237</sup> These provisions do not comply with international law.

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<sup>226</sup> Penal Code (2015), art.15bis.

<sup>227</sup> Penal Code (2015), art.101.

<sup>228</sup> Loi 69-4 du 24 janvier 1969, réglementant les réunions publiques, cortèges, défilés, manifestations et attroupements, chap. IV (Usage des Armes), art.21.

<sup>229</sup> Loi organique n°2013-43 du 21 octobre 2013, relative à l'Instance nationale pour la prévention de la torture, art.1.

<sup>230</sup> Constitution of Angola (2010), art.203 (Right to national security and legitimate defence).

<sup>231</sup> National Security Law (2002), art.2(2).

<sup>232</sup> National Police Discipline Regulations, issued by Council of Ministers Decree No. 41/96, 27 December 1996, art.5(38).

<sup>233</sup> Lei do Estatuto do Provedor de Justiça, Lei no.4/06, 28 April 2006, arts.1, 4, & 18. See also Justice Provider's Office, 'Report on the First Semester of 2012'; and Justice Provider's Office, "Report on the year of 2011".

<sup>234</sup> Botswana Criminal Procedure and Evidence Act (1939), ss.47(1)-(2).

<sup>235</sup> Police Act, No.29 of 1978, s.23(i).

<sup>236</sup> Police Act, No.29 of 1978, s.23(p).

<sup>237</sup> Prisons Act, No.28 of 1979, ss.33(1)-(3).

[154] In Botswana, the Botswana Police Service Internal Affairs Unit, which became operational in 2010, investigates allegations of misconduct, including unlawful arrest or detention, torture, excessive use of force, and unlawful discharge of firearms. In its periodic report to the UN Human Rights Committee in 2020, Botswana noted that the creation of an independent police complaints commission was “still under consideration.”<sup>238</sup>

[155] A range of legislation governs use of force by law enforcement officials in **Eswatini**. The 2017 Public Order Act allows unlawful public gatherings to be dispersed by force. However, the force used “shall not be greater than is necessary to secure the dispersal of the gathering and shall be proportionate to the circumstances of the case and the object to be attained.”<sup>239</sup>

[156] The 2018 Police Service Act stipulates that: “In the performance of their duties, where necessary, members of the Police Service may carry firearms in accordance with the provisions of the Aims and Ammunition Act, 1964, or its successor, and use such fire arms for achieving the functions conferred on the Police Service by this Act or any such other law.”<sup>240</sup>

[157] In this regard, the 1938 Criminal Procedure and Evidence Act allows a police officer immunity from prosecution for shooting to death an escaping criminal, whether or not he or she is armed or otherwise poses an immediate threat to life.<sup>241</sup> Under the 1964 Prisons Act, a prison officer is entitled to use lethal force against a prisoner to prevent his escape.<sup>242</sup> These provisions are all more permissive than international law allows.

[158] In **eSwatini**, a Police Service Commission has been established as part of the new Police Service Act.<sup>243</sup> Any person with a complaint against a police officer must first lodge their complaint with the National Commissioner, who is to attend to it (with reference to the Complaints and Discipline Unit). If the complainant is not satisfied with the response, they may ‘after the lapse of a reasonable time’ submit their complaint to the Police Service Commission.<sup>244</sup> Meanwhile, a Commission on Human Rights and Public Administration is mandated to investigate complaints of constitutional rights violations, injustice, corruption, abuse of power and unfair treatment by public officials.<sup>245</sup>

[159] The Penal Code in **Lesotho** generally allows use of force that is necessary and reasonable in effecting an arrest or preventing crime.<sup>246</sup> Lesotho does not appear to specifically regulate the use of firearms by law enforcement officials in its domestic law.

[160] In **Lesotho**, the Police Act established a Police Complaints Authority to investigate and report internally upon any complaint referred to it by the Police Authority or by the Commissioner.<sup>247</sup> However, it does not have the capacity to receive complaints directly from the public, leading to the impression that it is not a meaningful check upon police abuse. After its promotional visit in 2018 the ACHPR expressed its concern about ‘persistent allegations of police brutality,’ and while it did not explicitly refer to the Police Complaints Authority, it did recommend that the Government take immediate steps to establish or strengthen all human rights related bodies or institutions to handle allegations of violations reported to its delegation.<sup>248</sup>

[161] Under **Malawi’s** 1930 Penal Code, in effecting an arrest the means used must be necessary and the degree of force used must be reasonable.<sup>249</sup> The 2010 Police Act allows firearms to be used against an escaping felon.<sup>250</sup> In addition, the Act allows the use of firearms against a person

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<sup>238</sup> Second periodic report of Botswana, UN doc. CCPR/C/BWA/2, 17 November 2020, para.89.

<sup>239</sup> S. 11(10), 2017 Public Order Act.

<sup>240</sup> Police Service Act, No. 22 of 2018, s.9(4).

<sup>241</sup> Criminal Procedure and Evidence Act (1938), s.41.

<sup>242</sup> Prisons Act (1964), s.11.

<sup>243</sup> Police Service Act, No.22 of 2018, s.17.

<sup>244</sup> Police Service Act, No.22 of 2018, s.24.

<sup>245</sup> Constitution of the Kingdom of Swaziland Act 2005, s.164(1).

<sup>246</sup> Penal Code Act (2010), s.32.

<sup>247</sup> Police Service Act, No.7 of 1998, s.22.

<sup>248</sup> Press Release on the Promotion Mission of the African Commission on Human and Peoples’ Rights to the Kingdom of Lesotho (8–12 October 2018), available at: <https://bit.ly/2PoU7QS>.

<sup>249</sup> Penal Code (1930), chap. 7:01, s.18 – “Use of force in effecting arrest”.

<sup>250</sup> Police Act, No.12 of 2010, s.44.

attempting to destroy or damage “valuable” property.<sup>251</sup> The 1956 Prisons Act allows the use of firearms against escaping prisoners.<sup>252</sup> These provisions are more permissive than international law allows.

[162] The 2010 Police Act in **Malawi** technically established an Independent Complaints Commission, whose powers include investigating any misconduct or offence allegedly committed by the Police; investigating any death or injury in police custody or as a result of police action; and to investigate any complaints against police officers or against the Police Service.<sup>253</sup> For more than a decade this had no effect, but, following the elections of 2020, institutional arrangement began to be made, including the appointment of a Commissioner.<sup>254</sup> The Commissioner’s office is still being resourced, both physically and in terms of technical knowledge-management.

[163] In **Mozambique**, a 2013 Law requires that the police use only necessary and proportionate force to overcome illegitimate resistance to police officers.<sup>255</sup> A 1999 Police Statute, issued as a decree, provides that a police officer may only use firearms in situations where there is a reasonably serious risk to the officer’s life or physical integrity, or those of third persons, or in circumstances in which “it may be supposed that there is a serious risk to public security”, and in conformity with the principles of opportunity, appropriateness and proportionality.<sup>256</sup> This is more permissive than international law allows.

[164] The Prisons Act dates from 1936 and is in need of comprehensive reform.<sup>257</sup>

[165] In Mozambique there is a Council of Ethics and Discipline established under the Police Act.<sup>258</sup>

[166] In **Namibia**, the Police Act allows any police officer to use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of an offender or suspected offender or persons unlawfully at large.<sup>259</sup>

[167] Under the 1977 Criminal Procedure Act where the suspect is to be arrested for a range of offences (including theft, fraud, or sodomy) and the police officer cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.<sup>260</sup> Under the 2012 Correctional Service Act, a prison officer may shoot an unarmed escaping prisoner.<sup>261</sup> These provisions do not comply with international law.

[168] In **Namibia** there is an Internal Investigations Directorate at the Head Office of the Namibian Police in Windhoek which is responsible for investigating all matters concerning disciplinary conduct of members of the Force.<sup>262</sup> In 2017 the UN Committee Against Torture welcomed the creation of this body but expressed concern about its lack of independence and about the lack of information about complaints, investigations, prosecutions and convictions.<sup>263</sup> Domestic news reporting later in the year noted that 1,528 complaints had been received in 2016, following 1,367 in 2015.<sup>264</sup>

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<sup>251</sup> Police Act, No.12 of 2010, s.105(4). Subsection 5 provides that the level of force used must be no more than is necessary and appropriate in the circumstances.

