

SOUTH AFRICA BRIFFING

UNLAWFUL FORCE AND THE PATTERN OF CONCEALMENT

**BARRIERS TO
ACCOUNTABILITY FOR
THE KILLINGS AT**

**MARIKANA
AMNESTY
INTERNATIONAL**



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SOUTH AFRICA BRIEFING

UNLAWFUL FORCE AND THE PATTERN OF CONCEALMENT: Barriers to accountability for the killings at Marikana

The catastrophic events at Marikana in August 2012 have profoundly affected South Africa. In the midst of the second anniversary commemorations Amnesty International is appealing to the South African authorities to commit to ensuring full accountability for the deaths which occurred and the re-establishment of lawful and impartial policing as a matter of urgency. There is clear evidence that the decision taken at a secret meeting of senior police officials on 15 August 2012 to disarm and forcibly break up a gathering of striking mine workers at Lonmin platinum mine the next day had no basis in international or domestic law. It led to violations of the right to life, with the deaths of 34 mine workers at the hands of police using live ammunition on 16 August. Of further concern, as described in this Briefing, is the disturbing pattern of obstruction by the police, possibly with the involvement of others, of the subsequent official inquiry into the August 2012 events. This conduct has delayed access to justice and reparation for the victims and survivors of the police operation, as well as for those affected by ten other violent deaths in the preceding days.

During the course of an unprotected¹ strike in August 2012 over wages and conditions for platinum mine rock drill operators employed by Lonmin in the Marikana area of the North West Province, tensions increased between the strikers and the officially recognized union, the National Mineworkers Union (NUM). Lonmin management would not negotiate with the strikers. Violent incidents occurred in which some of the strikers killed two Lonmin security guards and three non-striking workers.² On 13 August a confrontation took

place between several hundred strikers and members of the South African Police Service (SAPS). Three strikers and two police officers were killed.³

During the same period of increasing tension and violence both Lonmin management and NUM officials appealed to the authorities to increase the police presence in the mining area. National level police officials visited the area late on 13 August and additional SAPS members from other provinces began to arrive over the following days. A joint operational centre involving police and Lonmin officials was established on Lonmin property. About 3,000 strikers, some of them armed,⁴ were gathering every day on a large hill (known as the Big Koppie) in Marikana and demanding that Lonmin officials come to address them. On the evening of Wednesday 15 August, during an "Extraordinary" meeting of the National Police Management Forum (NPMF)⁵ in a location near Johannesburg, a decision was made by the participating police leadership to disperse, disarm and arrest the strikers. If the strikers did not voluntarily disarm, then it would be done forcibly.⁶ This decision was taken in full awareness that such an intervention would almost inevitably lead to injuries and loss of lives among the protestors.

During the police operation the next day, 16 August, 34 striking miners were killed and over 70 others injured. In addition some 270 people were arrested.⁷ There were no police fatalities during the entire operation that day.

In the wake of these developments and a public outcry, including a call by Amnesty International for the setting up of a judicial inquiry,⁸ the South African government established a commission of inquiry into the events. The Commission of Inquiry was appointed by President Jacob Zuma on 23 August 2012 and its terms of reference issued shortly after on 12 September.⁹ Its core function was to investigate "matters of concern arising out of the incidents at the Lonmin Mine in Marikana from 11 to 16 August". The President appointed a retired judge of the Supreme Court of Appeal, Judge Ian Farlam, as Chair, along with two Senior Counsel as additional commissioners. An experienced Evidence Leader team was also later appointed. Regulations under the 1947 Commissions Act conferred on the Commission of Inquiry (the Marikana Commission) the

power to search premises, secure the attendance of witnesses and compel the production of documents. It also had the power to refer any matter concerning the conduct of specific persons to an appropriate law enforcement agency or other body for prosecution or further investigation. The Marikana Commission commenced its work in October 2012 and has currently had its terms extended until 30 September 2014.

