Submission by CASAC to the Marikana Commission of Inquiry

The role of the South African Police Service in the Marikana massacre on 16 August 2012

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Executive Summary

Context & Compass of the Submission

1. This submission by the Council for the Advancement of the South African Constitution (CASAC) to the Marikana Commission of Inquiry led by Judge Ian Farlam is located within the context of civil liberties as articulated in the Universal Declaration of Human Rights and the South African Constitution.
2. The submission is primarily concerned with the manner in which the South African Police Service (SAPS) acted at Marikana on the 16th of August 2012. The submission addresses a number of the issues which form part of the Terms of Reference (TORs) of the Farlam Commission.
3. The scope of the submission encompasses:
    - The actions of members of the SAPS and officials of the South African government that contributed to the course of events on the 16th of August.
    - It also covers action taken by members of the SAPS and/or government officials that led to the death of ANC councillor Pauline Masuhlo who died as a result of injuries that she sustained on the weekend of 15-16 September.
4. In this submission CASAC respectfully requests the Commission to examine whether:
    - It can be inferred that a policy of "maximum force" has been introduced into the operational practice of the SAPS, contrary to the Constitution;
    - There is a direct or indirect causal link between the articulation of such a policy and the events at Marikana on 16 August 2012;
    - In any event, whether the statements and acts referred to in this submission have contributed in any manner, whether directly or indirectly, to the events at Marikana on 16 August 2012.
5. CASAC requests that the Commission recommend corrective action should its findings support any of these conclusions.
6. CASAC submits that responsible officials of government, including the relevant members of cabinet, and senior officials of the South African Police Service (SAPS) are the principal persons who have to account for the massacre on 16 August.

Core Issues Examined by the Submission: Use of Maximum Force by the Police and Political Accountability

7. The submission details a shift in the attitude and approach of government towards the Police, leading SAPS to believe that the use of force is part of the acceptable norms of

policing in South Africa. It refers to a series of public statements by the President, Minister of Police, Deputy Ministers of Police and various National Commissioners of SAPS, to illustrate that there is a causal relationship between what is said by such leaders and what is done by police officers.

8. CASAC asserts, moreover, that a doctrine of maximum force became established within the SAPS contrary to the principles of proportionality and necessity and in violation of the law.
9. The CASAC submission highlights a period dating from approximately January 2011 when a policy of encouraging greater use of force was advanced through the promotion of a doctrine of 'maximum force' that was operationalized in SAPS.
10. It is argued that government initially pursued this policy in the belief that it would provide a solution to the problem of (violent) crime. However since January 2011, the policy has also involved the application of greater levels of force, including lethal force, to address the phenomenon of large numbers of service delivery protests.
11. The decision to militarise the ranks of the police also contributed to the use of greater force - the adoption of military ranks was even credited with reducing the crime rate.
12. From about July 2004 onwards South Africa experienced a series of community and labour demonstrations or strikes that involved significant levels of violence. While police responses to these demonstrations did not always lead to deaths, in a period of less than five months, from the middle of February to the beginning of June 2011, eleven people were killed in such demonstrations.
13. The precursor to this increase in killings in 2011 appears to have been the re-establishment of Operational Response Services (ORS) as a full division within the SAPS. The ORS included public order as well as a number of paramilitary units. Rather than strengthening the equipment and training that has been provided to public order policing units the approach that has been taken has increasingly been to use paramilitary units such as the Tactical Response Teams, National Intervention Unit and Special Task force to supplement public order police. Public order policing units are regarded as interchangeable with crime combating units.
14. However, the outrage following the killing of Andries Tatane in April 2011 caused Government to backtrack, and in July 2011 the Minister of Police marked a departure from the way in which the doctrine had previously been promoted. He suggested that maximum force was only to be used against 'violent criminals' and not against 'fellow citizens'. This implies that prior to this date (at least subsequent to January 2011) maximum force was also regarded as being applicable to demonstrations.
15. At the very least 'maximum force' is likely to have been advanced to members of ORS and other SAPS members as an appropriate doctrine to guide their use of force in confrontations with armed criminals. In so far as the group of miners at Marikana were

seen as 'armed criminals' they could then have been seen as legitimate targets of maximum force. Noting that two police officers were killed in the days preceding 16 August, it is possible that the police involved in the operation on 16 August were motivated by emotions of anger and the desire to exact revenge. The decision to 'disperse and disarm' the miners was also motivated by the intention (perhaps at a senior as well as rank and file level) to 'teach the miners a lesson' or 'show them who the boss is'. The decision to 'disperse and disarm' was made in the knowledge that the SAPS could be confident of getting the upper hand should the situation escalate.

Accountability for Constitutional Violations

16. The concept of maximum force should have no place whatsoever in the policing of democratic societies where, conversely, it is uniformly accepted that the principle that should govern the use of force by police is the principle of minimum force. The Regulations of Gatherings Act (205 of 1993) only authorises the use of force proportionate to the circumstances of the case and the object to be attained.
17. In addition to the use of live ammunition, the submission points to the use of rubber bullets in a manner that is designed to inflict maximum injury, and which resulted in the death of Councillor Pauline Masuhlo.
18. CASAC's view is that the failure of government to provide properly trained and equipped public order policing units notwithstanding a substantial problem of violent public protests may be understood as a contributing factor to the massacre.
19. It is submitted that the doctrine of maximum force, and the implied concept of the use of force embedded within it, directly shaped the course of events at Marikana on 16 August.
20. The South African government and SAPS have therefore deliberately and consciously violated the rights to freedom of assembly, demonstration, picket and petition provided under section 17 of the Constitution.
21. It is the responsible officials of government, as well as the senior officials of the SAPS who authorised the police operation to disarm the striking miners that was carried out on 16th August, who bear direct responsibility for the massacre, and should be accordingly held to full account.

Section One: Introduction and Overview

1. The Council for the Advancement of the South African Constitution (CASAC), in pursuit of its mission to promote the rights enshrined in the Constitution, respectfully tables the following submission to the Farlam Commission of Inquiry.
2. CASAC's submission is located within the context of civil liberties as articulated in the Universal Declaration of Human Rights and the South African Constitution.
3. As an organisation that has been established to advance the principles and values of the South African Constitution, CASAC does not represent any entity or group that features in the deliberations of the Commission but rather seeks to strengthen the very foundations of South African democracy.
4. CASAC's submission is primarily concerned with the manner in which the South African Police Service (SAPS) acted at Marikana on the 16th of August 2012. The scope of the submission includes:
    a. Actions by members of the SAPS and other officials of the South African government that contributed to the course of events on the 16th of August.
    b. Action taken by members of the SAPS, the South African National Defence Force, or other officials of the South African government that led to the death of ANC councillor Pauline Masuhlo who died on the 19th of September 2012 apparently as a result of injuries that she sustained on the weekend of 15-16th September.
5. Under Section Two below this submission sets out provisions of the South African Constitution that, it is submitted, were violated by these actions.
6. It should be noted that, in so far as these actions violated the South African Constitution they would also have violated a number of international human rights instruments. These would for instance have included the Universal Declaration of Human Rights, 1948, which provides *inter alia* that:
    a. All human beings are born free and equal in dignity and rights (Article 1).
    b. Everyone has the right to life, liberty and security of the person (Article 3).
    c. Everyone has the right to recognition everywhere as a person before the law (Article 6).
    d. All are equal before the law and are entitled without any discrimination to equal protection of the law (Article 7).
    e. Everyone has the right to freedom of peaceful assembly and association (Article 20(1)).

Purpose of this Submission

7. The submission is intended to address a number of the issues which form part of the Terms of Reference (TORs) for the Farlam Commission. The TORs provide *inter alia* that the Commission will look at:

a. The nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation which gave rise to these incidents;

b. The facts and circumstances which gave rise to the use of force and whether this was reasonable and justifiable in the particular circumstances;

c. To examine the role played by the SAPS through its respective units, individually and collectively in dealing with the incidents;

d. Whether by act or omission, it directly or indirectly caused loss of life or harm to persons or property.

8. Based on the terms of reference, CASAC respectfully requests the Commission to examine whether:

   a. It can be inferred that there has been introduced, contrary to Constitutional prescripts, a policy of "maximum force";
   b. There is a direct or indirect causal link between the articulation of such a policy and the events at Marikana on 16 August 2012;
   c. In any event, whether the statements and acts referred to in this submission have contributed in any manner, whether directly or indirectly, to the events at Marikana on 16 August 2012.

9. CASAC requests that the Commission recommend corrective action should its findings support any of these conclusions.

Terminology

The following terminology is used in this submission:

10. 'Doctrine' – the term doctrine is here understood to mean the guiding principle that underpins policy. It must be emphasised that many political pronouncements can be understood merely as 'rhetoric' and do not necessarily impact on what public servants, or other people do. However the contention in this submission is that:

    a. The consistent nature of the message conveyed by government leaders over the period since April 2008, as well as policy measures implemented by them, demonstrates that there is a government policy encouraging greater levels of the use of force by the police.

    b. That at a certain point (likely to be not later than early 2011) a doctrine of maximum force became established and served to underpin this policy.