<sup>252</sup> Prisons Act (1956), s.19. This article is subject to the general caveat that “the use of weapons in pursuance of this section shall be, as far as possible, to disable and not to kill” (s.19(4)), but with no reference to the threat potentially posed by the prisoner this remains more permissive than international law allows.

<sup>253</sup> Police Act, No.12 of 2010, s.129

<sup>254</sup> ‘Tukula to head ICC: Malawi Independent Police Complaints Commission’ *Nyasa Times* (18 September 2020) available at: <https://bit.ly/3uhI73p>.

<sup>255</sup> Lei no. 16/2013 de 12 de Agosto, art.33(3).

<sup>256</sup> Estatuto da Polícia, Decreto no. 28/99 de 24 de Maio, art.73.

<sup>257</sup> Organizacao Prisional, Decreto-Lei no. 26/643 de 28 de Maio 1936.

<sup>258</sup> Estatuto Orgânico da Polícia da República de Moçambique, Decreto no.27/99 de 24 de Maio 1999, art.12.

<sup>259</sup> Police Act (1990, as amended through 2005), s.14(10).

<sup>260</sup> Criminal Procedure Act (1977) s.49(2).

<sup>261</sup> Correctional Services Act, No.9 of 2012, s.35.

<sup>262</sup> “Namibian Police Force: Directorates and Divisions: Internal Investigations” available at: <https://bit.ly/31EYLN4>.

<sup>263</sup> Committee Against Torture, Concluding Observations on the second periodic report of Namibia, 1 February 2017, CAT/C/NAM/CO/2 para.18.

<sup>264</sup> “5,345 internal police cases”, *The Patriot* (22 December 2017) available at: <https://bit.ly/3drQr8Y>.

[169] According to **South Africa's** 1995 Police Services Act, where force has to be used, this must be only “the minimum force which is reasonable in the circumstances”.<sup>265</sup>

[170] The Criminal Procedure Act allows deadly force to be used in arrest or to prevent the escape where necessary with respect to a suspect who poses a threat of serious violence or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm.<sup>266</sup> The Regulation of Gatherings Act provides that firearms may be used against any person in an assembly who “destroys or does serious damage to, or attempts to destroy or to do serious damage to, or shows a manifest intention of destroying or doing serious damage to, any immovable property or movable property considered to be valuable.”<sup>267</sup> Under the Correctional Services Act, firearms may be used as a last resort to prevent escape.<sup>268</sup> All of these provisions are more permissive than international law allows. In 2020 the Cabinet approved an Amendment Bill that would make certain reforms to both the Police Service Act and the Regulation of Gatherings Act. That Bill was circulated for preliminary public comment and is expected to be presented back to Parliament during 2021.<sup>269</sup>

[171] South Africa has perhaps the longest history of independent police oversight on the continent, with an Independent Complaints Directorate established in 1997 as part of the post-Apartheid reconstruction of the security sector.<sup>270</sup> This body was replaced in 2012 with a new Independent Police Investigative Directorate (IPID).<sup>271</sup> According to the revised Act, IPID “must” investigate “(a) any deaths in police custody; (b) deaths as a result of police actions; (c) any complaint relating to the discharge of an official firearm by any police officer (d) rape by a police officer, whether the police officer is on or off duty; (e) rape of any person while that person is in police custody; (f) any complaint of torture or assault against a police officer in the execution of his or her duties; (g) corruption matters within the police initiated by the Executive Director on his or her own, or after the receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC or the Secretary, as the case may be; and (h) any other matter referred to it as a result of a decision by the Executive Director, or if so requested by the Minister, an MEC or the Secretary as the case may be”<sup>272</sup>

[172] In addition to IPID, the use of force by officials of the Department of Correctional Services are overseen by the Judicial Inspectorate for Correctional Services.<sup>273</sup> The Correctional Services Act provides that all uses of force “must be reported to the Inspecting Judge, immediately.”<sup>274</sup> The South African Human Rights Commission also plays an oversight role vis-à-vis both the conduct of the police and the broader conditions in prisons.<sup>275</sup>

[173] In **Zambia**, the use of force to arrest is generally subject to principles of necessity and reasonableness under the 1930 Penal Code Act.<sup>276</sup> That same Act, however, allows for the dispersal of rioters including by recourse to lethal force, and for immunity from criminal or civil proceedings in relation to such conduct.<sup>277</sup>

[174] Under the 1965 Zambia Police Act, a police officer may use a firearm where necessary to prevent a suspected or convicted felon from escaping or attempting to escape after a warning has

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<sup>265</sup> Police Services Act, No.68 of 1995 (as amended), s.13(3)(b).

<sup>266</sup> Criminal Procedure Act (1977, as amended), s.49(2).

<sup>267</sup> Regulation of Gatherings Act, No.205 of 1993, s.9(2)(ii).

<sup>268</sup> Correctional Services Act, No.111 of 1998, s.34(3)(c) [substituted by s.28 of Act No.25 of 2008] and s.34(4).

<sup>269</sup> South Africa Governmental News Agency, ‘SAPS Amendment Bill out for public comment,’ 30 September 2020, available at: <https://www.sanews.gov.za/south-africa/saps-amendment-bill-out-public-comment>.

<sup>270</sup> The old Independent Complaints Directorate was established pursuant to Chapter 10 of the 1995 South African Police Service Act, No.68 of 1995.

<sup>271</sup> Independent Police Investigative Directorate Act, No.1 of 2011, s.3.

<sup>272</sup> Independent Police Investigative Directorate Act, No.1 of 2011, s.28.

<sup>273</sup> Correctional Services Act, No.111 of 1998, s.90.

<sup>274</sup> *Ibid.*, s.32(6). This provision was added to the Act by s.26(c) of Act No.25 of 2008.

<sup>275</sup> South Africa Human Rights Commission Act, No.40 of 2013, s.13.

<sup>276</sup> Penal Code Act (Chap.87 of the Laws of Zambia, 1930), Chap. IV, s.18.

<sup>277</sup> *Ibid.*, Chap.IX, s.78.

gone unheeded.<sup>278</sup> The 1965 Prisons Act allows a prison officer to use a firearm to prevent an escape after a warning by the prison officer is unheeded.<sup>279</sup> These rules are considerably more permissive than international law allows. A police officer may also use a firearm when force is used to attempt to prevent a lawful arrest where it is necessary in the circumstances and that there is a danger of grievous bodily harm.<sup>280</sup>

[175] A Police-Public Complaints Commission (PPCC) was established in Zambia in 2016 to investigate complaints involving the police, which may be submitted by victims, agents of victims or organisations representing victim interests.<sup>281</sup> This superseded the Police Public Complaints Authority which had been established in 1999.<sup>282</sup> The PPCC can submit its findings, recommendations and directions to a range of bodies, including the Director of Public Prosecutions, the Inspector-General of Police, or to the Anti-Corruption Commission. It is important to note, however, that the PPCC's findings are only recommendatory and that it cannot impose specific penalties. In 2019 the PPCC announced it would be establishing provincial centres in order better to handle complaints received from the public.<sup>283</sup>

[176] Section 42 of **Zimbabwe's** 1898 Criminal Procedure and Evidence Act (as amended) gives police officers the power to use "such force as may be reasonably justifiable and proportionate in the circumstances" to overcome resistance during arrest or prevent escape. The 2001 Police Act stipulates that it is an offence for a police officer to use "unnecessary violence towards, or neglect... or in any way ill-treat... any person in custody or other person with whom he may be brought into contact in the execution of his duty".<sup>284</sup>

[175] Lethal force may be used to prevent an escape where the escapee is suspected of having committed a serious offence. This provision is more permissive than international law allows. The draft Prisons Bill should be amended to allow lethal force only in accordance with international law.

[178] The Constitution of Zimbabwe establishes a Police Service Commission, but did not mandate it to investigate allegations concerning use of force.<sup>285</sup> The Police Act gives the Police Service Commission the general function of inquiring into and dealing with complaints by members of the police, and provides it with the power to carry out any inquiry or investigation into the practices of the police.<sup>286</sup>

## **Western Africa**

[179] **Benin** has few domestic legal provisions governing use of force by law enforcement officials. The Penal Code states that a person will not be held criminally responsible for acts committed in self-defence or defence of others, unless the use of force is disproportionate to the seriousness of the threat.<sup>287</sup> A 2005 decree allows law enforcement agencies to use force to disperse assemblies either following warnings or when serious violence is directed by demonstrators towards law enforcement or security forces, but does not restrict the amount of force that may be used.<sup>288</sup>

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<sup>278</sup> Zambia Police Act (Chap.107 of the Laws of Zambia, 1965), Part IV, s.24.