THE MARIKANA COMMISSION AND THE STATE'S OBLIGATION TO INVESTIGATE SUSPECTED HUMAN RIGHTS VIOLATIONS

The obligation to ensure full accountability for the deaths at Marikana during that week in August 2012 lies with the government authorities, as one of the State's central duties is to protect life.¹⁰ This obligation carries a requirement to conduct "thorough, prompt and impartial investigation" of all suspected cases of "arbitrary deprivation of life"; these include deaths occurring under circumstances of "excessive or illegal use of force" by public officials or others acting at their instigation.¹¹ The State must also ensure that individuals have accessible and effective remedies.¹² A failure by a State to investigate allegations of violations of the right to life could also in and of itself constitute a separate breach of its obligations to respect and protect the right to life.

As the United Nations Human Rights Committee has underscored, the "deprivation of life by the authorities of the State is a matter of utmost gravity."¹³ The State must investigate such deaths in all cases, and those affected by police use of force, including dependants of those who died, must have access to an independent process, including a judicial process.¹⁴ Arbitrary or abusive use of force or firearms by law enforcement officials must be punished as a criminal offence.¹⁵ Reparations must be made to the families and to surviving victims.

The Marikana Commission, as the key vehicle through which these obligations were to be exercised, faced a number of challenges. Among them was that it had been provided with an enormous brief to investigate not only the role of the SAPS, but that of others including the two unions, Lonmin Plc, the Department of Mineral Resources and the conduct of "loose groupings in

fermenting...a situation of conflict", and it was expected to deliver its report within four months.¹⁶

Regarding the SAPS the Commission was obliged to inquire into, make findings, report on and make recommendations regarding the contribution to causing the incident from:

- any police standing orders, policy, law or other instructions;
- precise facts and circumstances which gave rise to the use of all and any force and whether this was reasonable and justifiable in the particular circumstances;
- the role of specific SAPS units; and
- Whether by act or omission [SAPS] directly or indirectly caused loss of life or harm to persons or property.

With respect to the first area of inquiry on the SAPS, a critical step for any state to take in fulfilling its obligations to protect the right to life is strictly regulating the use of force by law enforcement officials, in compliance with international law enforcement standards.¹⁷ There was consensus among expert witnesses at the Marikana Commission that the official policy and legal framework governing public order policing and the use of force in South Africa is broadly in line with international law enforcement standards.¹⁸ Domestic law and police regulations require SAPS members to conduct operations in a manner intended to minimise the need to use force. If force has to be used, it should be the minimum necessary, with lethal force used as a last resort where life is in danger.¹⁹

EVIDENCE EMERGING CONFIRMING THE UNJUSTIFIED USE OF LETHAL FORCE AND VIOLATIONS OF THE RIGHT TO LIFE

The inquiry process through the Marikana Commission has allowed for the gathering and testing of evidence which cumulatively and objectively confirm that the decision by senior police officials to forcibly disarm and disperse the striking mine workers by 16 August was unlawful under both international and domestic law. It led to the deployment of police armed with live ammunition and to the deaths of 34 of the protestors. Under international law and

standards, force must only be used when strictly necessary and proportional to the threat posed. Lethal force may be used only as a last resort to defend persons against an imminent threat of death or serious injury, and only when less extreme means are insufficient to achieve this.²⁰

Oral and documentary evidence before the Commission confirms that the decision taken on 15 August 2012 by the Provincial Commissioner and endorsed at the Extraordinary Meeting of the NPMF, to disarm, disperse and arrest the protestors was not dependent on any escalation of threat to life at the specific time. Furthermore the disarmament was to be done forcibly if the protestors refused to disarm voluntarily. The decision was taken despite the anticipation of possible loss of life and injury, and despite information suggesting that the disarming and dispersal of the protestors could be done in a less high risk manner. The decision was communicated to three senior police commanders involved in the Marikana operation that same evening, along with a deadline to accomplish the operation before the end of 16 August.²¹

The plan for the operation was hastily put together on 16 August by the commander of the Special Task Force, without any adequate briefing for the units involved. It was substantially dependent on the deployment of armed tactical units: the Special Task Force, the National Intervention Unit and the Tactical Response Team, to provide back-up for the regular Public Order Unit members who were without adequate protective equipment.²² In a situation of anticipated resistance from some of the protestors to being disarmed, the likelihood of the tactical units engaging with the protestors was high. The tactical units were armed with firearms with live ammunition, including R5 rifles capable of being put on automatic fire, which is totally inappropriate in law enforcement where only aimed shots may be fired in response to a specific and imminent threat to life or of serious injury.