11. 'Massacre' – it is submitted that the incident on 16 August entailed indiscriminate use of violence (this is in fact key to how a massacre is described – the nature and use of violence and not only the numbers involved) and involved large scale loss of life (34) and

injuries (78) and that the loss of life and injuries were one sided (i.e. the dead were all miners and the police experienced no significant injuries as far as is known). This submission describes the incident as a massacre. It should nevertheless be noted that other people were killed during the week leading up to the 16th particularly from Saturday 11 August onwards. Those who were killed on the afternoon of the 16th were exclusively amongst the group of striking miners and their associates but those who were killed during the period leading up to this included two police officers, two mine security officials, and some of the striking miners and others.

12. 'Minimum force' – in this submission the term minimum force means force that is used with the intention of adhering to principles of proportionality and necessity. In certain circumstances, such as where a person is facing a life threatening danger, use of force that is likely to cause death (lethal or deadly force) may conform to these principles.
13. The submission also refers extensively to the term 'maximum force' including to a 'doctrine of maximum force'. However it must be emphasised that this term is not 'defined' in this submission. Various contentions about the use, meaning and role played by this term are set out in Section Five of this submission.

Section Two: Violations of provisions of the Constitution

1. In this submission CASAC argues that responsible officials of government and senior officials of the South African Police Service (SAPS) are the principal persons who have to account for the massacre on 16 August- given their powers and authority.
2. Over time, we have witnessed a shift in the attitude and approach of government towards the Police. This has entailed emphasis and encouragement of greater use of force by the South African Police Services (SAPS). This has been seen in a number of statements that have been made by senior government officials, including the President and Ministers. Whilst this is at odds with stated policies on policing, these statements have in effect left the public and, to a large extent, members of SAPS to believe that this use of force is part of the acceptable norms of policing in South Africa.
3. These public statements have also had a negative impact on South African society broadly. They create an impression that SAPS is above the law and to a large extent have contributed to extremely negative relations between the police and the community. This is rendered more complex by a long and deeply embedded history of civil-police relations that are fraught with the narrative of violence.
4. The South African government has also tended to use 'talking tough on crime' in response to calls by citizens for 'something to be done about crime' or the complaint that 'in South Africa, criminals have more rights than their victims'. Instead of taking time to involve society broadly in reforming the institution and culture of policing in South Africa, politicians have tended to make these statements. Unfortunately, these have created an impression of a society that is under siege and these statements and responses contribute to a sense of panic and thus whatever action is taken by the Police is depicted as justifiable as SAPS tried to show immediately after the killings at Marikana.
5. We submit that there is no justification to make such an approach defensible. We also submit that policing needs to be systematic, structured and in accordance with the rules, consistent with the constitution and other international conventions. SAPS internal policies and overall policies on policing need to be carefully examined in relation to the values of human rights based constitutional democracy. If this is the departure point, it will be clear that excessive use of force is undesirable in our society. It will also be understood by politicians and senior officials of SAPS that there is a causal relationship between what is said and what is done – their language appears to make permissible excessive use of violence. This directly contributed to the massacre.
    a. Sections of this submission relevant to this contention include Section Three, Section Four, paragraphs 10 – 23, and Section Five.
    b. It should be noted that an integral part of the transition to democracy in South Africa was the establishment of the South African Police Service specifically as a police 'service' rather than a police 'force'. It is not the appropriate place to set out the many steps that were taken to ensure the effectiveness of this transformation.[1] What is important to emphasise in terms of this submission is firstly that as a

'democratic police service' the SAPS is bound to regard all people in South Africa as equal before the law.[2] This means both that they all have an equal right to be provided with policing services but also that police actions that are intended to enforce the law must be carried out in a manner that is consistent with the law as defined by the rights in the Bill of Rights. An essential dimension of the transition from South African Police Force to South African Police Services was not only the need for changes in policy but also a change of culture within the SAPS. It is CASAC's contention that the policy referred to, of encouraging greater use of force by the SAPS, directly undermines progress that has been made in this respect. It is of serious concern as it represents a remilitarisation of South African culture which has already suffered gravely from the impact of violence. Greater levels of violence by the state are not only contrary to the Constitution but inevitably result in greater levels of trauma within South African society.

6. That it is the responsible officials of government, as well as the senior officials of the SAPS who authorised the police operation to disarm the striking miners that was carried out on the 16th August, who bear direct responsibility for the massacre.

7. That the police operation launched on the 16th was carried out in violation of the Constitution, South African law and police standing orders on the policing of gatherings. Police activities at Marikana on August 16 amounted to a violation of several provisions of the Constitution including but not restricted to:

   a. Section 9(1) that guarantees that everyone is equal before the law.

   b. Section 10 that guarantees the right to human dignity.

   c. Section 11 that guarantees the right to life.

   d. Section 12(1)(c) that guarantees the right to be free 'from all forms of violence from either public or private sources'.

   e. Section 199(5) which provides *inter alia* that 'The security services' must act, and must teach and require their members to act, in accordance with the Constitution and the law'.

8. That the police operation at Marikana was in line with a policy that had the backing of senior officials of the South African government, that involved the deliberate intensification of violence against people involved in public protests. The units that were deployed at Marikana were units that fell under a division of the South African Police Service (the Operational Response Services Division) that was specifically created for the purpose of advancing this policy. Though in the aftermath of the public outcry that followed the killing of Andries Tatane by police in Ficksburg in April 2011, government signaled that it had abandoned this policy, effectively it merely remained dormant and was re-introduced at Marikana and has subsequently continued to be pursued. The South African government and SAPS have therefore deliberately and consciously violated the rights to freedom of assembly, demonstration, picket and petition provided under Section 17 of the Constitution.

9. Information supporting this conclusion may be found in Section Four, paragraphs 10 – 23 of this submission. The assertion that the policy was 're-introduced at Marikana' is subject to the observations made in Section Five, paragraph 42. This indicates that the police action at Marikana might have been understood by police as falling under the category of an action against 'violent criminals'. However this does not demonstrate that the assertion is false but merely labeling of protesters or strikers in a certain way may have facilitated the use of violence against them. There are other incidents which require careful examination by our society as they reflect increasing use of violence, even in cases where live ammunition as such is not used. One such is the use of rubber bullets in ways that inflict maximum injury. At the very least, the death of ANC councilor Pauline Masuhlo, who sustained serious injuries from rubber bullets fired in Nkanene on the weekend of the 15th-16th September, gives credence to this perception in the public domain.

Section Three: Government policy of encouraging greater use of force by SAPS members

1. In this submission CASAC presents information to demonstrate that the South African government has a deliberate policy that involves encouraging greater use of force by members of the SAPS. The facts outlined below, and reasonable inferences from them, provide the basis for the contentions that we have made in Section 2 above.
2. The government policy of encouraging greater use of force by members of the SAPS can be best understood if it is divided into three phases:
    a. A phase covering the period April 2008 to 12 November 2009 when leaders of government, and the national commissioner of police (the most senior police official who is appointed by the president), openly advocated greater use of force.
    b. A period dating from the 12 November 2009 to the end of 2010 when it is less clear how this policy was being advanced but during which the approach to the policy was reformulated.
    c. A period dating from approximately January 2011 up to the present, when this policy was advanced, inter alia through the promotion of a semi-formal and illegal doctrine of 'maximum force' that was, in part or in whole, operationalised through the ORS division of the SAPS.
3. There are some indications that an approach to the use of force based on this doctrine was also promoted through a 'firearms in law enforcement' training programme that was introduced early in 2011 for the training of SAPS members generally (see further Section Five, paragraph 42). However it is not necessary for this submission to explore questions to do with whether the doctrine was advocated outside of ORS as ORS was the division that was deployed during the Marikana operation with which this submission is concerned. Nevertheless the analysis contained in this submission (see for instance Section Five, paragraph 32) implies that the doctrine was intended to be of general application to the SAPS.
4. The evidence that is available on the use of the term also suggests that it was used more broadly.
5. Initially the government pursued this policy in the belief that it would provide a solution to the problem of (violent) crime. Notably since January 2011, the policy has also involved the application of greater levels of force, including lethal force, to address the phenomenon of large numbers of service delivery protests.
6. As indicated below (see paragraph 41(b) in Section Five) in so far as the SAPS used violence against people involved in demonstrations it may not be true that this only occurred in response to protests that already involved violence on the part of demonstrators.

Statements /actions during the period April 2008 – 12 November 2009

7. It is submitted that the following statements and /or actions, during the period April 2008 to 12 November 2009, may be taken as evidence that the responsible officials of government had a deliberate policy that involves encouraging greater use of force by members of the South African Police Service.

8. The statement by the then Deputy Minister of Safety and Security, Susan Shabangu on 9 April 2008 to the effect that "You must kill the bastards (criminals) if they threaten you or the community. You must not worry about the regulations. I want no warning shots. You have one shot and it must be a kill shot. I want to assure the police station commissioners and policemen and women from these areas that they have permission to kill these criminals. I will not tolerate any pathetic excuses for you not being able to deal with crime, you have been given guns, now use them. If criminals dare to threaten the police or the livelihood or lives of innocent men, women and children, then they must be killed." [3]

9. Deputy Minister Shabangu's words were not repudiated by the leadership of the African National Congress and the South African government (Mr Zuma became President of South Africa in May 2009) and appears to have represented a broad agreement reinforced as follows:

    a. The fact that, on 11 April 2008, two days after Ms Shabangu made the above statement, Mr Zuma who was then the President of the ANC said "If you have a deputy minister saying the kinds of things that the deputy minister was saying, this is what we need to happen. What the deputy minister was saying is: what we are to be doing is dealing with the criminals rather than talking about it.'[4]

    b. The fact that the approach taken by Ms Shabangu, of encouraging greater use of lethal force by the police, is consistent with the approach that has been taken by the government in the period since then.

