MARIKANA AND THE DOCTRINE OF ...

MAXIMUM FORCE

DAVID BRUCE

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Marikana and the Doctrine of Maximum Force

By David Bruce

LONDON — Nearly a quarter of a century after 96 Liverpool soccer fans were crushed to death in one of the worst stadium disasters in history, Prime Minister David Cameron formally apologized on Wednesday to the victims' families, saying their "appalling deaths" were compounded by an attempt by the police, investigators and the news media to depict the victims as hooligans and to blame them for the disaster.

Before a hushed House of Commons, Mr. Cameron said the families had suffered "a double injustice" in the failures of the police, fire officials and other authorities to anticipate the disaster or to contain its scale once it occurred, and in the efforts that followed to cover up police failings by altering witness statements, and to pin responsibility on the victims for their own deaths.

-- New York Times, September 13, 2012

David Bruce

David Bruce has been researching and writing about policing, violence and the criminal justice system since 1996, and is regarded as the country's leading experts on issues relating to police use of force. He has worked for a variety of think-tanks and NGOs, including the Centre for the Study of Violence and Reconciliation, the Institute for Security Studies, and Corruption Watch.

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CHAPTER ONE
The Massacre at Marikana

Something terrible happened at Marikana on 16 August, 2012. The full details are not available yet, and, even though President Jacob Zuma has appointed Judge Ian Farlam to head up a commission of inquiry into the events, it's quite possible that we will never know exactly what happened. But 34 people died and 78 were injured when police officers clashed with a crowd of striking miners, and, while South Africans have quickly become obsessed with the political implications of the tragedy, the event itself bears closer scrutiny.

Judge Farlam will have to answer most of these questions, but television footage and some excellent reportage means we already know quite a lot about what happened. One of the questions that has largely gone unasked, however, is not 'what happened?' or even 'how did it happen?' but 'why were the police allowed to do this?' It's a question that can only be answered if we look at how the police have come to embrace a doctrine of 'maximum force'.

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On Wednesday, 15 August, the day before the massacre, the standoff outside Lonmin's Marikana mine continued. A group of miners, by now numbering in the region of 3 000, had returned to occupy a *koppie* called Wonderkop, near the outskirts of the Nkaneng informal settlement, after first doing so the day before.

The miners had been on strike since the previous Friday in support of a demand for a monthly salary of R12 500 (about $1 500). How much of an increase this would have represented remains in dispute, with miners claiming their salaries were R4 000 (about $560) and employers suggesting that the actual figure was considerably more. The strike had already turned deadly, however, with 10 people – including two police officers and two mine security guards – having been brutally murdered over the weekend and on Monday, 13 August. Tensions were running very high and, at some point, perhaps fairly late on the Wednesday night, a decision was made that if the deadlock could not be broken during the course of the following day, the police would resort to more forceful measures. At this point we do not know who was

involved in making this decision. It would certainly have involved high level SAPS leaders, but it may also have involved others, notably senior officials of government.

How do we know that such a decision was made? Because the police have told us so. North West Provincial Commissioner, General Zukiswa Mbombo, for example, told a BBC television interviewer on the Thursday morning that "Today we are ending this matter." It was a point reiterated by police spokesperson Dennis Adriao when he said, "Today is unfortunately D-day. It is an illegal gathering. We've tried to negotiate and we'll try again. But if that fails, we'll obviously have to go to a tactical phase."

This was the course of action that had been called for on the Monday when the National Union of Mineworkers issued a statement in which they "condemned the violence and called for immediate action from the police."

"We are alarmed," said Frans Baleni, the union's general-secretary, "that the escalating violence has been allowed to continue unabated by the law enforcement agencies in that area in North West Province. We call for the deployment of a special task force or the SANDF to deal decisively with the criminal elements in Rustenburg and its surrounding mines."

It's important to understand that the decision to end the strike on the Thursday, if necessary by going to "tactical phase", was not driven by the imperatives of the standoff itself. There was no reason why more time could not have been allowed for negotiations to continue or for the miners' resolve to be allowed to weaken. There was nothing special about Thursday except, it seems, that the police had decided that this was to be "D-Day" – a choice of phrasing that might be read to reveal something about the type of intervention that the police intended to initiate. It was also the type of intervention that some of the police units present at Marikana were well equipped to carry out.

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In a police statement released after the massacre, details are provided about the police's response to the deadly violence that had taken place over the preceding weekend. This had left 10 dead, culminating on the Monday in the killing of two police officers by a group of miners. It reads, in part, "We proceeded to deploy additional reinforcements to the area on Monday 13th August 2012, boosting the numbers after the incident that day, with various police specialised units from around the country."

Thus, in addition to the ordinary policing units at Marikana, SAPS personnel now included members of a number of other specialised units. Importantly, these included paramilitary units trained and armed in order to be able to deal with 'medium' and 'high risk' situations such as hostage situations, confrontations with terrorists, and cash-in-transit gangs armed with automatic weapons. These are units, in other words, who are used for deploying what the SAPS has now come to describe as 'maximum force'.