The context in which the decision was taken to proceed to the tactical option was a breach of domestic law and regulations, including Standing Order (General) 262: Crowd Management During Gatherings And Demonstrations, obliging police officers to act within a minimum force framework, that is, to act

under the following terms:

- according to an assessment of the threat level based on available tactical information on the level of risk (s.7(2));
- that the use of force must be avoided at all costs (s.11(1));
- if it is unavoidable, its purpose should be to de-escalate conflict with the minimum force to accomplish the goal (s.11(3)(a));
- the degree of force used being proportional to the seriousness of the situation and the threat posed in terms of situational appropriateness (s.11(3)(b));
- the use of rubber bullets (shotgun batons) restricted and only to be used to disperse a crowd in extreme circumstances, if less forceful methods proved to be ineffective; and with
- Firearms and sharp ammunition prohibited (s.11(4)(b)).

The command decision was also not in line with international law and standards, in particular the obligation to protect life. Principle 9 of the UN Basic Principles on the Use of Force and Firearms allows for the use of firearms only in defence against imminent threat of death or serious injury and only when less extreme methods are insufficient.

In the framework of Standing Order 262, where "the success of the actions will be measured by the results of the operation in terms of cost, damage to property, injuries to people and loss of life", and in light of the high death toll on 16 August, it is hard to understand the comments of one of the commanders filmed on 18 August with other police officers declaring that they had achieved what they intended to do "one hundred percent".²³ Nor indeed the comments during the same period of the National Commissioner of Police who told the assembled police that "whatever happened we represent the best of responsible policing".²⁴

The impact of the level of force used in this operation can be measured in terms of the number of shots fired by the police, the number of fatalities and grave nature of the injuries sustained. Although there was at least one pistol fired by a striker in the direction of the police at Scene 1, there were no police

fatalities at either Scene 1 or Scene 2.

Shots fired by police:²⁵

- At Scene 1, 327 live rounds over eight seconds. According to analysis of audio enhanced visual footage, the shooting continued for over 1 minute after the first cease fire call.²⁶
- At Scene 2, about 14 minutes later, police fired 295 rounds of live ammunition and 30 rubber bullet rounds over a 12 minute period.²⁷ At Scene 2 the loss of command and control led also to different units firing towards each other in the apparently mistaken belief that the shots were coming from the protestors who had fled into the rocky, woody area known as Koppie 3.²⁸

The scale of fatalities and nature of the injuries:

The autopsy results indicated the following:²⁹

- Independent forensic pathologists and the state pathologists who undertook the post-mortem examinations on 22 and 23 August 2012 were in agreement on their findings.³⁰ Thirty of the 34 men died as a result of injuries caused by police high-velocity ammunition from R5 assault rifles. The fatal injuries in three other cases were caused by handgun ammunition and in one case by shotgun ammunition.³¹

Survivor records indicated:³²

- Expert analysis of the medical records at seven hospitals of 46 injured survivors admitted for treatment on or shortly after 16 August indicate that 31 cases involved high-velocity gunshot injuries; in cases where shot direction could be ascertained, 18 of the survivors appear to have been shot from the rear. In 14 cases the scale of severity of the injuries were classified as "major", with major/long-term/permanent disabilities noted in 22 cases.

Survivability of the injured:³³

- Expert analysis of the post-mortem records of 16 of the men who died at Scene 1, 15 of whom died as a result of high-velocity gunshot injuries, further corroborates the extent of excessive force used by the police and in particular the inappropriate weaponry used.
- The R5 assault rifle, which has military origins and can be set to fire on automatic, and the 5.56mm ammunition used (known also as 'Nato' rounds), have highly destructive effects at skin impact level and internally.
- In seven cases, even if appropriate medical care could have been accessed rapidly, the "catastrophic" nature of the injuries would have precluded survival.
- The remaining nine, including the 16th person who died from shotgun injuries to his neck and chest, did not have necessarily fatal injuries, but their condition would have rapidly deteriorated. With two exceptions, their survival would have depended on the availability of higher level medical care within at most one hour.