10. The statements made by the Minister of Safety and Security Nathi Mthethwa (re-appointed as Minister of Police in May 2009) during a briefing of Parliament's Select Committee on Security on 12 November 2008 to the effect that those involved in cash-in-transit heists are 'people who go all out to get what they want, whatever the circumstances, even if it means they kill those security guards. They kill whoever is around… We don't believe that, when you are faced... with criminals armed with sophisticated weaponry, the police's task would be to take out some human rights charter. Because we are in the field, we are in the killing field, where criminals are killing law-abiding citizens. Now we are saying to the police that we ourselves have an obligation as well to strengthen the arm of these task forces. So that they are able, on the field, to teach those people a lesson -- fight fire with fire. There's no other way on that.'[5]

11. The steps taken by Minister Mthethwa, and other members of the African National Congress in Parliament, to amend Section 49 of the Criminal Procedure Act, the legal provision dealing with the use of lethal force 'for arrest'. It is submitted that amending

the Act has fitted in with the government's agenda of increasing the use of lethal force by the police. The amendment to Section 49 that came into force at the end of September 2012 enables this by expanding police powers to use lethal force. It may be noted that Mr Mthethwa motivated for this as early as his 12 November 2008 briefing to the select committee on security where he said to the committee that "If South Africans feel they are not safer in their country because of the legislative regime, then we have to look into those parts of the legislation."[6]

12. In a subsequent press interview Mr Mthethwa also presented the fact that large numbers of police were being killed as one of the reasons why it was necessary to amend Section 49 despite the fact that the law already authorised the use of lethal force in self-defence.[7] No evidence has been presented at any point to demonstrate that amending Section 49 will improve the safety of police.

13. On a similar theme Mr Mthethwa told the Sunday Independent newspaper in an interview that police needed to be more aggressive in defending themselves. "We don't want some hesitation from the police (as) 117 policemen died last year because they hesitated... to defend themselves as they feared the media and some human rights practitioners.[8] Mr Mthethwa also said that "We are at war with criminals".[9]

14. The appointment of Mr Bheki Cele as National Commissioner of the SAPS in July 2009[10]. At the time when he was appointed, Mr Cele already had a reputation for advocating the aggressive use of force[11] and continued to openly do so during the initial months after he was appointed. For instance, in an address to the Pretoria Press Club in September 2009, Mr Cele is reported to have said that 'criminals were heavily armed with R5 assault rifles' and that 'The only language that R5s understand is R5s. The police do not have to think twice and lose their lives'.[12]

15. The statements made by President Zuma at a specially convened meeting [in September 2009] with more than 1000 police station commissioners to the effect that police should not have to fire warning shots when they were faced with an immediate threat to their lives. [13] (President Zuma's statements reflecting his ignorance of the issue. There is no requirement anywhere in South African law or police regulations for warning shots to be fired when facing an imminent or immediate threat to one's life.)

16. The statements by Deputy-Minister Fikile Mbalula during this period that:

    a. The police service will show 'no mercy' to criminals and will be 'taking the war to the criminals'.[14]

    b. The police should 'shoot the bastards' and it was unavoidable that civilians would be killed in the cross-fire between police and criminals. [15]. (Note that this statement, on the 12th of November, was one of the last manifestations of this type of rhetoric. As indicated [in paragraph 19 below] on the same day President Zuma made an announcement that largely heralded the end of this phase of rhetoric).

17. The statement by then ANC Youth League President Julius Malema following the killing by police of 7 'would-be robbers' at a cash depot in Polokwane on 8 November 2009 to the effect that 'That's very perfect. Shoot to kill — that's what we need'.[16]

18. Note that the above is not intended as an exhaustive list of examples of rhetoric and actions that are consistent with the policy referred to.[17]

Announcement by President Zuma on 12 November 2009

19. It is submitted that during late 2009 a number of incidents caused government to realise that the open advocacy of more aggressive force might not be appropriate. In particular two killings by police during this period – that of Olga Kekana (11 October 2009) and a three year old boy, Atlegang Phalane (7 November 2009) – caused considerable controversy.[18] It is submitted that it was because of the political fallout from these incidents that, on 12 November 2009, President Zuma issued a statement to the effect that "No police officer has permission to shoot suspects in circumstances other than those provided for by law. The law does not give the police a licence to kill."[19] Likewise Minister Mthethwa made a similar statement shortly thereafter. With Deputy-Minister Mbalula at his side he told the National Press Club in Pretoria on the 18th of November that 'trigger-happy' police had no place in the SAPS.[20]

Statements/actions subsequent to 12 November 2009

20. However it is submitted that the statements referred to in the previous paragraph cannot be taken as reflecting a 'change of heart' on the part of government in respect of the policy of encouraging greater levels of the use of force by police. Government ministers now used much less of the crude rhetoric that had characterized the April 2008 –November 2009 period. But it continued to be the policy of government to promote more aggressive use of force by the police. In addition to statements and events in the period from January 2011 onwards [see Section Four, paragraphs 10 – 23, and Section Five, paragraphs 1 - 9], this is apparent from:

    a. Statements made by Minister Mthethwa in late November 2009 indicated that he maintained the view that what was called for was a 'fight fire with fire' approach.[21]

    b. The decision to militarise the ranks of the police. That this was first announced in October 2009[22] (prior to President Zuma's announcement of 12 November) indicates that this was part of the same agenda that was otherwise being advanced during the 2008-2009 period. The decision was implemented early in 2010.

    c. The statement by Mr Mthethwa in November 2011 that the 'fight fire with fire' approach that he had called for in 2008 had been decisive in reducing crime.[23]

d. The statement by President Zuma when he told Parliament on 13 September 2012 that the militarisation of police ranks 'had empowered the police to act decisively' and that this had resulted in a lower crime rate (the contention that there are 'lower crime rates' being itself debatable).[24] In defending the militarisation of police ranks, President Zuma was implicitly defending the overall 'get tough' agenda that this was part of as articulated publicly during the 2008-2009 period.

e. The consistency between Minister Mthethwa's pronouncements and those of the two national commissioners who have been appointed subsequent to Mr Cele also suggests that they may have been encouraged to follow this policy. Lieutenant General Mkhwanazi, who was appointed as Acting National Commissioner following the suspension of General Cele on 24 October 2011, told reporters three days later that 'we will meet fire with fire'.[25] General Phiyega, who was appointed as National Commissioner on 12 June 2012, referred to the war on crime on a television show on 21 October 2012.[26]

Section Four: Police response to violent demonstrations

1. From about July 2004 onwards South Africa has experienced a series of community and labour demonstrations or strikes that involved significant levels of violence. These included sporadic protests against the inadequate provision of housing and against service delivery and local council corruption. They also included a municipal workers strike in July-August 2005, various protests over the demarcation of provincial boundaries, and a major strike by security guards in April-June 2006. This pattern of violent protests has continued up to the present.

2. Some strikes, notably the 2006 security guards strike, included a number of killings.[27] Concerns have been raised about the apparently limited effort made by police to bring those responsible for this violence to justice.[28]

3. In so far as community protests involved violence on the part of protestors this was largely confined to attacks on property.

4. The major exceptions to this rule were acts of collective violence that were motivated by xenophobia, or took on a xenophobic dimension. Most notably in May 2008, 62 people were killed in a series of riots by mobs that targeted people who were believed to be foreigners from other African countries. To date, those implicated in the xenophobic attacks have not been brought to book. This also provides another dimension to our concern – that in South Africa there is a conscious or unconscious creation of the 'other' as those who are responsible for violence. Again, the failure of police to protect communities that are vulnerable is consistent with the notion of 'policing a crisis' which entails creating a sense of crisis and panic and holding others responsible, whether or not they are. In the context of large scale poverty, we have seen poor South Africans 'blaming 'those who are from outside of this country for taking their opportunities. The silence of the state in relation to this and the behaviour of the police during those attacks shows, a deliberate approach entailing collusion with those involved in criminal activity or taking extra judicial actions to deal with challenges. All this, is of course done outside the law and normal policing processes.

5. Notwithstanding this dramatic increase in violent demonstrations there was no significant increase in killings by police during demonstrations.

6. Over roughly five years, between the beginning of 2000 and the end of 2004, four people are known to have been killed by police during demonstrations. Three of these deaths did take place in 2004 but two of these occurred during an operation by the Ekurhuleni metro police and one of the local sheriff's offices. Two more people were killed in 2006 and one in 2008.

7. Notwithstanding the horrific violence that was involved no people were killed by the SAPS during the xenophobic attacks of May 2008. Police were in fact accused of being deliberately tardy in their response to this wave of violence (and to several other attacks on foreigners before and subsequent to this) notwithstanding the fact that people were being killed.

8. Two people were also killed during a demonstration in Thandakukhanya township near Piet Retief in Mpumalanga in 2009. One was allegedly shot by a traffic police officer and the other by a private security guard.