<sup>279</sup> Prisons Act (Chap.97 of the Laws of Zambia, 1965), Part V, ss.29(1) and (2).

<sup>280</sup> Zambia Police Act (Chap.107 of the Laws of Zambia, 1965) Part IV, s.24.

<sup>281</sup> Police-Public Complaints Commission Act, No.18 of 2016, s.4.

<sup>282</sup> The prior body, the Authority, had been established by the Zambia Police (Amendment) Act 14 of 1999 s.9.

<sup>283</sup> 'Zambia Police Public Complaints Commission to establish provincial centres' *Lusaka Times* (5 December 2019) available at: <https://bit.ly/3fzT1fG>.

<sup>284</sup> Police Act (2001), s.21.

<sup>285</sup> Constitution of Zimbabwe Amendment, No.20 of 2013, s.222 (the same body was previously established under s.94 of the former Constitution). The Police Service Commission does have a mandate to "foster harmony and understanding between the Police Service and civilians" (s.224(e)) and can "exercise any other function conferred or imposed on the Commission by this Constitution or an Act of Parliament" (s.223(g)).

<sup>286</sup> Police Act [Chapter 11:10] of 1995, s.55(1)(b) and s.55(2)(a).

<sup>287</sup> Penal Code (2018), art.28.

<sup>288</sup> Decree 2005-377 of 23 June 2005 on Regulation of the Maintenance of Public Order, arts.230-25.

[180] Firearms may be used during serious and widespread violence and to defend the posts, persons or property officials are tasked with safeguarding or otherwise ensure their own safety.<sup>289</sup> This is more permissive than international law allows. The decree appears to allow firearms without rounds to be used for pistol whipping.<sup>290</sup> This would also violate international law as it would amount to inhumane treatment.

[181] The Benin Human Rights Commission (Commission Béninoise des Droits de l'Homme) is competent to hear allegations of violations of human rights, and to conduct regular, announced or unannounced visits to places of detention.<sup>291</sup>

[182] **Burkina Faso** has few domestic legal provisions governing use of force by law enforcement officials. The Penal Code prohibits unnecessary and disproportionate force, including in law enforcement.<sup>292</sup> A 2005 decree stipulates that force may be used where necessary to defend a position held by a law enforcement official.<sup>293</sup> The decree also provides that the civilian authority may only have recourse to the armed forces for public order management based on a specific requisition.<sup>294</sup>

[183] The use of firearms is regulated both by the 2003 Law on Internal Security and by the 2005 decree. The 2003 Law allows law enforcement officials to use firearms, inter alia, where necessary to defend a post they occupy, and protect the installations, tasks or the people entrusted to them.<sup>295</sup> This is more permissive than international law allows. The 2005 decree requires that the use of deadly force be either authorised by a commanding officer, without specifying conditions for that use, or must comply with the principle of proportionality in self-defence set forth in the Penal Code.<sup>296</sup>

[184] The Military Justice Administration examines all cases involving killings by military personnel or gendarmes, and refers cases deemed outside the line of duty or unjustifiable to civilian courts. Civilian courts automatically handle killings involving police. The gendarmerie is responsible for investigating abuse by police and gendarmes, but, as has been noted in a recent review of human rights implementation, it has rarely made public the results of its investigations.<sup>297</sup>

[185] Legislation in force in **Cabo Verde** authorises the police to use “adequate and strictly necessary force to restore legality, prevent imminent or ongoing aggression, in self-defence or in defence of others, to overcome resistance to legitimate law enforcement, and to maintain the principle of authority”.<sup>298</sup>

[186] With respect to firearms, the 2010 Statute of Police Personnel of the National Police permits use of firearms “as a measure of extreme coercion provided that it is proportionate to the circumstances of each case”.<sup>299</sup> The government of Cabo Verde has explained that this includes against an escaping prisoner or who is the subject of a warrant of arrest even if he or she is unarmed. This is more permissive than international law allows.

[187] There is no detailed legislation governing police use of force in **Côte d'Ivoire**. With respect to the use of firearms in prisons, the 1960 Code of Criminal Procedure allows firearms to be discharged against an unarmed escaping prisoner. This is not permitted under international law.

[188] There is no external, independent civilian oversight of the police in Côte d'Ivoire. The General Directorate of the National Police (*Direction Générale de la Police Nationale*) is responsible for

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<sup>289</sup> Decree 2005-377 of 23 June 2005, art.27.

<sup>290</sup> Decree 2005-377 of 23 June 2005, art.20.

<sup>291</sup> Loi n° 2012-36 portant création de la Commission béninoise des droits de l'Homme, art.4.

<sup>292</sup> Penal Code (2018), art.132(3).

<sup>293</sup> Decree 2005-025-PRES\_PM-MJ – Public Order Management, January 2005, art.36.

<sup>294</sup> Ibid., art.3.

<sup>295</sup> Law on Internal Security (2003), art.13.

<sup>296</sup> Decree 2005-025-PRES\_PM-MJ – Public Order Management, January 2005, art.37.

<sup>297</sup> US Department of State Human Rights Report (2018) available at: <https://bit.ly/3rNt2DK>.

<sup>298</sup> Statute of Police Personnel of the National Police (2010), art.74(g).

<sup>299</sup> Statute of Police Personnel of the National Police (2010), art.96(4).

investigating alleged abuses of police powers.<sup>300</sup> In 2018, in its Concluding Observations, the ACHPR called on the authorities to put in place a national mechanism to prevent torture in police stations, detention centres, and other places.<sup>301</sup>

[189] In **The Gambia** the Criminal Code allows the use of “necessary and reasonable force” in the exercise of a lawful arrest of a criminal suspect.<sup>302</sup> The Gambia does not appear specifically to regulate the use of firearms by law enforcement officials in its domestic law. But under the 1933 Criminal Code, deadly force may be used against rioters with impunity.<sup>303</sup> This is more permissive than international law allows.

[190] Arrest in **Ghana** is governed by the 1960 Criminal Code, which allows “any force which is necessary” to be used.<sup>304</sup> If an arrest is made in respect of a felony, the police are entitled to use deadly force where necessary.<sup>305</sup> Deadly force may also be used to disperse an unlawful gathering.<sup>306</sup> The Prisons Act allows use of deadly force against an escaping prisoner.<sup>307</sup> All of these provisions, by failing to consider the question of proportionality, and specifically the gravity of the threat posed by the individual in each case, are more permissive than international law allows.

[191] The Inspector-General of Police is directly responsible for the operational control and administration of the national police. Referrals for disciplinary action are forwarded to him by the Police Intelligence and Professional Standards Bureau. There is also an (external) Police Council which also has the power to recommend disciplinary action for police officers.<sup>308</sup> Regional Police Committees advise the Police Council on any matter relating to the administration of the Police Service in a specific region.

[192] Use of force by the police in **Guinea** is governed by a 1998 Code of Practice, which restricts force and, in particular, use of a firearm, in accordance with strict necessity and in proportion to the goal to be achieved.<sup>309</sup> The 2015 Law on the Maintenance of Public Order allows the police to use force to disperse an unlawful assembly.<sup>310</sup>

[193] A 2019 law governs the use of firearms by the gendarmerie. The law sets out several justifications for the use of force, including to defend positions gendarmes occupy.<sup>311</sup> This does not comply with international law.

[194] Police use of force in **Guinea-Bissau** is generally restricted by the principles of adequacy, opportunity, and proportionality, and member of the judicial police are prohibited from using force “more than is strictly reasonable” to carry out a lawful or authorised purpose.<sup>312</sup> The law allows firearms to be used in a number of scenarios, such as to confront imminent or ongoing violence directed at the police officer or a third party, or to prevent a “serious and imminent attack on socially beneficial installations whose destruction would cause material injury”.<sup>313</sup> This does not comply with international law.