Failure or delays in providing medical assistance:

- The police commander in charge of the paramedic units inexplicably failed to bring them to Scene 1 for nearly one hour after the shooting occurred. His evidence before the Marikana Commission failed to explain his decisions which caused him to lead the paramedic teams away from where they were most urgently needed.³⁴ At the very least this constituted a violation of the UN Basic Principles on the Use of Force and Firearms, Principle 5, which states that "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:...(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment".
- Further compounding the effects of this delay in medical care was the impact of the location of the shooting, a rural area with the nearest hospital facilities of an appropriate level being 40 minutes to two hours away by ambulance. In regards to suitable modes of transport to these facilities, evidence before the Commission indicates that there was

available on the day one emergency helicopter with a paramedic on board and two Advanced Life Support vehicles with paramedics on board.³⁵

- If mass casualties were anticipated in the context of the authorities' change in approach to ending the "illegal gathering", there is no indication that any planning was done to mitigate the consequences of the force used by ensuring that emergency medical aid would be at hand.³⁶
- It is chilling in this context to note the contrary evidence, that a SAPS officer had requested four mortuary vans in advance of the operation on 16 August, once again confirming their anticipation of deaths resulting from the impending operation to disarm, disperse and arrest the strikers.³⁷

The large-scale death toll and high number of individuals left with serious injuries were a consequence of a number of factors ranging from an over-reliance on tactical units armed only with live ammunition, poor command and control, the lack of any written plan and adequate briefing to all of the units involved in the operation on 16 August and, above all, the decision, which has still not been properly explained, to disarm, disperse and arrest the protestors by a certain time on 16 August, despite the acknowledged high associated risks of bloodshed.

OBSTRUCTING THE INVESTIGATION PROCESS

The mass fatalities on 16 August resulting from the unlawful decision of the previous day clearly obliged the State to launch an investigation as part of its obligation to protect the right to life.³⁸ Such an investigation should, among other things, be an official investigation initiated by the State, be exhaustive and impartial, be conducted by persons independent from those potentially implicated, and be promptly established and reasonably expeditious. It must be capable of making a finding on whether the force used was justified in the circumstances and should seek to establish command responsibility in relation

to the incident under investigation. Public scrutiny is essential to the accountability process.³⁹

The Marikana Commission, the main official response to the events of 16 August, is still involved in its efforts to conduct an exhaustive, impartial and open inquiry into the police shootings and the preceding incidents which involved the loss of ten lives.⁴⁰ Family members of all of the victims have been assisted to be present at the hearings through non-governmental and official sources of support. The proceedings have been conducted in a hybrid manner, partly through an inquisitorial process involving the Commissioners and Evidence Leader Team, but also strongly in the adversarial tradition. Legal teams representing named parties such as the SAPS, Lonmin and the unions, along with different legal teams representing families of the deceased, the injured and arrested miners and the South African Human Rights Commission, have all been involved in discovering and testing evidence. Although at times cumbersome, this approach has kept the proceedings open, while allowing the inquiry process to benefit from the Commission's investigation powers.

Of serious concern, however, is the evidence indicating what appears to have been a systematic attempt by the police authorities, with possibly higher level involvement or influence,⁴¹ from the start to conceal or falsify evidence and to mislead the inquiry. These activities appear, at least by inference, intended to jeopardise the ability of the current inquiry process and potentially other criminal or civil legal processes from establishing individual, organizational or corporate responsibility for acts or omissions leading to the loss of life on 16 August.⁴² They involved obscuring or "losing" evidence relating to the meetings held on 15 August 2012 when the disastrous decision was taken for the police to implement the 'tactical' phase to force the dispersal and disarmament of the protestors on the following day.