9. There was something of an escalation in 2010, with three people killed by police in that year. These included a 46 year-old grandmother, Priscilla Sukhai, in Daveyton in May, a schoolgirl, Anna Nokele in Welkom, in September 2010 and an unnamed man at 'Lion Park' in October 2010.[29]

New heavy handed approach to policing of demonstrations introduced in 2011

10. Then during a period of less than five months, from the middle of February 2011 to the beginning of June, eleven people were killed in demonstrations. (Available information on these deaths, from the press, is summarised in Annexure A). These included two young children who were allegedly drowned as they tried to escape from police who were firing at a township demonstration in Boipelo, 300 kilometres southwest of Johannesburg.[30] The other nine deaths appear to have been a direct consequence of the adoption by the SAPS of various brutal new methods for dealing with public protests.

11. Live ammunition was used in some instances.

12. Other cases involved directly firing rubber bullets at demonstrators. Where rubber bullets are fired directly at close range they are highly likely to be lethal. Rather than being fired directly the understanding of their purpose is that they are intended to be used as 'skip fire ammunition'.

    a. It is for instance rubber bullets that the International Association of Chiefs of Police is referring to when it says in its policy on 'civil disturbances' that 'Skip-fired projectiles and munitions or similar devices designed for non-directional non-target-specific use may be used in civil disturbances where life is in jeopardy'.[31]

    b. It should be noted that rubber bullets are potentially lethal but have a far lower rate of lethality than does live ammunition. In relation to the use of live ammunition by police, deaths occur in roughly 25%-40% of cases where people are hit.[32] For rubber bullets the lethality rate is substantially lower. However the rate of lethality is likely

to be greater when these are fired directly at close range. Furthermore the potential for lethality is accentuated by factors such as the age of the person hit by the rubber bullet and pre-existing medical conditions. The use of rubber bullets, especially where directly fired at close range, is therefore a potentially lethal use of force.

13. There is some indication that the new strategy involved the targeting of leaders or other people playing a prominent role in the demonstrations.[33]

Operational Response Services Division of the SAPS

14. The precursor to the increase in killings in 2011 appears to have been the re-establishment of Operational Response Services (ORS) as a full division within the SAPS. Though it had previously been a full division, over 2008-2010 ORS was a sub-component of the SAPS Crime Prevention division. In January 2011 the then ORS head was transferred to assume the position of provincial commission of the Western Cape. ORS was then re-established as a full SAPS division and a new divisional commissioner, Lieutenant General Malewa, appointed as its head.

15. In addition to the public order units, ORS included a number of paramilitary units including the Special Task Force, National Intervention Unit and Tactical Response Teams. These units were all deployed at Marikana with the Air Wing, which is also part of ORS.

Political rhetoric potentially legitimating heavy handed response to (violent) protests

16. Though there are no formal statements by senior politicians that endorse this heavy handed approach that was adopted by the re-established ORS division, there are statements that have been made that could be seen to legitimise the approach that has been taken by the ORS division. At the very least therefore it cannot be said with confidence that these heavy handed actions were without the backing of senior politicians.

17. Addressing 280 mayors and municipal managers at a meeting in October 2009 for instance, President Jacob Zuma said that 'I wish to take this opportunity to state without any ambiguity: this government will not tolerate the destruction of property, the violence and the intimidation that often accompanies protests'.[34]

18. In an address in Alexandra on 22 September 2012 President Zuma is reported to have 'blasted the use of violent protests as a bargaining tool'. Zuma is reported to have called for 'a renewal of morals and ethics' saying that 'We cannot destroy that which we have built ourselves and we cannot continue organising protests in which people die'.[35]

19. If reported correctly the latter statement suggests that the fact that people were dying in protests was being used by President Zuma to motivate against the use of protests as

a tool. However, as indicated in this submission, the available information indicates that deaths during protests have largely been at the hands of the police with violence in community protests (as opposed to strikes) largely limited to violence against property. Violent actions by the police that have caused deaths have not necessarily been limited to protests where protesters have been violent.

20. President Zuma's remarks, in both instances, were made notwithstanding consistent evidence that violent protests generally followed repeated unsuccessful attempts by people in communities to have their grievances heard and attended to. In addition it is evident that police action often aggravated the situation rather than contributing to an reduction of violence. A report was published in 2011 based on research conducted in 2009 and 2010 in eight areas where protests had taken place. The report stated that 'In all of our research sites on community protest, police action was itself heavy-handed and violent, and was frequently described as provoking the violence of protesters'. It goes on to state that the police actions during these protests 'suggest that the police view protest as a threat to public order rather than as a democratic right which should be protected by the police. Police violence took the form of tear gassing crowds of protesters [and] firing rubber bullets at protesters and at times quite randomly into crowds of bystanders, and assaulting and beating protesters.'[36]

21. In doing so President Zuma fails to acknowledge that the use of violence in protests has frequently been an 'act of desperation' by communities that feel frustrated by their apparent inability to have their concerns attended to through non-violent protests or other non-violent means, despite repeated attempts to do so. There is also a failure to acknowledge that the manner in which public order policing is conducted sometimes has precipitated violence and that there is a visible pattern of excessive force by police, including the apparently unjustified use of lethal force in dealing with demonstrations.

22. We wish to emphasise that CASAC does not encourage or condone the use of violence as a tool of protest in democratic South Africa.

23. Though heavy handed police actions were a characteristic of some protests prior to 2011[37] the dramatic increase in killings during the period February –June 2011 indicates that the re-establishment of Operational Response Services as a full division in January 2011 clearly marked a radical departure. At the same time what must be noted is that, in the period June 2011-15 August 2012 there is only one recorded death (In July 2012 a 14 year old boy died of a gun-shot wound during a protest in Folweni township near Durban).[38] There is then a question as to how to account not only for the sudden dramatic increase, but also the sudden decrease, in the rate of killings at the hands of units associated with the ORS division.

Section 5: Existence of and unlawfulness of doctrine of maximum force

1. In this submission it is argued that this phenomenon can be understood once it is accepted that the SAPS introduced a doctrine of 'maximum force'. It is submitted that there is sufficient evidence to believe, on a balance of probabilities, that such a doctrine existed and was actively promoted by officials at the highest level of the SAPS and government including the Minister of Police, Mr Nathi Mthethwa.
2. It is submitted that there is no official document within the SAPS that endorses a doctrine of 'maximum force', since it is illegal. But it is submitted that such a doctrine was put into practice.
3. As at 16 August 2012 Section 49 of the Criminal Procedure Act provided, *inter alia*, that where a suspect cannot be arrested without the use of force, 'the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing'. These provisions remain in force notwithstanding the amendment to Section 49 that came into operation at the end of September 2012.
4. Section 13(3)(b) of the SAPS Act states that 'Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances'.
5. The common law authorises the use of lethal force in defence but this is qualified by the principle that 'the act of defence may not be more harmful than is necessary to ward off the attack'.
6. The Regulation of Gatherings Act (205 of 1993) only authorises the use of force -
    a. Under Section 9(2)(c) where 'The degree of force which may be so used shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the case and the object to be attained.'
    b. Under Section 9(2)(e) where 'The degree of force which may be so used shall not be greater than is necessary for the prevention of the actions contemplated in subparagraphs (d)(i) and (ii), and the force shall be moderated and be proportionate to the circumstances of the case and the object to be attained.'
7. Standing Order (General) 262 provides at 11(3)(points b-f) that 'Should the use of force be unavoidable, it must meet the following requirements:
    a. The use of force must correspond to the seriousness of the situation, in terms of situational appropriateness;

b. It must be proportional to the threat;

c. It must be reasonable in the circumstances;

d. The minimal force must be used to accomplish the goal; and

e. The use of force must be discontinued once the objective has been achieved.

8. Maximum force is not consistent with the principles set out in the above laws or in SAPS Standing Orders.

9. Minister Mthethwa's promotion of maximum force directly contradicts occasional statements that he has made that he is committed to principles of legality.[39]

Evidence of the existence of a doctrine of maximum force

10. In a press interview reported on in July 2009 Minister Mthethwa is quoted as using the term as follows. "We are saying in such dangerous situations we will be flexible, so that the police can use maximum force without these surprises happening. When (criminals) shoot the police, they boast about that, while the police are here to protect the public and to protect the property of the country. As long as (Section 49) is there, these criminals will have a field day," said Mthethwa.[40] [Annex B] Given that there are regulations governing use of force, it is submitted that such statements may lend themselves to interpretation as providing an environment protecting indiscriminate violence.

11. From the context in which the term is used in this press report (illustrated not only by the quote used here but by the article more generally) it would appear that when the term 'maximum force' is used by the Minister it may be a synonym for lethal force (shooting). It must be emphasised that this interpretation of the term is not consistent with later uses of the term by the Minister [See Section Five, paragraph 25 (a)].

12. On 13 November 2009 the Mail & Guardian carried a report titled 'Insecurity in the forces' that is attributed to three journalists (Rawoot, Alcock and Dibetle). In addition to a news story, the article refers to a text box headed 'Junior police officers say that they are anxious and confused'. [Annex C] This text box contains quotations from some individuals.

13. One of these who is referred to as 'A member of the Langlaagte dog unit' says *inter alia* 'We do get orders from our superiors to exert maximum force but only when it is necessary'.