One of the consequences of the killings on the Monday, then, was to change the mix and make-up of the police units deployed at Marikana. Nor is this a simple matter of adding

additional capacity: members of units, whose tactics and weaponry differ from those of the rest of the force, think about themselves and their work in ways that are markedly different from police officers whose work is more mundane. The police deployed in Marikana by the Tuesday, or at least some among them, would now be seeing the miners through the prism of training and operational experience more suited to confrontations with armed gangs than with crowds – however militant and aggressive – of striking workers.

Instead of allowing time to find other ways of resolving the situation, the SAPS leadership decided to bring the situation to a head. In doing so they realised that there was strong potential for this to lead to bloodshed. Nevertheless, the presence of the specialised units meant they could be confident of getting the upper hand.

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The SAPS D-Day operation that afternoon began with the police erecting a barbed wire barrier. According to a subsequent police statement, this was intended "to protect their members adjacent to the protesters". The police, the statement said, intended "to disperse the protesters from their stronghold into smaller groups which would be more manageable for the police to disarm". According to Adriao, the spokesperson, this was all that they wanted to achieve. "We have tried over a number of days to negotiate with the leaders and with the gathering here at the mine. Our objective is to get the people to surrender their weapons and to disperse peacefully," he said.

The operation was not a conventional crowd management exercise to disperse the gathering but one intended to disarm a hostile and potentially unpredictable crowd. But disarming a crowd means forcing it to submit to police authority. It is a dangerous call, fraught with risks of escalation. If armed miners defied the police, they could only be forced to disarm at gunpoint. And if they continued to resist, this would likely lead to the use of lethal force.

The erection of the barbed wire barrier clearly unsettled the crowd. Whether this was provoked by concern about being trapped and attacked by the police is unclear, but a large group of the miners descended from the hill and rounded the end of the barbed wire barricade. The police have said that the miners were attacking the police officers but this is disputed by some. The photojournalist Greg Marinovich interviewed some of the miners after the incident. He gives the name 'Themba' to one of them who tells him that the bulk of the miners simply wanted to get off the hill and was heading towards the nearby informal settlement. "Most people then called for us to get off the mountain," he said. "And as we were coming down, the shooting began."

*

In television footage taken of what seems to be the shots that killed the first miners, one sees police firing rubber bullets even as they begin to retreat. A group of miners, some fifteen strong,

emerges. They are running hard, and are flanked on one side by the police Nyalas. It is footage that could be read to support the police's argument that they were forced to shoot in self-defence, and that they did so only after trying to deter the advance of armed men using less-lethal weapons and ammunition. But another interpretation is also possible: that these men wanted to get away from the hill, but that the rubber bullets and armoured vehicles had channeled the miners towards the police.

Whatever drove the men forward, the consequences were devastating.

First there are a couple of isolated shots, then a fusillade of gunfire that lasts seven or eight seconds before officers are heard shouting, 'Ceasefire!'

In a few more seconds, the shooting is over.

On the screen one can sense the devastation. A number of bodies can be seen prostate, both dead or wounded. They are lying on the ground. Policemen advance nervously towards them. One runs forward to recover a handgun from the ground where the bodies are lying.

*

There should be no illusions about the miners. These were men who lived hard lives. They were defiant, angry and militant, having stood up not only against the bosses, but the mine security, the union overlords, and the police. When they downed tools, they took steps to enforce the strike. Earlier in the week, some among them had taken the lives of other men through brutal, vicious assaults, and claims have circulated of 'hit lists' and assassinations directed at local leaders of the National Union of Mineworkers (NUM). (It should be noted, however, that there are also claims that two of the 10 who had died over the previous weekend were shot by members of NUM). They had threatened to kill other workers who might undermine the strike.

The weapons that they carried enabled them to enforce the strike but also to defend themselves.

But they were not fools. And it is unlikely that they would have decided to attack the massed ranks of the police and their armoured vehicles. At the time of the massacre, much media attention was invested in the figure of the *sangoma* who had had been amongst them from earlier in the week. According to some press reports, his *muti* was understood by the miners to make them invulnerable to police bullets. But would they really have believed that *muti* would enable them to defeat the police in a frontal attack? Or is this a kind of urban legend with roots in the nineteenth century which people believe because it fits in with pre-existing assumptions and prejudices?

Whatever the miners' intentions, at least at the moment that the shooting started, the police might genuinely have believed themselves to be under attack. And, if they did, the shots that they fired in self-defence might be regarded as within the law: our courts have shown sympathy with those who believe themselves to be acting in self-defence when they use lethal force even if they are later shown to have been mistaken.

But to describe this as an act of self-defence (whether they were under attack or merely believed this to be so) is to partly misread what happened. In terms of the law, police are authorised to use force for a lawful purpose, but this must be "the minimum force necessary in the circumstances". This is consistent with common law principles in terms of which an act of self-defence "may not be more harmful than necessary to ward off the attack". But the police units deployed at Marikana are apparently not guided by these principles but by an illegal doctrine of maximum force. And what the television cameras captured, for the first time, was the type of concentrated fire that some of these units are trained to use. This is intended to guarantee that they gain the upper hand in confrontations with armed opponents, including cash-in-transit gangs armed with automatic weapons.