In the midst of an exchange during proceedings on 26 June this year, Mr Justice Farlam responded to criticism from Counsel for the SAPS on what was viewed as excessive focus on the police in the inquiry by noting:

"There are certain reasons which I don't want to go into as to why some of the

*cross-examination, some of the police people took far longer than we thought. Documents which had previously been asked for and were said to be non-existent finally appeared on Colonel Scott's computer and that led to lengthy cross-examination. And other documents came forward.*⁴³

However, dedicated individuals from legal parties in the inquiry process, members of the Evidence Leader Team, technical experts, civil society members and some witnesses, including at least one police witness, before the Commission, have contributed to mitigating the impact of this conduct on the ability of the inquiry to fulfil its fact-finding responsibilities. The Marikana Commission has also used effectively its inquiry powers, including search and seizure and to compel the production of documents.

Some of the indications of attempts to frustrate investigations into the suspected unlawful use of force on 16 August include:

- The withholding of information about and the "loss" of the Minutes of the Extraordinary Meeting of the National Police Management Forum on 15 August 2012, when the decision to proceed to the tactical option was made;⁴⁴
- The withholding until September 2013 of a significant body of evidence contained on police hard drives;⁴⁵
- Political interference by an inter-ministerial committee in the process normally applying in cases of police-related suspicious deaths and completely inappropriate time limits placed on the post-mortem examinations of the 34 protestors shot dead by the police;⁴⁶
- The withholding of or unacceptable delays in the handing in of certain weapons for ballistics testing, including shotguns and handguns;
- Delays in crime scene investigators from SAPS and the Independent Police Investigative Directorate (IPID), the statutory police oversight body, getting access to the crime scene; and the altering of crimes scenes, in particular in relation to the later placement of weapons in the vicinity of some of the bodies;⁴⁷

- The obscuring of information put in the public domain after the 16 August shootings which would otherwise have indicated that there were two separate locations where police shootings occurred and protestors were fatally wounded;⁴⁸
- The delayed provision of access by parties involved in the inquiry process to police 'pocket books' (daily investigative and incident diaries);
- The rapid creation of a version of "private and self-defence",⁴⁹ beginning with a briefing sent to the government Minister of International Relations and Cooperation on the night of 16 August 2012;⁵⁰ the first press conference called by the police authorities on 17 August;⁵¹ the "Shooting Incident" report completed on the same day;⁵² and continuing through the so-called 'Roots' conference of police officers involved and held secretly from late August 2012 which resulted in the police version, known as Exhibit L, and presented to the Marikana Commission hearings in November 2012,⁵³ and
- Police statements submitted to the inquiry lacking in detail as well as evasive oral evidence of senior police officials and commanders to the Marikana Commission in 2013 and into 2014.

The extent to which acts of concealment may have jeopardised the accountability process will perhaps only emerge when the Marikana Commission has to make its findings for the report which will be handed to the President in due course.

CONCLUSION

The decision by senior police officials on 15 August 2012 to disarm, disperse and arrest the protestors was not justified by any increased threat posed by the protestors. The consequence of that decision, to deploy large numbers of police units with firearms and live ammunition, was not triggered by any threat to life or the intention to protect or save life. The launch of the operation on 16 August in the anticipation of almost inevitable loss of life and serious injury was therefore unlawful both under international human rights law and South African

legislation.

The resulting deaths of 34 people must therefore be considered arbitrary deprivation of life for which the authorities bear overall responsibility.⁵⁴ In addition to that, the conduct of individual armed officers may need to be examined.

Despite the bloodshed that was foreseen by those who made the decision there was a further failure to protect the right to life in the failure to plan for adequate medical assistance to be on hand.

The mass fatalities on 16 August 2012 resulting from the unlawful decision clearly obliged the State to launch an investigation as part of its obligation to protect the right to life. In the wake of the establishment of the Marikana Commission of Inquiry, the systematic attempt by police authorities, with possibly higher level of involvement or influence, from the start of the inquiry process, to conceal or falsify evidence is another serious violation of the human rights of the victims and their families.

Amnesty International is calling on the South African authorities to ensure that all those involved in the decision of 15 August and subsequent events on 16 August co-operate fully with the current inquiry process and any further investigation processes which may arise from it.

There should be full accountability of all those found to be involved in the arbitrary deprivation of life which occurred on 16 August and safeguards put in place to ensure no future departure from the public order framework which is grounded in the State obligation to respect and protect life.