14. Another who is referred to as "A Krugersdorp peace official (police in training) says *inter alia* 'I support the idea of applying maximum force when dealing with criminals, especially those who tend to be violent towards the police'.

15. It would appear that in these cases the term might be understood as a synonym for lethal force (use of firearms). In so far as this is correct it is not clear to what degree they illustrate an orientation towards legality or it's opposite. Thus it is not clear what is meant by the Krugersdorp peace official in referring to 'the application of maximum force in dealing with criminals, especially those who tend to be violent towards the police'. It is possible that this indicates that the use of force outside of the law was already being encouraged within the SAPS as the statement makes no reference to questions of proportionality (what level of violence justifies the use of maximum force').

16. An article in the Mail & Guardian of 3 June 2011 which is introduced as describing the 'heavy handed, military style approach to the training of police recruits, which includes assault, harsh punishment and sleep deprivation' includes the following words: 'One trainee said that an instructor in street survival and the use of firearms had introduced a discussion about the police killing of Ficksburg protestor Tatane, in which he allegedly insisted that the police were correct to use maximum force.' [The following paragraph reads:] "He claimed Tatane was posing a threat to the police. That's why they protected themselves," said the student'. [Annex D]

    a. We note here that the words 'maximum force' are not used as a direct quotation from the trainee and could have been inserted by the author of the article. However, from the information presented here it would appear that the term is probably also a direct quote reflecting the language used by the trainee who was interviewed and in turn reflecting the terminology used by the instructor.

    b. It is apparent from the date of the article and the reference to the killing of Andries Tatane that the incident that is described must have taken place between April 13 2011 (the date of the Tatane killing) and the beginning of June 2011. This places the training session that is described squarely within the 5 month period from February to June 2011.

    c. If it is accepted that the term 'maximum force' used in the passage is likely to reflect the actual language used by the instructor then this means that the quotation indicates that it is likely that the term 'maximum force' was actually used during police training in this period.

17. At a national summit on killings of police on 8 July 2011, Minister Mthethwa, read from a prepared speech. This included the statement that "there must be a good appreciation

of the distinction between the need to use maximum force against violent criminals and, minimum force in dealing with fellow citizens."[41] [Annex E] As far as can be established, this was the first time that Minister Mthethwa had used the term "maximum force" on a public platform, and it may have been the first time that it had ever been used by him in public.

18. Minister Mthethwa again referred to "maximum force" in a speech that he gave in May 2012 in which he again contrasted it with the need to use "minimum force" at demonstrations.[42] [Annex F]

19. At the beginning of August 2012, the month of the Marikana massacre, Minister Mthethwa promoted the use of 'maximum force' in public on two occasions.

    a. In an address in Mpumalanga on Friday August 3rd he revisited his July 2011 speech from the summit on police killings using exactly the same formulation 'There must be a good appreciation of the distinction between the need to use maximum force against violent criminals and, minimum force in dealing with fellow citizens. We should not have any blurring lines when it comes to command and control.'[43] [Annex G]

    b. Five days later, speaking to Wits students on the on the sidelines of a meeting of the newly formed Black Lawyers Association (BLA) on Wednesday 8 August he said "Police must return fire with fire. We will use maximum force based on the law itself. Those who want to break the law, such as cash-in-transit heists and bank robberies, must think again. They should know that we will not waver in continuing to let them feel the heat and that we squeeze them with maximum force."[44] [Annex H]

20. It should be noted that Mr Mthethwa not only used the term 'maximum force' in this address but also used the term 'medium force', though at law in South Africa the only terms that are used are minimum force[45]and deadly force[46]. The relevant passage reads: "If there is no life-threatening situation, people are just marching and they are there illegally and you have to disperse them, then you use the necessary equipment (such as water cannons) that is appropriate for the situation. "If they are pushed to a situation where medium force is required, then we will use rubber bullets. The point is that there is no need to be heavy-handed with people who are not harming people."[47]

21. In his speech he also said that work had started on reviewing the 1998 white paper on safety and security. "We need a policy that inspires society and empowers law enforcement agencies to effectively fight crime. At the same time, we require a policy that will send a message to criminals that their 'honeymoon' is over," he said.

22. In a statement issued on the day after the massacre the SAPS stated that the police 'were forced to utilize maximum force to defend themselves'.[48] [Annex I] Television footage of the press conference on 17 August, addressed by the National Commissioner, shows the National Commissioner reading out these words.[49]

Preliminary contentions regarding meaning and use of the term 'maximum force'

23. The concept of maximum force has no currency in the field of policing in democratic societies where it is uniformly accepted that the principle that should govern the use of force by police is the principle of minimum force. This is also the position at law in South Africa. It is however necessary to apply a degree of subtlety in analysing the use of the term.

24. It would appear that the term is sometimes used as a term that has an equivalent meaning to 'lethal force' or 'deadly force'. Though it is generally not used within policing circles it is sometimes used in this way by some people , including by 'lay persons'. Where it is used in this way the term 'maximum force' is effectively a descriptive term similar to the term 'deadly force' or 'lethal force'.

25. On the other hand it is apparent that the term maximum force has been used recently in South Africa, including by the Minister of Police, as an 'antonym' to the term 'minimum force'. Where it is used in this way the term is no longer merely descriptive but takes on the character of a doctrine (i.e. 'underlying principle').

    a. In the period since July 2011 it is submitted that Minister Mthethwa's use of the term must of necessity be understood in the latter sense (i.e. as doctrine). Thus the pronouncement that 'there must be a good appreciation of the distinction between the need to use maximum force against violent criminals and, minimum force in dealing with fellow citizens' would only be susceptible to the former interpretation if it was the Minister's intention to indicate that all 'violent criminals' should be shot.

    b. CASAC's contentions regarding how maximum force as doctrine ('the doctrine of maximum force') is to be understood or interpreted ('its meaning') are set out more fully under paragraphs 36 - 44 below.

26. In relation to these instances in which the term was used it is therefore submitted that many, and perhaps all, of the instances of the use of the term cited above are related to each other. In particular it would appear reasonable to argue that though the term may have been used in a 'descriptive' way in 2009, by 2011 it had become established as a 'doctrine'. It is submitted that when the term was used in her formal public statement by the SAPS National Commissioner on August 17 , this indicates that maximum force

had come to be regarded as an acceptable doctrine, at the very least, within sections of the senior leadership of the SAPS.

27. The evidence that is provided here that the term was used in SAPS training is not substantial but it is unlikely that it is merely a coincidence that the term appears in the November 2009 and 3 June 2011 press article.

28. It is apparent from the increasing confidence with which Mthethwa talked about 'maximum force' that he either was not aware of the fact, or had lost sight of the fact, that he was promoting an illegal doctrine. This ignorance (or disregard of) the law was also clearly demonstrated by the National Commissioner of the SAPS on 17 August both in the press statement released by her office and in the verbal statements that she made to the press conference.

29. Maximum force may therefore not merely be understood as a term that was used by the Minister. It was clearly was used more broadly. It would appear reasonable to conclude that, from at least early in 2011, police in the ORS division started being told in training and elsewhere they should use maximum force in certain situations. It is likely that the idea that maximum force was acceptable was promoted most actively within ORS (as opposed to other components of the SAPS). If this is true this would go some way to explain the escalation of killings during the February 2011 – June 2011 period

30. Whilst the use of excessive force by Operational Response Services in Wesselton and in other localities had not caused too many political repercussions, the killing of Tatane had turned into a political problem for government. Not only were the police actions condemned by members of the public, opposition parties and civil society groups but also by a number of trade unions including unions that tended to be regarded as aligned with government. Government therefore sought to contain excessive force by police during demonstration.

31. It would therefore appear that the speech on 8 July 2011 was intended to give notice to SAPS members, and in particular those who had already been instructed in the use of maximum force, that the doctrine of maximum force was being reformulated to establish a distinction between 'violent criminals' and 'fellow citizens' in the application of maximum force. The inference appears to be, as also reflected in Mthethwa's speech of 29 May 2012 (referred to in paragraph 18 above) that demonstrators were to be understood as 'fellow citizens' even if engaged in some level of violence.

32. It would appear that steps may have already been taken internally to indicate to ORS members that the use of force during demonstrations needed to be more restrained as

instances of killings in operations involving ORS ceased more than a month prior to the address of 8 July.

33. It may be noted that the decline in killings also long preceded a formal instruction that was issued to ORS members in December 2011 that they were not to use rubber bullets or shotguns in dealing with demonstrations.[50]

34. Though much of the criticism of police in this environment was not restricted to public order policing it seems that the formulation reflected a political reading of the situation in terms of which the political crisis could be addressed by emphasising the use of minimum force, and more general improvements, in relation to the policing of demonstrations. At the same time, in terms of this reading, it was not necessary or advisable to restrict police generally to minimum force. Mthethwa's pronouncement here was not qualified in relation to the cash in transit gangs that had been the subject of his address in Parliament in November 2008 but now took the form of a general maxim applicable to the police response to 'violent criminals'. Nevertheless it may probably be assumed that it was in relation to the units dealing with these gangs, and the policing of armed robbery more generally, that the idea of maximum force was believed to be most pertinent.[51]

35. The above implies that it was partly through a doctrine of maximum force that the use of force agenda that was first articulated in the 2008-2009 was now being promoted.