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<sup>300</sup> The DGPN does not appear to have an official website but seeks public engagement through its Facebook page, available at: <https://bit.ly/31FRpJf>.

<sup>301</sup> ACHPR, Observations conclusives et Recommandations relatives au Rapport périodique de la République de Côte d’Ivoire (2012–2015), adoptées par la 23<sup>ème</sup> Session extraordinaire, réunie du 13 au 22 février 2018, para.42(II)(ii).

<sup>302</sup> Criminal Code (1933), s.15(A).

<sup>303</sup> Criminal Code (1933), s.72; Indemnity Act (as amended in 2001), ss.2(a) and 2(b).

<sup>304</sup> Criminal Code (1960), s.36.

<sup>305</sup> Criminal Code (1960), s.36.

<sup>306</sup> Criminal Code (1960), s.37.

<sup>307</sup> Prisons Service Act (1972), s.46.

<sup>308</sup> Police Service Act 1970 (Act 350), ss.12-16 and ss.19-21.

<sup>309</sup> Code De Déontologie De La Police Nationale (Décret D/98/15/PRG/SGG du 11 aout 1998), art.9.

<sup>310</sup> Loi N° L/2015/009/AN portant maintien de l’ordre public (4 juin 2015), arts.34-36.

<sup>311</sup> Loi N° L/2019/029/AN relative à l’usage des armes par la Gendarmerie nationale (25 juin 2019), art.1(b).

<sup>312</sup> Estatuto Orgânico da Polícia Judiciária (Decreto-Lei no.14/2010 de 15 de Novembro), arts.12(e) and 12(f).

<sup>313</sup> Estatuto Orgânico da Polícia Judiciária (Decreto-Lei no.14/2010 de 15 de Novembro), art.15, particularly art.15(2)(e).



[195] Liberia's 1978 Penal Law allows use of force when a police officer is making or assisting in making an arrest and the officer "believes that such force is immediately necessary to effect a lawful arrest".<sup>314</sup>

[196] Firearms may be used to affect a felony arrest where the officer believes that "the crime for which the arrest is made involved conducted including the use or threatened use of deadly force".<sup>315</sup> Prison guards are justified "in using any force, including deadly force" when they believe it to be "immediately necessary to prevent the escape" of a detained person.<sup>316</sup> In both cases the use of deadly force is justified by reference to the prior conduct of the person targeted rather than the threat posed in the future, and, as such, are more permissive than international standards allow.

[197] The 2016 Police Act provided that ('until a civilian complaints authority is established for all the Security Agencies') there should be established a National Police Civilian Complaints Review Board, which shall 'Receive, process, and determine any complaint made against the Liberia National Police, any Police Officer, or Civilian Personnel.'<sup>317</sup> This body would be chaired by the President of the Liberia Bar Association (or a representative from the Executive Council) and also include representatives various Ministries, the Chair or Deputy Chair of the National Human Rights Commission, and representatives of civil society.<sup>318</sup> Within its own Regulations, this Review Board established standing committees at county and district level.<sup>319</sup> Though it was constituted in 2017, the Board was not made functional in 2017 because of circumstances surrounding the 2017 election; in 2019 it was reported that the Ministry of Justice was making it functional.<sup>320</sup> In 2020 it was reported that this body was undertaking an investigation into the circumstances that resulted in the death of a three-year-old child in April 2020.<sup>321</sup>

[198] Law enforcement operations by the gendarmerie in **Mali** are regulated by a 1997 code of conduct. The Security Forces should not employ force and firearms to disperse unauthorised assemblies, but should seek to use non-violent methods. When assemblies are violent, the use of force should be the minimum necessary and should respect human rights.<sup>322</sup>

[199] Mali does not appear to specifically regulate the use of firearms by law enforcement officials in its domestic law.

[200] According to a 2011 Decree in **Niger**, which approved a Code of Ethics and Duties of the National Police, when the law allows the use of force, and in particular, the use of weapons, a police officer must only use force that is strictly necessary and proportionate to the objective sought ("ne peut en faire qu'un usage strictement nécessaire et proportionné au but à atteindre").<sup>323</sup>

[201] The Penal Code authorises the use of force, including potentially lethal force, to disperse an unlawful gathering that may disturb public order.<sup>324</sup> This provision does not comply with international law. A 2014 Decree stipulates that the police may only discharge a firearm in self-defence or when duly ordered to do so.<sup>325</sup>

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<sup>314</sup> Penal Law (1978), s.5.6.1.

<sup>315</sup> Penal Law (1978), s.5.6.3.

<sup>316</sup> Penal Law (1978), s.5.6.4.

<sup>317</sup> Liberia National Police Act of 2015, s.22.85(a) and s.22.85(c).

<sup>318</sup> Liberia National Police Act of 2015, s.22.85(b).

<sup>319</sup> Liberia National Police (Civilian Complaints Review Board) Regulations of 2016, s.14.

<sup>320</sup> 'Liberia: Ministry of Justice, Partners Re-establish Civilian Complaints Board for Police and Immigration Officers' *Front Page Africa* (15 January 2019) available at: <https://bit.ly/3wqgz1N>.

<sup>321</sup> '6 Police Officers Suspended for Death of 3-yr-old Boy in West Point' *Daily Observer* (29 June 2020) available at: <https://bit.ly/2PTKPvO>.

<sup>322</sup> Code of Conduct of Armed Forces and Security Forces of Mali, (1997), art.12.

<sup>323</sup> Decree No.2011-164/PCSRD/MIS/D/AR dated 31 March 2011, art.10.

<sup>324</sup> Penal Code (2003) art.97.

<sup>325</sup> Décret 2014-724 du 26 novembre 2014 déterminant les matériels susceptibles d'être utilisés pour le maintien et le rétablissement de l'ordre public (Decree 2014-724 from 26 November 2014 Determining the Equipment Likely to be Used in Public Order Operations), art.7.

[202] In **Nigeria**, Section 33(2) of the 1999 Constitution of the Federal Republic of Nigeria allows deprivation of life resulting from “such force as is reasonably necessary” for the defence of any person from unlawful violence or for the defence of property; and in order to effect a lawful arrest or to prevent the escape of a person lawfully detained. A 2007 Supreme Court decision held that this provision does not permit a police officer to “summarily execute any person who refuses to allow him free ingress into an apartment that he believes a suspect has entered”.<sup>326</sup>

[203] In addition to the Constitution, a range of federal and state laws govern police use of force. Relevant laws (applied in some cases in different parts of the country) include the Criminal Code, the Penal Code, the 1945 Criminal Procedure Act, the 1960 Criminal Procedure Code,<sup>327</sup> the Administration of Criminal Justice Act (2015); and the Nigeria Police Act.<sup>328</sup> Of these, the Criminal Code deals most extensively with police use of force.

[204] The Criminal Procedure Code stipulates that “an arrested person shall not be subjected to more restraint than is necessary to prevent his escape”.<sup>329</sup> Meanwhile, in the context of an assembly, per the Criminal Code, the police in the southern states of Nigeria may use all such force as is reasonably necessary to disperse an unlawful gathering.<sup>330</sup> The Criminal Code also allows for the use of intentional lethal force to prevent a fleeing suspect who is avoiding arrest for a capital offence or one punishable by seven years imprisonment or more (when the offender can be arrested without a warrant), where there are no other means to effect the arrest.<sup>331</sup> Likewise, regarding offences for which an arrest can be made without a warrant, the Criminal Code permits the use of force intended or likely to cause death or grievous harm in order to prevent the escape or rescue of an arrested person.<sup>332</sup>

[205] At policy level, Police Force Order 237, entitled Rules of Guidance in the Use of Firearms by the Police, previously allowed deadly force to be used to tackle rioters or where otherwise necessary to arrest a suspect or individual convicted of a felony or misdemeanour. The revised Order 237, promulgated in 2019, restricts lawful use of firearms or lethal or potentially lethal force to when it is necessary to confront an imminent threat of death or serious injury to a police officer; to defend a person against imminent death or serious injury; or to disperse a violent assembly (although it is further noted that indiscriminate firing into a crowd is always unlawful).

[206] The 1972 Prisons Act allows use of firearms to prevent the escape of an unarmed man.<sup>333</sup> This does not comply with international law. The revised Police Order 237, however, stipulates that a person charged with or convicted of a simple offence who is escaping from lawful custody shall not be fired upon unless they “at that very moment poses an imminent threat of death or injury to the police or others”.