The State must make reparations, including adequate compensation and other appropriate forms of support, to the victims, including those who survived and the families of those who died.⁵⁵

ENDNOTES

¹ A strike which does not comply with requirements under the Labour Relations Act.

² These incidents occurred between 12 and 14 August 2012.

³ The circumstances in which these five deaths occurred on the 13th have still not been fully clarified.

⁴ Those who were armed were carrying so-called traditional weapons such as pangas, spears and knobkerries.

⁵ This meeting occurred after the regular NPMF meeting and its details were kept secret. See further below.

⁶ See further below for details of this decision and its context.

⁷ The proceedings against those arrested and charged with, among other counts, possession of dangerous weapons and illegal gathering, were postponed due to the subsequent appointment of a judicial commission of inquiry. On 20 August 2014 all charges were withdrawn in the Ga-Rankuwa Magistrate's Court (<http://www.iol.co.za/news/crime-courts/charges-dropped-against-marikana-miners-1.1738385>).

⁸ 17 August 2012, South Africa: Judge must oversee probe into mine protest deaths (<http://www.amnesty.org/en/for-media/press-releases/south-africa-judge-must-oversee-probe-mine-protest-deaths-2012-08-17>).

⁹ Proclamation, President of the Republic of South Africa, No.50, 2012 in Government Gazette No.35680.

¹⁰ A/HRC/26/36, at para 26. Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christophe Heyns. 1 April 2014 (Heyns). The right to life is entrenched in s11 of the 1996 Constitution of the Republic of South Africa. It is one of the rights in the Bill of Rights in the Constitution which the "state must respect, protect, promote and fulfil" (s7 (2)). It is recognized in a variety of global and regional treaties to which South Africa is a State Party, including under Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) which states that "No one shall be arbitrarily deprived of his life", and similarly Article 4 of the African Charter on Human and Peoples' Rights. The right to life is also a rule of customary international law (Heyns, at para 42).

¹¹ United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, 24 May 1989. United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles), Principle No.22. See also the United Nations Human Rights Committee, General Comment No.31 to Article 2 of the ICCPR (CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.15.

¹² General Comment 31 to Article 2 of the ICCPR (CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.15.

¹³ United Nations Human Rights Committee, General Comment No.6 on Article 6 of the ICCPR (1982), para.3, cited in Heyns.

¹⁴ UN Basic Principles, Principle No. 6 and Principle No. 22. See also United Nations Human Rights Committee, General Comment 6 on Article 6 of the ICCPR, para. 3 and General Comment 31, para. 15.

¹⁵ UN Basic Principles, Principle No. 7.

¹⁶ See above footnote 9, referring to Clause 1.6 in the terms of reference. The initial deadline was extended by the President. There have been a number of further extensions since then, often approved only close to the deadline of the existing extension date.

¹⁷ See the Code of Conduct for Law Enforcement Officials (adopted by the United Nations General Assembly in resolution 34/169 of 1979) and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eight United Nations Congress on the Prevention of Crime and Treatment of Offenders, Cuba, 1990).

¹⁸ See the views of the three expert witnesses on policing issues before the Marikana Commission: Gary White, Final Statement, 4 October 2013 and Transcripts of his oral evidence, Days 249, 250 and 251, on 25-27 June 2014; Eddie Hendrickx, Final Statement, 27 January 2014; and Cees de Rover, Statement, 8 March 2013 (Exhibit FFF-11).

¹⁹ See the conclusion reached by the expert, Gary White, in his evidence before the Marikana Commission, Final Statement October 2013, Sections 2.2 and 2.3, from his review of: Standing Order (General) 262 – Crowd Management During Gatherings and Demonstrations; Public Order Police – Policy Document on Crowd Management; National Instruction (2012) on POP Crowd Regulation and Management during Public Gatherings and Demonstrations; and Use of Force Directive – Public Order Police – Operational Response Services.

²⁰ UN Basic Principles, Principle No. 9; see also Heyns, paras. 56-73.