The meaning of 'maximum force' as 'doctrine'

36. As indicated above, to CASAC's knowledge there is no official document that spells out what the doctrine of maximum force means or is intended to mean. In this regard we submit the following as to the meaning of the term in so far as it represents a 'doctrine' (see paragraph 24 above).

37. It is therefore assumed in this document that the term cannot be understood to have had a specific meaning. It is nevertheless possible to advance certain assertions about the implied or intended meaning of the term. At face value the term represents the antithesis of minimum force and implicitly therefore justifies illegal and excessive force.

38. It would appear that the idea of maximum force needs to be understood as related to the idea of 'fighting fire with fire'. In other words maximum force could be seen as linked to a militaristic concept in terms of which the problem of violence can be addressed by responding with greater violence. This is of course contrary to the principle, applied in democratic countries in terms of which police use of force is governed by principles of necessity and proportionality (minimum force).

39. It is argued above (paragraph 31) that the address on 8 July 2011 marked a departure from the original way in which the doctrine had previously been promoted. As indicated after this point, the instruction was, maximum force was only to be used against 'violent criminals' and not against 'fellow citizens' (i.e. those involved in protests). This implies that prior to this date (at least subsequent to January 2011) maximum force was also regarded as being applicable to demonstrations.

40. In this regard it should be noted however that there is some indication that, even though the general application of the term may have been intended to be linked to the 'fight fire with fire' concept it was not necessarily true that maximum force was only deployed by members of the ORS division in cases where protestors where violent. Thus it may have been the case that in some instances members of ORS took actions that (deliberately or not) served to goad protestors into acts of violence and that this in turn was used as a pretext by ORS for deploying even greater levels of violence.[52] [See also Section Four, paragraph 20, and Section Three, paragraph 5).

41. It must be emphasised that in so far as maximum force remained as a doctrine that was not clearly defined in formal terms the way in which the term was understood by those to whom it was communicated would not necessarily be consistent with what was intended by it.

    a. In particular it may be noted that the term is also understood by some people as equivalent to the term 'lethal force' in which case the authorisation to use 'maximum force' may be understood as authorisation to kill (if there was a 'pretext') and to disregard principles of restraint and minimum force.

    b. It is not beyond possibility that it may also have been interpreted as an endorsement of the type of extrajudicial executions that the Cato Manor organised crime unit has been accused of and as providing justification for wholesale violations of the law.

42. It would appear that the belief that it was acceptable to use 'maximum force' that was reflected in SAPS National Commissioner Phiyega's open use of the term on 17 August 2012 may have been understood as consistent with the doctrine as apparently formally 'reformulated' in Minister Mthethwa's speech of 8 July 2011. Thus it may have been the case that, partly due to the fact that individuals who were believed to have been linked to the group of miners who were on strike were believed to have killed two police officers and a number of other people over the preceding Sunday and Monday, as well as the fact that some of the miners were heavily armed, the miners had now collectively been labelled by the police as 'violent criminals' and therefore were regarded as legitimate targets of maximum force.

43. At the very least ‘maximum force’ is likely to have been advanced to members of ORS and other SAPS members as an appropriate doctrine to guide their use of force in confrontations with armed criminals. In so far as the group of miners were seen as ‘armed criminals’ they could then have been seen as legitimate targets of maximum force.

44. This exposes the obvious fallacy that was embedded within the reformulated doctrine – that it is a straightforward matter for police to differentiate between ‘violent criminals’ and ‘innocent civilians’.

Section Six: Impact of the doctrine of maximum force at Marikana on 16 August

1. It is submitted that the doctrine of maximum force, and the implied concept of the use of force embedded within it, directly shaped the course of events at Marikana on 16 August. Several possibilities in this regard should be considered.

2. By way of introduction to this section of the submission, CASAC wishes to clarify its understanding of questions relating to whether or not the actions by members of the SAPS on 16 August may be regarded as acts of 'self-defence'. For this purpose we distinguish between:

    a. The initial shooting at the foot of Wonderkop that was captured by television cameras. It has been contended by the police that the miners were engaged in a potentially lethal attack on the police at this point. CASAC is unclear as to whether it is appropriate to take this contention by the police at face value and awaits the findings of the Commission of Inquiry on this issue.

    b. The second phase of the massacre at the 'small koppie' (described as 'the high bushy ground in the SAPS statement) – CASAC's reading of available information in the public domain is that the people who were killed during this phase of the massacre were fleeing from the police and that these killings are unlikely to be justifiable in terms of principles of self-defence. This section of the submission therefore takes as a point of departure that it is unlikely that the killings during this phase of the massacre can be regarded as having been legitimate acts of self-defence by the police. CASAC acknowledges that, in the event that this view is proved to be wrong, this may bring into question some of the assertions that are made in this section of the submission.

3. As already mentioned above the miners were understood by police to have killed two police officers and were also heavily armed. Many observers and commentators on the massacre are inclined to emphasise the role played by the killings of the two police officers, Warrant Officer Tsietsi Hendrik Monene and Warrant Officer SR Lepaaku, on Monday 13 August. The emphasis given to these killings is sometimes used to imply that the killings by police on the 16 August were an act of revenge for the killing of their colleagues. In addition, not only had some of the miners allegedly killed police officers but the striking miners more generally had refused to comply with police demands that they disarm. Policing studies emphasise the role played by the assertion of authority in policing. By refusing to submit to police authority the miners may therefore have been seen to have challenged police authority on a fundamental level. It is therefore possible that the police involved in the operation on 16 August were not only motivated by emotions of anger and the desire to exact revenge but also that the decision to 'disperse

and disarm' the miners was motivated by the intention (perhaps at a senior as well as rank and file level) to 'teach the miners a lesson' or 'show them who is the boss'.

4. CASAC agrees that it is possible that these kinds of emotions and motivations played a role in the events of 16 August. However CASAC believes that, on their own, they do not provide an adequate explanation for the high level of violence used by the police against the miners. In so far as these factors played a role it is reasonable to assume that this is a role that complemented and reinforced that played by the doctrine of maximum force.

5. Commentators have also raised questions about whether the massacre should be regarded as the result of a failure on the part of government and police leadership to adequately equip and train public order policing units.[53] Particularly since the upsurge of violent protests referred to above (Section Four) it has been apparent that there has been a need to strengthen public order policing. The failure of government to rectify these shortcomings was for instance highlighted in considerable detail in a monograph published by the Institute for Security Studies in 2007.[54]

6. It is CASAC's understanding that the problem has not been that government does not recognise that there is a need to better be able to police public protests. However it would appear that in the period since 2007 the government's approach to this matter has been strongly shaped by the militaristic outlook that is highlighted in this submission. Thus rather than strengthening the equipment and training that has been provided to public order policing units the approach that has been taken has increasingly been to use paramilitary units such as the Tactical Response Teams, National Intervention Unit and Special Task force to supplement public order police. Units that are to a large degree intended to enable government to respond more forcefully to crime have been brought into the public order policing arena. As discussed in the ISS monograph for roughly a decade units that were intended to fulfil a public order policing function have been involved in a crime combating role.[55] Over recent years this process has been accentuated to the point that public order policing units are regarded as interchangeable with crime combating units. This is reflected for instance by:

    a. The section in the SAPS annual report for 2010-2011 dealing with 'Specialised Interventions' the component of Operational Response Services that includes public order policing units as well as the Special Task Force, National Intervention Unit and Tactical Response Teams) This section of the report has a paragraph dealing with the Special Task Force and another dealing with the National Intervention unit. A third paragraph that discusses public order policing starts with the words 'the crime

combating intervention capacity of the SAPS deals with the combating of crime and the maintenance of public order'.[56]

b. A notice issued this year by Lieutenant General Malewa, the head of Operational Response Services, relating to the operational utilisation of Tactical Response Teams. The notice provides, inter alia, that these units are to be used for the 'combating of crime' (at 3.1) as well as the 'combating of public violence' including 'supporting Public Order Police in the combating of crowd management' (at 3.2 – sic).[57] [Annexure J]

7. CASAC's view is that the failure of government to provide properly trained and equipped public order policing units notwithstanding a substantial problem of violent public protest may be understood as a contributing factor to the massacre. However while this may be understood as a contributory factor this in itself is unlikely to explain the large number of people killed and injured by police on 16 August.

8. Though it is not known exactly who made the decision, it would appear that the decision to 'disperse and disarm' was made in the knowledge that the SAPS could be confident of getting the upper hand should the situation escalate. The people who made the decision were confident of this because they knew that SAPS had the capacity to determine the outcome of any confrontation through superior firepower if necessary. As indicated above (see paragraph 5 above) it has been suggested that the SAPS units at Marikana were inadequately equipped with non/less-lethal equipment. If this is true it implies that at the point where they initiated their efforts to 'disperse and disarm' the miners the SAPS knew that, should the situation escalate, they might not be able to deal with it without resorting to the lethal force capacity of the specialised units.