[207] The Police Service Commission was established by the Constitution to have the power to appoint, dismiss and exercise disciplinary control over the members of the Nigeria Police Force.<sup>334</sup>

[208] The Complaint Response Unit was established in November 2015.<sup>335</sup> According to its website, it “leverages on available everyday technology to receive complaint and treat them. It was created to further bridge the gap between police and the citizens by ensuring that officers are held accountable for their actions or inactions”.<sup>336</sup>

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<sup>326</sup> Supreme Court of Nigeria, *Adegboyega Ibikunle v. The State*, Judgment ((2007) LPELR-8068(SC)), 12 January 2007.

<sup>327</sup> At the time of writing, 29 out of 36 states in Nigeria have now enacted their own Administration of Criminal Justice Laws (ACJLs). Only in states which have not done so do the Criminal Procedure Act or Criminal Procedure Code apply.

<sup>328</sup> Revised Police Force Order 237 (2019), p. 9, para. 2.4.

<sup>329</sup> Criminal Procedure (Northern States) Code (1960), s.37. Similar provisions have later been codified in the more generally applicable Nigeria Police Act, 2020, ss.33-34.

<sup>330</sup> Criminal Code (1916, as amended), s.73.

<sup>331</sup> Criminal Code (1916, as amended), s.271.

<sup>332</sup> Criminal Code (1916, as amended), s.273.

<sup>333</sup> Prisons Act (1972), s.10.

<sup>334</sup> Constitution of Nigeria, 1999, Third Schedule, s.29-30.

<sup>335</sup> Since then its status has been formalised in the Nigeria Police Act, 2020, ss.131-134.

<sup>336</sup> ‘Nigeria Police Force: Complaint Response Unit’ available at: <https://bit.ly/20mec9U>.

[209] The Revised Order 237 (2019) makes clear that “In all cases where force has been used by Police Officers, no matter how much injury has actually been caused, there should be a review of the circumstances by their supervisors and, in all serious or potentially serious cases, an investigation by Force Provost Marshall”.<sup>337</sup> Moreover, it is clear that ‘All incidents involving the discharge of a firearm, including accidental discharges, whether anyone is injured or not, shall be investigated by the Provost Marshall or subjected to criminal investigation as the case may be.’<sup>338</sup> But the lack of clear federal law regulating police use of firearms in line with international standards could pose a problem for accountability, as it may prove hard to prosecute a police officer who breaches the Revised Order which is more or less a policy document, but whose actions are within the provisions of the law.

[210] According to the Government of **Senegal**, in its submission in the context of its human rights Universal Periodic Review, it is “prohibited for the security forces, in the performance of their law-enforcement tasks, to use force except when it is necessary and in moderation, in accordance with operational requirements”.<sup>339</sup> The legal basis for this is unclear: in 2019, while regretting the lack of information concerning investigations into allegation of abuse, the Human Rights Committee also reminded Senegal of the need to ensure that its laws complied with international standards.<sup>340</sup>

[211] There do not appear to be specific legal provisions governing the use of firearms. In 2012, the African Commission adopted Resolution 208 on the Human Rights Situation in Senegal in which it expressed itself concerned “by the use of force by law enforcement officers who are firing live bullets at peaceful demonstrators resulting in the loss of lives.”<sup>341</sup>

[212] The Criminal Procedure Act in **Sierra Leone** allows sufficient force to effect an arrest “but not more”.<sup>342</sup> Potentially deadly force may be used to stop unarmed prisoners from escaping under the 2014 Correctional Service Act.<sup>343</sup>

[213] The Independent Police Complaints Board was established in 2013 and became operational in 2015.<sup>344</sup> The Board is mandated to investigate any death in police custody, any shooting incident where a police officer discharged a firearm, and any fatal road traffic accident involving a police vehicle, among others.<sup>345</sup> A Memorandum of Understanding was agreed in 2019 between the Complaints Board and the Police’s internal Complaint Discipline and Internal Investigations Department, with a view to ensuring the referral of any relevant case within 14 days.<sup>346</sup> However, after producing informative early annual reports, including statistical analysis of the number of complaints received and investigations opened, the IPCB has either stopped producing these reports or stopped making them public.

[214] There are few legal provisions on police use of force in **Togo**. A 2013 decree on the maintenance and re-establishment of public order allows the police to use firearms or bladed weapons if other less-lethal weapons have proven ineffective and the police have been “exceptionally calm and patient”.<sup>347</sup> This clearly does not conform with the requirement of international standards that firearms be used only to confront an imminent threat of serious injury.

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<sup>337</sup> Nigeria Police Force: Revised Order 237 on the Use of Force (2019), §2(F)(5).

<sup>338</sup> Nigeria Police Force: Revised Order 237 on the Use of Force (2019), §10(C)(1).

<sup>339</sup> National report submitted by Senegal, A/HRC/WG.6/31/SEN/1, 31 August 2018, para.86.

<sup>340</sup> Human Rights Committee, Observations finales concernant le cinquième rapport périodique du Sénégal, CCPR/C/SEN/CO/5 (11 décembre 2019) paras.24-25.

<sup>341</sup> Resolution on the Human Rights Situation in Senegal, ACHPR/Res.208 (EXT.OS/XI), 22 February 2012.

<sup>342</sup> Criminal Procedure Act (1965), s.4(2).

<sup>343</sup> Correctional Service Act (2014), s.16.

<sup>344</sup> Independent Police Complaints Board Regulations, No.11 of 2013

<sup>345</sup> Independent Police Complaints Board Regulations, No.11 of 2013, s.3(1)(a)-(c)

<sup>346</sup> Memorandum of Understanding between the Independent Police Complaints Board and the Sierra Leone Police (2019) available at: <https://bit.ly/20i6s8J>.

<sup>347</sup> Décret N° 2013-013/PR du 0603 2013 portant réglementation du maintien et du rétablissement de l’ordre public, art.31.

## Thematic concerns

[215] Having in the previous section surveyed the existing substantive regulations at national level across the continent, and pointed to instances of non-conformity with international law, in this section the Study takes a more thematic approach.

### Insufficient legal precision concerning use of force

[216] There are a number of States in which it has not been possible to identify a statutory basis for the use of force by law enforcement, or for its effective regulation: Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Gabon, Libya, Mauritania, Morocco, Saharawi Arab Democratic Republic, Sao Tomé and Príncipe, Senegal, Sierra Leone, and Somalia.

[217] This of course is not to say that law enforcement officials in these States use force howsoever they like. Their conduct is almost certainly regulated by police standing orders or training curricula, and their commanders likely take decisions in the light of a wider history of practice and of disciplinary decision-making, some of which may even have been litigated in national courts (though no evidence of such was readily available).

[218] As discussed in Part I, the principle of legality requires that use of force by law enforcement officials be regulated by law. The lack of public information about the provisions of such regulation makes it difficult if not impossible for victims of abuse to challenge wrongful conduct in national settings, and difficult for international bodies, such as the African Commission, to engage with States in order to enhance the protection of rights.

[219] Though these States have failed to respond to *notes verbales* to obtain further information about their legislation, the Commission stands ready to open a dialogue on these questions in order better to understand the protection of the full range of Charter rights implicated.

### Permissive rules (or lack of rules) specifically concerning the use of firearms

[220] There are a significant number of States in which there are no specific legal limitations on the use of firearms by the police (at least in primary legislation): Algeria, Central African Republic, Chad, Comoros, Congo, Eritrea, Gabon, Gambia, Ghana, Lesotho, Libya, Mali, Mauritania, Mauritius, Saharawi Arab Democratic Republic, Sao Tomé and Príncipe, Senegal, Sierra Leone, Somalia, and South Sudan.