²¹ Marikana Commission, Statement of Lt General MNZ Mbombo, 19 November 2012, para. 18; Extract: Minutes of National Management Forum of the Police of 15 August 2012 (Exhibit JJJ177 and cited by Gary White, Supplementary Statement, 21 June 2014, Section 2.2.3); Phone records of Lt. General Mbombo (Exhibit LLL3) and oral evidence of Lt. General Mbombo, Transcript Day 180, 4 February 2014, pages 21573-21580; pages 21575 – 21579, 21616-21619; and Transcript Day 181, 6 February 2014, pp. 21719-21725.

²² See Supplementary Statement, Gary White, Section 2.3.8). The Public Order Unit (POP), the main unit which should play a lead role in responding to public order or crowd management situations, are trained and equipped to work within the framework of minimum force under Standing Order 262 as described below in the text. However during the 2000s their role and capacity was weakened by decisions taken by senior officials. See Ministry of Police, Policy and Guidelines: Policing of Public Protests, Gatherings and Major Events, August 2011 (Marikana Commission, Exhibit R); Eddie Hendickx, Final Statement, 27 January 2014, paras 10 – 20 on the demilitarisation of the South African Police and the development of POP capacity during the 1990s; Council for the Advancement of the South African Constitution (CASAC) to the Marikana Commission, January 2013 (Exhibit FFF-17) on the drift into the development of what they refer to as the 'doctrine of maximum force'. The Minister of Police, Nathi Mthethwa, in his oral evidence to the Marikana Commission, denied that this approach existed (Transcript Days 255 and 256, 14-15 July 2014).

²³ Marikana Commission, Brigadier Calitz, video taken on 18 August 2012 (Exhibit JJJ81).

²⁴ Marikana Commission, Transcript of General Phiyega's address (Exhibit WW6) and live recording (FFF12).

²⁵ Marikana Commission, Discharge 16 August 2012, corrected version of the report (Exhibit FFF8 and FFF35) (Cited by Gary White, Supplementary Statement, Section 3.1.11- 3.1.15).

²⁶ Marikana Commission, Affidavit of Katherine Scott relating to analysis of audio enhanced video footage from Scene 1 (Exhibit JJJ198), done at the request of the Centre for Applied Legal Studies legal team for the South African Human Rights Commission.

²⁷ See above note 25.

²⁸ Marikana Commission, analysis of Gary White (Supplementary Statement, Section 2.5.1 – 2.5.11).

²⁹ Marikana Commission, Medico-Legal Report: Marikana Mine deaths, 22 October 2012 (Exhibit FFF-20).

³⁰ There was agreement in all significant respects in the findings made by the two independent forensic pathologists and five of the six state pathologists, with differences eventually resolved in respect of the sixth state doctor.

³¹ The causes of death were identified as a result of gunshot wounds to the upper body or head in nearly all cases: to the head and/or face (8 cases); to the neck (3); to the chest (11); to the chest and neck (1); to the abdomen (2); to both chest and abdomen (7); to the pelvis (1); and to the chest

and lower limbs (1).

³² Marikana Commission, Exhibit FFF-22 dated 26 March 2013. The information had been gathered and analysis done by a forensic medical expert at the request of one of the legal parties to the Commission, the Legal Resources Centre. The medical records were often incomplete.

³³ Marikana Commission, Medico-Legal Report, Prof. K D Boffard (Exhibit MMM-10) done at the request of the Evidence Leader Team.

³⁴ Marikana Commission, Transcripts Days 192 and 193, 26 and 27 February, cross-examination by Evidence Leader of General Naidoo and using the expert report (note 33 above) to draw out the consequences of the delay in bringing the paramedics to Scene 1 in specific cases.

³⁵ See above note 33.

³⁶ UN Basic Principles, Principle No.5, states: "Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: ...(b) Minimize damage and injury, and respect and preserve human life:"

³⁷ Marikana Commission, Affidavit of Josephine Keetseng Ngake (Exhibit JJJ183). Gary White, Supplementary Statement, Section 2.3.7, notes that the request by Brig Van Zyl is a further indication that deaths were anticipated as a result of the impending operation.

³⁸ Heyns, para. 78.

³⁹ Heyns, paras.80-83.

⁴⁰ Referring to the killing of two Lonmin security guards and three non-striking workers, as well as the deaths on 13 August of three strikers and two police officers in a single incident which is still not fully clarified.