9. In terms of the doctrine of 'maximum force' this would have been regarded as an acceptable resolution of the situation. As indicated the doctrine of maximum force is not formalised in any document and therefore any analysis of its meaning it partly speculative. There is no indication that the doctrine was a nuanced or sophisticated one. In crude terms it might take the form of reasoning that 'If minimum force is not likely to work it's ok to use maximum force' or that 'we've communicated and that hasn't worked so now we are justified in forcibly dispersing the miners even if this means that we may have to use maximum (deadly) force.' Interpreted in this way the doctrine of maximum force would have appeared to give support to the idea that it was now acceptable for the SAPS to use the lethal force capacity at their disposal. In this way the doctrine of maximum force may have enabled the SAPS members in charge of the operation at Marikana to allow the 'disperse and disarm' operation to go ahead notwithstanding the likelihood that this would lead to an escalation of the situation and

the loss of life. It would therefore help to answer the crucial question as to why they decided to disperse and disarm the miners.

10. It would appear that the doctrine of maximum force was to some extent promoted generally within the SAPS and that this was not restricted to ORS. Nevertheless it appears likely that the units that carried out the massacre were units that had a greater familiarity with the doctrine than the average SAPS unit. Some or all of these units has been trained and equipped to be sure of gaining the upper hand in confrontations with CIT gangs. Above all else it may be understood that 'maximum force' is intended as a guiding doctrine for them in dealing with these confrontations. The type of concentrated fire that was unleashed in the initial shooting may be seen as a style of shooting that the SAPS developed in terms of the doctrine with a view to ensuring that they would obtain the upper-hand in these encounters. In other words these units may be understood as the SAPS's 'maximum force units' that were not trained in habits of restraint but instead were orientated towards the deployment of overwhelming force and elimination of those against whom it was wielded.

11. There is extensive evidence that many of the miners who were killed by the police were fleeing or trying to hide from the police. Available information suggests that this rampage may have conformed to what the American sociologist, Randall Collins, has termed a 'forward panic'. A massacre resulting from a forward panic is a type of adrenalin fuelled killing frenzy that typically takes place in a context of 'tension and fear in a conflict situation' that is 'prolonged and built up'. However Collins argues that the factors that contribute to 'forward panics' are not purely situational and physiological. Another factor that heightens the potential for a 'forward panic' is when there is a 'moral holiday' in which 'moral constraints are suspended, and no one restrains anyone else from violating normal civilised practises'. If the members of the specialised units understood that they were authorised to use maximum force this would have resulted not only in a 'holiday' from legal constraints but also from the moral codes that underpin them. In other words it may have meant that once the operation got underway there was nothing holding them back.

12. But in addition to the massive use of live ammunition, direct firing of rubber bullets was also brought back into use during the police operation at Marikana on 16 August. *Al Jazeera* footage of police firing directly at the miners with rubber bullets, prior to what police allege was an attack by the miners on the police, can be seen on You Tube.[58] In so far as this use of rubber bullets was also justified in terms of a doctrine of 'maximum force' the doctrine may have contributed to heightening the likelihood of the initial

confrontation particularly in so far as the use of rubber bullets in this way may have propelled the miners forward into their 'charge' at the police line.

13. This use of ammunition that is supposed to be used non-lethally appears also to be a likely cause of the death of ANC councillor Pauline Masuhlo following a police crackdown in Marikana's Nkanene township on the weekend of 15 - 16 September. Councillor Masuhlo died in hospital on Wednesday 19 September. She was allegedly shot by police. Her family believe that she died as a result of a rubber bullet lodged for three days in her leg, close to the knee.[59]

14. It therefore appears reasonable to suggest that the doctrine of maximum force may have played a defining role in the Marikana massacre in various ways and may plausibly have been a contributing factor to the way in which events unfolded. At the very least political pronouncements in favour of maximum force would have exacerbated a prevailing climate of confusion within the SAPS about the principles, which are supposed to guide members in using force. At the very least in this sense the doctrine of maximum force may be seen to have directly contributed to the massacre on 16 August.

15. This submission has not engaged with the issues raised by the possibility that the 'disperse and disarm' operation that was launched by the SAPS on 16 August may have included the explicit intention to kill some of the miners. Were this to be true this would raise issues of the most serious nature. However CASAC does not reject the idea that it is possible that there was indeed such an intention. As indicated in Section Four, paragraphs 10 -13 there is evidence that operations that involved the units that were deployed at Marikana involved both the use of live ammunition, the potentially lethal use of rubber bullets, and the targeting of leaders. In addition some of the information that has been presented to the Commission is consistent with this possibility.[60] While CASAC is not rejecting the possibility that such an intention may have existed it is not expressly arguing that there was such an intention. It is therefore not necessary for this submission to engage with questions to do with the role that the doctrine of maximum force may have played in this regard.

Conclusions: Constitutional Accountability

1. The concept of maximum force should have no place whatsoever in the policing of democratic societies where, conversely, it is uniformly accepted that the principle that should govern the use of force by police is the principle of minimum force. The Regulations of Gatherings Act (205 of 1993) only authorises the use of force proportionate to the circumstances of the case and the object to be attained.
2. In addition to the use of live ammunition, the submission points to the use of rubber bullets in a manner that is designed to inflict maximum injury, and which resulted in the death of Councillor Pauline Masuhlo.
3. CASAC's view is that the failure of government to provide properly trained and equipped public order policing units notwithstanding a substantial problem of violent public protests may be understood as a contributing factor to the massacre.
4. It is submitted that the doctrine of maximum force, and the implied concept of the use of force embedded within it, directly shaped the course of events at Marikana on 16 August.
5. The South African government and SAPS have therefore deliberately and consciously violated the rights to freedom of assembly, demonstration, picket and petition provided under section 17 of the Constitution.
6. It is the responsible officials of government, as well as the senior officials of the SAPS who authorised the police operation to disarm the striking miners that was carried out on 16th August, who bear direct responsibility for the massacre, and should be accordingly held to full account.
7. CASAC accordingly calls on the Commission to ensure that such persons are indeed called to account for their acts and omissions, so that the full circumstances leading to this massacre can be brought to the attention of the South African public.
8. Where individuals are found to have responsibility for any part of the massacre, CASAC would expect that the Commission will make the necessary recommendation for further action and sanction.

[1] On the range of initiatives that formed part of police transformation see for instance: Bruce, D (2002). "New wine from an old cask? The South African Police Service and the process of transformation". Paper presented at John Jay College of Criminal Justice, New York, 9 May. Rauch, J (2000). "Police reform and South Africa's transition". Johannesburg: Centre for the Study of Violence and Reconciliation. Online at <http://www.csvr.org.za/papers/papsaiia.htm>. Shaw, M, (2002) Crime and policing in post-apartheid South Africa – Transforming under fire. Cape Town and Johannesburg: David Philip Publishers.

[2] See for instance Bayley, D (2006) Changing the Guard – Developing Democratic Police Abroad, Oxford University Press. Bayley defines the following as the four 'essential characteristics' of democratic policing: 1. Police must be accountable to law rather than to government; 2. Police must protect human rights, especially those rights that are required for the sort of political activity that is the hallmark of democracy; 3. Police must be accountable to people outside their organisation who are specifically designated and empowered to regulate their activity; 4. Police must give top operational priority to servicing the needs of individual citizens and private groups.

[3] Graeme Hosken, 'Kill the bastards' – Minister's astonishing order to police, the Star, 10 April 2008.

[4] Chantelle Benjamin, Zuma backs deputy over 'shoot to kill', Business Day, 14 April 2008.

[5] Wyndham Hartley, Police will fight fire with fire – Minister, Business Day, 13 November 2008, http://www.bdlive.co.za/articles/2008/11/13/police-will-fight-fire-with-fire---minister

[6] W, Hartley, Ibid (also see **http://www.citizen.co.za/index/article.aspx?pDesc=82802,1,22#UserTools**).

[7] Sibusiso Ngalwa, Cops treated like criminals – Mthethwa, 5 July 2009 http://www.iol.co.za/news/south-africa/cops-treated-like-criminals-mthethwa-1.448537#.UJzpTeQzrIc

[8] Mail & Guardian Staff Reporter, Army to help fight crime, says Minister, Mail $& Guardian, 17 May 2009, http://mg.co.za/article/2009-05-17-army-to-help-fight-crime-says-minister (accessed 26 November 2012). Note that the figure of 117 police officers killed that Minister Mthethwa refers to includes police officers killed in road accidents as well as police officers killed in violent confrontations with other people.

[9] Mail & Guardian Staff Reporter, Ibid.

[10] http://en.wikipedia.org/wiki/Bheki_Cele

[11] Niren Tolsi, 'Aim for the head', Mail & Guardian, 20 July 2007; Charlotte Plantive, Shooting deaths spark row over MEC's remarks to police, Business Day, 23 July 2007. Fred Kockott, What really happened – Taxi boss so feared police action that he obtained a court protection order, Sunday Independent, 15 November 2009.

[12] Mfundekelwa Mkhulisi, Unrepentant Cele Stands By Shoot-to-kill order, Sowetan, 16 September 2009.

[13] Sello S Alcock, You got it wrong, Mr President, Mail & Guardian, 2 October, 2009.

[14] Johan Burger, SA Policing – moving from defensive to offensive policing in SA, ISS Today, 1 June 2009, http://www.issafrica.org/iss_today.php?ID=1185

[15] Wyndham Hartley Mbalula says civilian deaths are 'unavoidable', Business Day, 13 November 2009

[16] Brendan Boyle, Mbalula: Innocents will die in crime war – Zuma, Mbalula and Malema support tough new laws, The Times, 13 November 2009.