[221] In some States which might at least be said to have *some* regulation, the law is extremely vague. For example, in **Botswana**, the Police Act makes it a disciplinary offence to discharge a firearm either negligently or 'without orders or just cause', without any clarification as to the circumstance which might be considered a 'just cause'.<sup>348</sup>

[222] In other jurisdictions there are quite detailed provisions, but they are overly permissive. For example, as was discussed above, in **Kenya**, the National Police Service Act provides an over-inclusive list of purposes for which firearms may be used, including protection property, preventing a person charged with a felony from escaping lawful custody, and preventing a person from attempts to rescue a person charged with a felony from lawful custody.<sup>349</sup>

[223] It is not sufficient for States to authorise law enforcement officials to carry firearms and not to include specific provisions within their domestic legal framework for how their use will be circumscribed. The general principles applied to force more broadly, that it be for example necessary and proportionate, or reasonable, do not capture the higher threshold that applies to the use of force that in a significant proportion of cases will prove fatal.

[224] Another common problem is the existence of laws relating to prisons which permit the use of firearms against "escaping prisoners". This is for example the case in Botswana, Cabo Verde,

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<sup>348</sup> Police Act, No.29 of 1978, s.23(p).

<sup>349</sup> National Police Service Act, No.11a of 2011 [Rev.2016], Sixth Schedule, s.B.1.

Cote d'Ivoire, eSwatini, Ethiopia, Ghana, Kenya, Liberia, Malawi, Namibia, Nigeria, Seychelles, Sierra Leone, Somalia, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe. In some case this provision exists only in the Prisons Act or equivalent, which, while problematic, likely only becomes factually relevant in extremely rare circumstances. However, in many cases similar language is found in legislation regulating the use of force by the police (relating to those "escaping lawful custody" or equivalent). This is an extremely permissive provision, justifying the use of potentially lethal force in a significant number of cases that would not be allowed under international law.

[225] A problem that recurs in many Francophone jurisdictions is the persistence of the inclusion within a list of circumstances in which firearms may be used some variant of being unable otherwise to defend the ground they (usually the gendarmerie) occupy. This is for example the case in Equatorial Guinea, Guinea, and Morocco. In Gabon, the same circumstance is provided for the use of force in general, with no specificity about the use of firearms. While in some circumstances having no other ability to defend a position may well coincide with an imminent threat to the officers' lives, that will not always be the case (and where it does, it would be the threat, and not the ability to defend the position that would justify force). Depending on the circumstances, officers who choose not to take an opportunity to withdraw and regroup, and then seek to justify the use of lethal force with reference to a threat faced may well have violated the principles of precaution and necessity.

[226] It should be noted that in some cases law enforcement agencies themselves have supplied the legal void with respect to the regulation of their use of firearms, and that in some cases this can be to the practical protection of the public. For example, notwithstanding a relatively permissive provision within the Constitution of Nigeria regarding the use of force to protect property ("such force as is reasonably necessary"), the Police themselves developed Police Order No.237, which includes safeguards that are much closer to conformity with international standards (though regrettably still permitting the use of firearms to disperse a violent assembly).

#### **Overly-restrictive "public order" enforcement**

[227] Many States across the continent have legislation in force which does not conform with international standards with respect to the full enjoyment of the right of peaceful assembly. That has previously been the subject of a Study by the African Commission,<sup>350</sup> and is a matter of ongoing review, *inter alia* by the Study Group on Freedom of Assembly and Association in Africa. These laws, for example by determining (under national law) whether an assembly is lawful or unlawful, often have a relatively direct impact on the use of force by law enforcement officials. However, for the purpose of this section, those laws will be put to one side and here the Study will highlight a number of jurisdictions in which the regulation of the use of force is itself problematic.

[228] In several jurisdictions, legislation contains provisions that allow for law enforcement officials (usually only those over a certain rank) to declare a gathering to be an "unlawful assembly" or "a riot" without providing objective criteria for such a determination. The same legislation then often permits escalated force to be used against a gathering on the basis of its illegality, rather than on the basis of what should always be the only determinant of use of force during an assembly, namely the peacefulness of participants.

[229] In several jurisdictions law enforcement officials are empowered—usually explicitly after having exhausted other means—to use firearms to disperse an assembly. This is in violation of international standards: to the extent they can be used at all in the context of an assembly (and practical considerations such as the likelihood of overpenetration or striking bystanders make them generally inappropriate), then firearms can only be targeted against individual participants within an assembly whose violent conduct rises to the threshold that applies to the use of firearms in other contexts (the only available means to protect against an imminent threat of death or serious injury).

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<sup>350</sup> ACHPR Report of the Study Group on Freedom of Assembly and Association in Africa (2014).

[230] As an example, in 2013 a law was adopted in **Egypt** updating the regulation of the use of force in the context of peaceful public meetings, processions and protests. This law reformed some of the most problematic dimensions of the law up until that point in force (dating from 1964, and which had authorised the use of automatic weapons).<sup>351</sup> The new law introduced more formally the concept of graduated use of force, but still ultimately permits the firing of “non-rubber cartouche bullets” for the purpose of dispersing a crowd.<sup>352</sup>

### **Broad immunity provisions**

[231] In many jurisdictions relevant legislation includes provision that effectively provides immunity for law enforcement officials when using force. This is often particularly the case with respect to the use of force during an assembly, but in some case the immunity applies in a more blanket fashion. Such provisions are clearly antithetical to the core principle of accountability detailed above in Part I.

[232] In **The Gambia**, law enforcement officials are explicitly absolved of any civil and criminal liability from any consequential harm or death caused by the use of force. Moreover, the Indemnity Act (as amended in 2001) exonerates any public official including law enforcement from civil or criminal liability in the exercise of their duties in unlawful assemblies, riotous situations, or public emergencies.<sup>353</sup>

[233] There have been a number of attempts to pass a permissive security bill in **Tunisia** (Draft Organic Law No. 25-2015), which was approved by the Parliamentary Commission in July 2020, following unsuccessful attempts to adopt it in 2015 and 2017. This law would provide immunity from prosecution from criminal offenses, including homicide, for law enforcement officials if their acts were carried out pursuant to other laws or orders from a competent authority.

[234] The 2009 Police Service Act in **South Sudan** would seem to impede police accountability as it offers broad immunities to police officers, by providing that any act done “in good faith while discharging his or her functions and duties” shall not constitute an offence.<sup>354</sup> It further provides that “No police personnel shall be arrested for or charged with murder in connection with acts committed in the course of his or her duty, except with a written authorisation obtained from the President in the case of officers, or a written authorisation from the Minister or Inspector General in the case of non-commissioned officers and privates.”<sup>355</sup>

[235] The broad immunities in some domestic laws also apply to other security actors. For example, while the Game Act in **eSwatini** limits the use of firearms by game ranger to cases of self-defence or defence of their colleagues,<sup>356</sup> and authorises them to “use reasonable force necessary to affect the arrest of or to overpower any person who resists arrest and who is suspected on reasonable grounds of having contravened” the Act,<sup>357</sup> it goes on to provide that “A game ranger or person acting on the instructions of a game ranger shall not be liable to prosecution in respect of any act or omission done in the exercise of his powers or rights under [...] this section.”<sup>358</sup> In 2017, eSwatini told the Human Rights Committee they were considering “to review” the Game Act but in its Concluding Observations the Committee expressed its concerned at reports that proposed amendments to the Act may give game rangers immunity from prosecution for using force against persons suspected of poaching.<sup>359</sup>

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<sup>351</sup> Decree 156 of 1964, art.1(3). Many of the same provisions were included later in the Law on the Regulation of Police Authority, No.109 of 1971, art.102.

<sup>352</sup> Law No.107 of 2013 for organizing the right to peaceful public meetings, processions and protests, art.13.

<sup>353</sup> Indemnity Act (as amended in 2001), ss.2(a) and (b).

<sup>354</sup> Southern Sudan Police Service Act, 2009, s.51(1).

<sup>355</sup> Southern Sudan Police Service Act, 2009, s.51(2).

<sup>356</sup> Game Act (1953, as amended in 1991) s.23(2)(b).

<sup>357</sup> Game Act (1953, as amended in 1991) s.23(2)(d).

<sup>358</sup> Game Act (1953, as amended in 1991) s.23(3).

<sup>359</sup> Human Rights Committee, Concluding observations on Swaziland in the absence of a report, UN doc. CPR/C/SWZ/CO/1, 23 August 2017, para.30.