⁴¹ An aspect currently being considered in the Marikana Commission hearings, with evidence heard in July and August 2014 from the then National Minister of Police, Nathi Mthethwa, and the current Deputy President Cyril Ramphosa, in his then capacity as a Lonmin Non-Executive Director, with the Minister of Mineral Resources to be heard in late August 2014.

⁴² Marikana Commission hearings in late July and early August 2014 of evidence of Lonmin security personnel confirmed that Lonmin was also involved in concealing or altering evidence.

⁴³ Transcript Day 250, 26 June 2014, at page 31508, lines 4-10. He was referring to the handing over of a hard drive by Lt. Colonel Scott during his cross-examination by a member of the Evidence Leader Team in September 2013.

⁴⁴ Transcript of proceedings, Day 270, 8 August 2014, Evidence of Major Lethoko.

⁴⁵ See above note 43.

⁴⁶ Government officials publicly stated that the post-mortem examinations had to be completed in less than two days. The ministerial committee terminated the mandate of the Independent Police Complaints Directorate (IPID) and the two independent forensic pathologists who had been

requested by IPID to observe, along with their own investigators, post-mortems conducted by the state pathologists. However a concerted effort by Legal Resources Centre with the support of others, helped secure the presence of the two independent specialists at the Ga-Rankuwa mortuary. Nonetheless, the time pressures remained, with certain limitations inherent to optimal medical examinations, and circumstances less than ideal for conducting these critical examinations. (Provisional Statement of Dr S. R. Naidoo, 20 February 2013).

⁴⁷ Marikana Commission, Transcript Days 6, 7 and 8, 30 and 31 October and 5 November 2012.

⁴⁸ Marikana Commission, Media Statement, South African Police Service, General Phiyega Pronounces on Mine Unrest, 17 August 2014 (Exhibit FFF5); Civil Unrest Incident: Lonmin Marikana Mine: North West Province: Internal Brief, night of 16 August 2012 (intended for the Minister of International Relations and Co-operation and the President) (Exhibit FFF4). SAPS Crime Scene Officer, Captain Mohlaki, told the Commission when giving evidence in late 2012 that he had not been aware that there was a second scene when he began his investigations. At the first scene, widely captured by domestic and international media teams, sixteen died and one later after being taken from the scene for medical treatment. At the second scene (known as Koppie 3) to which protestors had fled, 14 died at the scene and three others who were wounded died shortly after being taken from the scene for medical treatment. Veteran investigative journalist, Greg Marinovich, broke the story of the second scene.

⁴⁹ Police Standing Order 262 section 11(7) states that notwithstanding the restrictions and prohibitions on certain types of force, "Common law principles of self- defence or private defence [that is, defence of the life of another person in imminent danger] are not affected by this Order."

⁵⁰ Marikana Commission, Civil Unrest Incident: Marikana: North West Province: Internal Brief (Exhibit FFF-4).

⁵¹ Marikana Commission, Media Statement from the South African Police Service, 17 August 2012 (Exhibit FFF-5).

⁵² Marikana Commission, Police Shooting incident report compiled by the Office of the Station Commander Marikana, 17 August 2012; Transcript Day 274, 14 August 2014, pages 35055 – 35087, cross-examination of Major Govender.

⁵³ This version of the police case was presented to the Commission by Lt Colonel Visser and Lt Colonel Scott not under oath and over several days (Transcripts Days 9, 10, 11 and 12, on 6, 8, 9 and 12 November 2012).

⁵⁴ See for example Case of McCann and Others v. The United Kingdom, (Application no. 18984/91), Grand Chamber Judgment of 27 September 1995, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943>, in particular paras. 192 – paras. 214. At para 194 the Court noted that "in determining whether the force used was compatible with Article 2 the Court must carefully scrutinize ...not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the

greatest extent possible, recourse to lethal force.”

⁵⁵ UN Human Rights Committee, General Comment 31, at para. 16 states that “Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power includes that “A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term “victim” also includes, where appropriate, the immediate family or dependents of the direct victim....”

(<http://www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx>)

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