[17] For other examples see for instance: http://www.info.gov.za/speeches/2009/09081714451002.htm;

[18] For information about these deaths see Annexure A to Bruce, D (2010). *An Acceptable Price to Pay. The use of lethal force by police in South Africa.* Open Society Foundation for South Africa. http://osf.org.za/wp/wp-content/uploads/2012/09/CJI_Occasional_Paper_81.pdf

[19] IOL, Zuma: Cops don't have licence to kill SAPA, 2009-11-13. President Zuma also made statements in an article published on ANC today in October 2009 (see Zukile Majova, 'Easy on trigger' – But president warns criminals, Sowetan, 13 October 2009).

[20] Simon Mundy, No place for 'trigger- happy' police – Minister denies that the government has formulated a 'shoot to kill' policy for police officers, Business Day, 19 November 200.

[21] Ido Lekota, Meet fire with fire – Mthethwa, Sowetan, 25 November 2009.

[22] Daniëlla du Plooy, Binnekort is sy naam genl. Cele, Beeld, 9 October 2009, http://www.beeld.com/Suid-Afrika/Nuus/Binnekort-is-sy-naam-genl-Cele-20091008#

[23] SABC, Fighting fire with fire approach reducing crime: Minister, 18 November 2011 http://www.sabc.co.za/news/a/5e4c3a80491ab25b8b55db49a6dc3ee7/Fighting-fire-with-fire-approach-reducing-crime:-Minister-20111118

[24] Linda Ensor, President defends police ranking, Business Day, 14 September 2012.

[25] SAPA, New police boss talks tough, 27 October 2011, http://www.news24.com/SouthAfrica/News/New-police-boss-talks-tough-20111027

[26] Interface, SABC 1, 21 October 2012.

[27] In the case of the security guards strike it is generally believed that those killed were mostly security guards who were working notwithstanding the strike ('strikebreakers').
[28]See for example: Jeremy Gordin and Eleanor Momberg, Licensed to kill in lawless SA, Sunday Independent, 24 August 2008, http://www.iol.co.za/news/south-africa/licensed-to-kill-in-lawless-sa-1.413612?ot=inmsa.ArticlePrintPageLayout.ot
[29] In July 2009 SAPS members fired rubber bullets at people at close range during an operation in response to protests in Balfour n Mpumalanga. The report of a 'quick response' study published in September that year describes, and includes photographs of, 'a 15 year-old boy who had been shot 10 times by rubber bullets at close range. The boy had also suffered a severe head injury allegedly from being struck on the back of his head with the butt of a gun.' According to the report 'The research team also met a woman who had recently given birth and who had been shot in the stomach at close range by a rubber bullet while, according to her, hiding under her bed when a police officer demanded to know who had blocked the road with stones. An accompanying photograph indicates that, in this case, 'close range' meant a distance of less than one metre.
http://www.uj.ac.za/EN/Faculties/humanities/researchcentres/csr/research/Documents/Quick%20response%20research%20into%20Service%20Delivery%20Protest%20Hotspots.pdf
[30] Agence France-Presse, SA police fire rubber bullets, the Herald online, 16 February 2011, http://www.herald.co.zw/index.php?option=com_content&view=article&id=2643:sa-police-fire-rubber-bullets-&catid=45:international-news&Itemid=137.
[31] International Association of Chiefs of Police, National Law Enforcement Policy Centre, Model policy on Civil Disturbances, December 2005.
[32] Geller, W. & Scott, S. 1992. Deadly force: What we know. Washington DC: Police Executive Research Forum; Bruce, D. & O'Malley, G. (2001). In the Line of Duty? Shooting incidents reports and other indicators of the use and abuse of force by members of the SAPS. Research Report written for the Independent Complaints Directorate, October 2001. http://www.csvr.org.za/docs/policing/inthelineofduty.pdf
[33] Incidents where leaders appear to have been the targets of grossly excessive force include both the killings of Andries Tatane in Ficskburg in April 2011 and that of Pauline Masuhlo at Marikana in September 2012.
[34] Government of South Africa, Opening address by President Jacob Zuma to the presidential meeting with executive mayors and mayors to discuss improving service delivery in municipalities; Khayelitsha, Cape Town http://blogs.timeslive.co.za/hartley/2009/10/20/zuma-warns-against-violent-protests-full-text/
[35] Ngwako Modjadji, JZ slams violent protests, The Citizen, 24 September 2012.
[36] Von Holdt, Karl., Langa, Malose., Malopo, Sepetla., Mogapi, Nomfundo., Ngubeni, Kindiza., Dlamini, Jacob., and Kirsten, Adèle. 2011. *The smoke that calls: Insurgent citizenship and the struggle for a place in the new South Africa*. Centre for the Study of Violence and Society, Work and Development Institute, p. 30. See also Luke Sinwell, Joshua Kirshner, Kgopotso Khumalo, Owen Manda, Peter Pfaffe, Comfort Phokela & Carin Runciman with Peter Alexander, Claire Ceruti, Marcelle Dawson, Mosa Phadi, Service Delivery Protests: Findings from Quick Response Research on Four 'Hot spots' Centre for Sociological Research, University of Johannesburg, 2009, 5; Dale Mckinley & Ahmed Veriava, 2005, Arresting Dissent – state repression and post-apartheid social movements, Violence and Transition Series, Centre for the Study of Violence and Reconciliation, http://www.csvr.org.za/wits/papers/papvtp10.htm
[37] See Von Holdt et al, ibid; Sinwell et al, ibid.
[38] Slindile Maluleka and Silusaphu Nyanda, Youngster shot dead in crossfire, 4 July 2012, http://www.iol.co.za/dailynews/news/youngster-shot-dead-in-crossfire-1.1334276#.UHb-UG8zrId
[39] See for instance South African Government Information, Minister Mthethwa reiterates war on jewellery and large sums heists, http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29299&tid=77416

[41] Polity, SA: Mthethwa: Remarks by the Minister of Police, at the summit against police killings, Boksburg (08/07/2011), http://www.polity.org.za/article/sa-mthethwa-remarks-by-the-minister-of-police-at-the-summit-against-police-killings-boksburg-08072011-2011-07-08 (Accessed 9 July 2011)
[42] Polity, SA: Mthethwa: Address by the Minister of Police, at the POPCRU National Crime Summit, Boksburg (29/05/2012) http://www.polity.org.za/article/sa-mthethwa-address-by-the-minister-of-police-at-the-popcru-national-crime-summit-boksburg-29052012-2012-05-29 (accessed 30 May 2012)
[43] South African Government Information, Address by Minister of Police, Nathi Mthethwa, MP at the Mpumalanga Safety and Security Summit, Graceland Hotel Secunda, Mpumalanga, 3 August 2012, http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29584&tid=78784

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[45] SAPS ACT
[46] Section 49 of the Criminal Procedure Act.
[47] Trevor Neethling, Police not backing down on violent protests, says minister, Business Day live, 8 August 2012 http://www.bdlive.co.za/national/2012/08/08/police-not-backing-down-on-violent-protests-says-minister
[48] South African Police Service, General Phiyega pronounces on mine unrest, 17 August 2012, http://www.saps.gov.za/_dynamicModules/internetSite/newsBuild.asp?myURL=2103
[49] Footage from SABC News available at http://www.youtube.com/watch?v=2T3EKcURAww
[50] SAPA, Police told not to use rubber bullets, 14 January 2012, http://www.timeslive.co.za/local/2012/01/14/police-told-not-to-use-rubber-bullets
[51] See for instance See for instance South African Government Information, Minister Mthethwa reiterates war on jewellery and large sums heists, http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29299&tid=77416.
[52] There are some indications that this analysis may apply in the Andries Tatane incident. See for instance Maureen Isaacson, Tatane's death a political football – teacher, activist killed, Sunday Independent, 17 April 2012; SAPA, Tatane family, witness in tears, 23 April 2012, http://www.news24.com/SouthAfrica/News/Tatane-family-witness-in-tears-20120423
[53] See for instance Marianne Merten, What have our leaders done? Saturday Star, 28 August 2012, http://www.iol.co.za/saturday-star/what-have-our-leaders-done-1.1371375#.ULORJOQzrIc
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[55] Omar, 2007 ibid, 15.
[56] South African Police Service, Annual Report 2010-2011, p. 78 http://www.saps.gov.za/saps_profile/strategic_framework/annual_report/2010_2011/4_prg2_vispol.pdf
[57] South African Police Service, Operational Utilisation: Tactical Respons (sic) Teams: Operational Response Services. (instruction dated 2012-08-21). NOTE that the instruction differs in the role allocated to the TRTs as compared to that described in the 'Profile: Operational Response Services' on the SAPS website at http://www.saps.gov.za/_dynamicModules/internetsite/OPBuildBP3.asp?myURL=136
[58] Al Jazeera - South African mine shooting leaves dozens killed http://www.youtube.com/watch?v=DY22CdX_uOk
[59] Poloko Tau, Police's rubber bullets may have caused councillor's death, http://www.iol.co.za/the-star/police-s-rubber-bullet-may-have-caused-councillor-s-death-1.1387859#.UHdYSm8zrId
[60] Lucas Ledwaba, I've destroyed him – cop gloats, City Press, 11 November 2012 http://www.citypress.co.za/SouthAfrica/News/Ive-destroyed-him-cop-gloats-20121110