[236] The 2019 law regulating the use of firearms by the Gendarmerie in **Guinea** has been highlighted above because of the breadth of circumstances it envisages potential use, but it is also important to highlight that in the legislation's explanatory note drew attention to the need to protect gendarmes who resort to force from vengeful prosecutions, raising concern that it will be used to prevent judicial oversight of law enforcement.<sup>360</sup>

[237] With respect to the use of force in the context of assemblies in **Kenya**, the Penal Code provides an immunity for law enforcement officials from any criminal or civil proceeding related to their having used force in the context of a riotous assembly.<sup>361</sup> As noted above, the same is true of the Penal Code Act in **Zambia**.<sup>362</sup>

### **Vague counter-terrorism exceptions**

[238] In its Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, the African Commission made clear that the same international standards described above in Part I apply in the case of the use of force in counter-terrorism operations.

[239] Vague assertions of "national security" priorities in countering terrorism, leading to joint operations between police and military authorities, or indeed military-led operations risk undermining protection of rights, including by dropping a veil of state secrecy over subsequent investigations and the pursuit of accountability. For example, in 2017 the Committee Against Torture expressed its deep concern that in Cameroon, according to reports it had received, the Cameroonian defence forces killed more than 70 people during cordon-and-search operations and disposed of their bodies in a mass grave in Mindif. Moreover it regretted that the State did not indicate whether investigations had been launched to establish the whereabouts of the individuals reported as missing or killed during cordon-and-search operations.<sup>363</sup>

[240] Another troubling dimension of the law enforcement response to terrorism relates to the detention of suspects. Concerns have been expressed, for example, that mass trials against Boko Haram suspects in Nigeria have been used in an attempt to conceal abuses by security forces.<sup>364</sup> Moreover there are allegations, for example in Burkina Faso in 2020, of summary executions of detained suspects.<sup>365</sup>

### **Under- or partially-regulated state actors (e.g. wildlife services etc.)**

[241] In 2015, a paramilitary structure called the Corps for the Protection of National Parks and related natural reserves (CorPPN) was created in the **Democratic Republic of Congo**. It is tasked with 'ensuring the protection of the fauna, of the flora and of the ecosystems in national parks and in affiliated natural reserves, and in particular combating poaching and all other forms of criminal acts against wildlife species.'<sup>366</sup> In the exercise of their functions, members of the CorPPN 'may use firearms, when violence is or is about to be used against them and in order to protect the parks

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<sup>360</sup> Exposé des motifs du projet de loi relatif à l'usage des armes par la gendarmerie, 5 décembre 2018. See also Human Rights Watch, 'Guinea: New Law Could Shield Police From Prosecution,' 4 July 2019, available at: <https://bit.ly/3cNHGok>.

<sup>361</sup> Penal Code (Cap. 63, 1930), s.82.

<sup>362</sup> Penal Code Act (Chap.87 of the Laws of Zambia, 1930), Chap. IX, s.78.

<sup>363</sup> Committee against Torture, Concluding observations on the fifth periodic report of Cameroon, CAT/C/CMR/CO/5, 18 December 2017, para.9.

<sup>364</sup> Amnesty International, "Willingly Unable: ICC Preliminary Examination and Nigeria's Failure to Address Impunity for International Crimes", 2018, available at: <https://bit.ly/2PoV6R4>.

<sup>365</sup> Human Rights Watch, "Burkina Faso: Security Forces Allegedly Execute 31 Detainees", 20 April 2020, available at: <https://bit.ly/3sQTca4>.

<sup>366</sup> Décret n° 15/012 du 15 juin 2015 portant création d'un corps chargé de la sécurisation des parcs nationaux et réserves naturelles apparentées (Decree 15/012 of 15 June 2015 creating a corps tasked with securing national parks and affiliated natural reserves), art.2.



and affiliated natural reserves as well as their resources.<sup>367</sup> As discussed frequently above with respect to the use of firearms, a unqualified threshold of ‘violence’ is more permissive than international law allows: the threat must be violence posing an imminent risk of death or serious injury.

[242] In **Kenya**, the Wildlife Conservation and Management Act contains some highly problematic provisions concerning the use of firearms by members of the Kenya Wildlife Service. The Act mandates the use of firearms against any person charged with an offence under the Act when attempting escape (provided only that no other means of preventing escape is available and that ample warning has been given).<sup>368</sup> Moreover, the Act makes no provision at all for reporting of use of firearms even to a superior officer, let alone to some form of oversight authority. Members of the Kenya Forest Service are also authorised to use firearms. Like the Wildlife Service their Act authorises the use of firearms against any person escaping custody having been charged with an offence under the Act, and even more broadly, also against ‘any person unlawfully hunting any animal within a forest area or nature reserve.’<sup>369</sup>

### **Regulation of private security providers**

#### ***Delegation of state functions***

[243] As established in Part I, a law enforcement official can be any officer of the law, whether appointed or elected, who exercises police powers, especially the powers of arrest or detention. The State remains fully responsible for the conduct of those agents it directly contracts to undertake state functions.

[244] One of the most direct examples of this kind of delegation is in the privatisation of penitentiaries and other detention facilities.

[245] With respect to the use of force in South African prisons, officials in private prisons are subject to the same regulatory framework that applies to those in prisons under the management of the Department of Correctional Services, which is good practice. The challenge, however, comes with respect to accountability.<sup>370</sup>

[246] In 2013, for example, allegations of abuses occurring in a privately-run custodial facility in South Africa, the Manguang Correctional Centre in Bloemfontein, led the Department of Correctional Services temporarily to take over the facility in order to investigate. The report of that investigation was not made public for more than six years, and then only after a lengthy legal process.<sup>371</sup>

#### **Provision of private security for private clients**

[247] While strictly beyond the scope of a Study on the use of force by law enforcement officials, it is important to note that there is an extensive practice across the continent of safety and security being provided by non-state actors. This can take the form of large or small business corporations (“private security providers”) or less formal neighbourhood watch patrols and vigilantes. While the use of force by these actors will generally be a matter of criminal law, there can be a range of other policy implications and necessary laws and regulations.

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<sup>367</sup> Décret n° 15/012 du 15 juin 2015 portant création d'un corps chargé de la sécurisation des parcs nationaux et réserves naturelles apparentées (Decree 15/012 of 15 June 2015 creating a corps tasked with securing national parks and affiliated natural reserves), art.17.

<sup>368</sup> Wildlife Conservation and Management Act, No.47 of 2013, s.112.

<sup>369</sup> Forest Conservation and Management Act, No.34 of 2016, s.63.

<sup>370</sup> See, generally, David Bruce ‘The use of less-lethal weapons in South African prisons and crowd management’ *ISS Monograph 201*, November 2019, available at: <https://bit.ly/3up5pU5>.

<sup>371</sup> Elna Schütz, ‘Official report into Bloemfontein prison reveals mistreatment of inmates’ *GroundUp*, 3 March 2020, available at: <https://bit.ly/3rPwTQ0>.



[248] In **South Africa**, an extensive economy of private security providers is regulated by the Private Security Industry Regulation Act of 2001.<sup>372</sup> This for example requires the clearance of all employees of the entire security sector prior to employment in a PMSC and close monitoring of the change of name and trade of PMSCs.<sup>373</sup> The law also established the Private Security Industry Regulatory Authority, a body which has in recent years opened more than 1,000 criminal investigations each year against unregistered security service providers as well as for other criminal contraventions of the Act.<sup>374</sup> Under the terms of the same Act, the Ministry for Safety and Security also established a “Code of Conduct for Security Service Providers” (2003), which regulates how private security guards can lawfully be licensed to carry weapons, and which requires that private security providers (the companies) draw up and consistently enforce a disciplinary code with respect to all of their employees.<sup>375</sup>

[249] In **Kenya**, the Private Security Regulatory Authority was established in 2016.<sup>376</sup> Under the same legislation, a Code of Conduct for Private Security Providers was established, requiring all private security providers operating in Kenya, *inter alia*, to “develop standard operating procedures and put in place strict and detailed guidelines on the use of minimal force in accordance with international best practices”.<sup>377</sup> Private security providers are not permitted to use firearms in the rendering of security service.<sup>378</sup>

### **The need for effective accountability and oversight mechanisms**

[250] Three countries in Africa (South Africa, Kenya and Sierra Leone) have independent institutions that have existed for some time and which are capable of conducting investigations into potentially unlawful use of force by law enforcement officials. This is not to say that the institutional arrangements in these three countries are settled, or necessarily examples of model practice (and there are proposals for further reform that could be made in all three cases) but the basic foundations exist.

[251] In a number of other countries new legislation has been introduced in the last decade establishing at least the formal architecture of similar oversight institutions. There have been promising developments, for example, in Liberia, Malawi, Mauritius and Zambia, however, these bodies have yet fully to establish themselves.

[252] In the plurality of African States, complaints concerning police action and investigation into allegations of abuses, including of excessive force, falls to bodies internal to the police. These can be of varying statuses, both in terms of investigative capacity and functional independence.

[253] The African Commission has frequently recalled the importance of independent oversight of the security sector<sup>379</sup> and has underlined the benefits such oversight provides both for the effective protection of human rights and for the improvement of service delivery and contributing to law enforcement that enjoys public legitimacy and trust.

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<sup>372</sup> Private Security Industry Regulation Act No. 56 of 2001

<sup>373</sup> *Ibid.*, ss.4, 7.

<sup>374</sup> Private Security Industry Regulatory Authority, *Annual Report 2019/2020*, Pretoria, 2020, available at: <https://bit.ly/3fJfR4J>.

<sup>375</sup> Ministry for Safety and Security, “Code of Conduct for Security Service Providers” (2003), s.8(a).

<sup>376</sup> Private Security Regulation Act, No.13 of 2016, s.7(1).

<sup>377</sup> Private Security Regulation Act, No.13 of 2016, s.68(1) [Second Schedule: Code of Conduct for Private Security Providers] s.(e).

<sup>378</sup> Private Security Regulation Act, No.13 of 2016, s.53(1).

<sup>379</sup> See, for example, Resolution on Police Reform, Accountability and Civilian Police Oversight in Africa, ACHPR/Res.103a(XXX)06 (November 2006).

## Conclusions & Recommendations

[254] In undertaking this Study, the Commission aimed to provide an overview of the current state of the law applicable to the use of force by law enforcement officials in Africa—on the international and in particular on the domestic levels—and to make recommendations on how the domestic laws can be improved, in order to ensure the better protection of human rights.

[255] At the international level, the Commission hopes to begin an enriched dialogue with member States and other stakeholders about these important issues. For example, during the consideration of State periodic reports, it is envisioned that the questions concerning articles 4 and 5 will no longer need to consist of seeking information about what the domestic laws provide on the use of force, but rather, based upon the survey of this Study, the interaction between States and the Commission can focus on recent updates and about what can be done to address remaining discrepancies between the international and domestic standards.

[256] At the domestic level, the aim is also to provide courts, litigants, members of civil society and others with the ability to engage more easily and directly with the international standards, and to provide a comparative reference point for national law across the continent in order better to inform their arguments and advocacy.

[257] The Study has also drawn attention to particularly important trends, and highlighted certain areas of concern at a continental level. A number of countries have been identified where a legal vacuum needs to be filled in order more directly to give effect to the international standards and guidelines concerning the use of force by the police. In other states, existing laws are outdated, and sometimes in clear tension with the standards developed to protect a range of fundamental human rights. These laws need urgent reform.

### ***Recommendations for the international community:***

[258] The African Commission, and particularly the Special Rapporteur on Policing, the Working Group on the Death Penalty and the Special Rapporteur on Human Rights Defenders, should continue dedicated attention to the issue of the use of force, seek opportunities for constructive dialogue and engagement with other stakeholders, undertaking research on related thematic issues, and find means of collating and reporting information and data about comparative policies and programmes.

[259] This engagement should include the continuation of active collaboration with both the continental body charged with policing matters, AFRIPOL, as well as sub-regional organisation for police cooperation and capacity building, such as EAPCCO, PoliDH, SARPCCO.

[260] The African Commission should consider developing guidance for how human rights principles generally, and the standards on the use of force in particular, can be better integrated into training curricula for law enforcement officials on the continent.

### ***Recommendations for member States:***

[261] States should undertake urgent legal review to identify protection gaps or outdated legislation that does not reflect international standards. In some cases, more protective subsidiary regulation may have been developed to “work around” such gaps or challenges in primary legislation. Such subsidiary guidelines—while welcome—do not overcome the requirement of the principle of legality that the powers of law enforcement officials to use force be established by law.

[262] States should collate and make publicly available information about current and recent use of force by law enforcement officials.

[263] Where they do not exist, States should establish independent bodies to receive complaints about abuses by law enforcement officials and empower them to undertake investigations into serious violations. Such bodies should be designed to work in conjunction with internal accountability mechanisms designed to maintain police discipline. Where such bodies already exist, or where the function is fulfilled by a National Human Rights Institution, States should ensure

that such bodies are adequately resourced and empowered in order to be capable of effectively investigating all relevant cases.

[264] States should equip law enforcement officials with appropriate protective equipment, as well as with less-lethal weapons so as to reduce the likelihood of their recourse to firearms.

[265] States should avoid the ad hoc deployment of members of the armed forces to assist in the conduct of law enforcement operations. In exceptional circumstances, where strictly necessary, any such deployment should be under clear civilian command and control, and with personnel only equipped with weapons or equipment appropriate for law enforcement.

[266] States should take steps to address the issues of overcrowding and under-staffing in custodial facilities, which would make less likely that incidents of violence escalate.

[267] States should establish clear regulatory frameworks for private security providers in their jurisdictions, including the necessary limitations on the authority of their employees to use force.

[268] When presenting periodic reports to the African Commission States should include information about legal standards on the use of force, training practices, oversight and accountability mechanisms. Wherever possible this information should include data (for example the number of officers trained, number of investigations undertaken) and also include examples of practice.

***Recommendations for law enforcement agencies:***

[269] Law enforcement agencies should work with relevant ministries to identify and reform the legal basis for the use of force by their agents in such a way as to conform with international standards.

[270] Law enforcement agencies should develop or revise and should generally publicise specific guidelines or standard operating procedures (SOPs) for the use of force by their agents in particular circumstances, as well as for the training of their agents. All such guidelines must include clear protocols for the reporting of instances of the use of force, including any injuries that may have been caused.

[271] Training should include the applicable human rights principles and standards; means of avoiding the use of force, including through de-escalation techniques, mediation and effective communication; specific information on how less-lethal weapons may offer a safer and effective alternative to firearms and which individuals or groups may be especially vulnerable to the use of certain less-lethal weapons. Training should be both scenario-based and theoretical in nature. Training programmes should be reviewed continuously, to incorporate lessons learned during operations and to ensure that they reflect all relevant policies and updated internal regulations.

[272] Law enforcement agencies should not rely upon outside expertise for training in negotiation and peaceful conflict resolution. They should promptly arrange for specialized trainers to be trained in this area who can then train other officials. These trainers should regularly update their own knowledge.

***Recommendations for independent oversight bodies:***

[273] Oversight bodies should engage with law enforcement agencies and relevant government ministries to make clear protection gaps within existing legal frameworks and to make recommendations for reform.

[274] Oversight bodies should continue routinely to monitor and report upon policing operations, such as the policing of public assemblies

[275] Bodies that receive public complaints should periodically make public data about the number and nature of complaints received (with appropriate safeguards for anonymisation, and with due regard to ongoing investigations), as well as details of cases in which investigations have been commenced on the institution's own motion. Oversight bodies should draw particular attention to the investigative challenges that follow from slow notification by law enforcement officials (or failure to notify at all). Where legally empowered to do so, oversight bodies should

consider the merits of seeking criminal or disciplinary sanctions against officers who fail to make relevant notifications.

***Recommendations for civil society:***

[276] Civil society organisations, including those working with the victims of police abuses of power, should consider mounting constitutional or human rights-based challenges to domestic legal regimes for the use of force by law enforcement officials that do not conform with international standards.

[277] Civil society organisations should seek to cooperate with independent oversight bodies (where they exist) in order to highlight cases of police use of force with a view to encouraging prompt and effective investigations.

[278] Civil society organisations should continue to submit shadow reports to the African Commission to supply data about the use of force by law enforcement officials, or detailed information about specific incidents

[279] Civil society organisation should engage with sub-regional policing organisations.

[280] Media organisations and members of the academy have important roles to play in information and knowledge-sharing: making accessible and informative to the public the data which the State may publish.

# **Study on the Use of Force by Law Enforcement Officials in Africa**



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