*

If the initial killings on 16 August might be understood as having been the result of police officers' believing themselves to be under attack, those deaths were not the only deaths that day. And if the initial burst of police gunfire was roughly ten seconds in duration. The events that ensued took considerably longer. Indeed, one of the television commentaries states that following the initial burst of gunfire, "Police pursued the miners and there was gun-fire for another half an hour."

Half an hour.

The killings in the initial police fusillade, widely shown on television, accounted for a minority of the killings that afternoon in Marikana.

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Television footage from a point close to the initial shooting shows miners fleeing the scene. Members of the specialised units in their vehicles are also seen accelerating away. Many of the first-hand accounts from miners who were part of the group in this area say that the miners were shot whilst trying to escape. And, there is reporting from Marikana that supports this claim, with some noting that a number of miners were shot in the back and even run over by police vehicles. According to some witnesses, worse was still to happen.

A number of those who tried to escape fled towards a *koppie* that is referred to in the police statement as "the high bushy ground". Marinovich's 'Themba' says, "We ran in the other direction, as it was impossible now to make it through the bullets. We ran until we got to the meeting spot and watched the incident at the *koppie*. Two helicopters landed... Police surrounded the area. We never saw anyone coming out of the *koppie*."

The Star journalist, Poloko Tau, spoke to some of survivors of the massacre after their release from custody on Monday, 3 September. One said, "people were shot for fun while down on their knees with their hands up in the air and begging for their lives."

*

According to the official police statement released the day after the massacre (at a point, in other words, when it would have been impossible to have conducted a full investigation), the killings at the high bushy ground, like those at the foot of Wonderkop, were carried out by police acting in self-defence.

In contrast to this, we have multiple other pieces of information from miners who were involved in, or witnessed, the events in this area. They all say that the people killed in the high bushy ground were not attacking the police. Some have interpreted this to mean that these killings were premeditated, cold-blooded killings. But this is likely to be wrong.

The killing in the high bushy ground appear to fit in with the pattern of what the American sociologist, Randall Collins has termed a 'forward panic'. Forward panics, Collins argues, are characteristic of many of the famous incidents of massacres and brutality that are written in the annals of official infamy. This includes the killings by Japanese soldiers of civilians and disarmed Chinese soldiers at Nanking in 1937, and the 1968 murder of Vietnamese villagers by American infantrymen at My Lai.

A forward panic occurs after a period of prolonged confrontation between two groups when tension and fear – on both sides – has built up and escalates further in the final moments. Police officers who wish to avenge the killings of some of their colleagues, or whose authority is openly challenged, may be especially susceptible to being carried away in a 'forward panic'.

The build-up to and dynamics of the massacre at Marikana would have provided the perfect conditions for a 'forward panic'.

The specialised unit members started arriving on the Monday following the killings of the two police officers. As a result of these killings in particular, they believed the crowd to be hostile and belligerent well prior to the final bloody confrontation. It was evident to the police that many of the miners were heavily armed. They would have been angry about the deaths of their colleagues and, the crowd's size and the weapons it displayed, are likely to have induced a measure of fear and tension. The descent of the miners from the hillside would have been a period of dramatically increased tension and fear on both sides. On the police side, this would have been exacerbated by not knowing what the intentions of the miners were, and the fear that they might attack. Believing that the miners had attacked their colleagues, the first fusillade served to dramatically escalate the dynamics of fear and tension at the final moment amongst the other police present.

Thought of in this way, the first fusillade, by breaking the tension, might be seen to have changed the dynamics of the event profoundly. Now, as is common in forward panics, the police units, equipped with high calibre weapons, quickly got the upper hand over the fleeing miners.

In a forward panic, Collins says, the built-up tension and fear comes out in an 'emotional rush' driven by adrenalin that is experienced as a mood of elation. A massacre resulting from a

forward panic is usually totally out of proportion with any resistance that the victim may put up, resulting in what Collins calls ‘over kill’.

CHAPTER TWO
Bulldogs and Bastards

Policing has a tangled relationship with politics. To retain credibility with voters, governing parties in democracies must present themselves to the voting public as being 'serious' about crime. Crime, and particularly violent crime, terrifies voters, so politicians who understand those fears and can articulate and respond to them, may find traction and support. The stakes are even higher for governing parties, because high levels of crime are often understood as a reflection of their failure, and the failure of their state. In such circumstances, making calls to "strengthen the police" is politically natural and inevitable. In addition, the police are themselves an important political constituency for politicians to keep on side. Certainly, no government likes to see police officers criticising the handling of law and order. So, apart from resonating with voters, 'tough on crime' rhetoric may appeal to the police as well. Nor are all the reasons for such rhetoric strategic; it may also represent the visceral, knee-jerk responses of civilian politicians who have little understanding of the nuances of policing and addressing crime.

Despite this, and perhaps somewhat surprisingly, the first five years of so after the inauguration of democracy, and despite rising levels of violent crime, the ANC-led government resisted populist calls for tougher, boots-and-all policing.

Perhaps the first politician to openly engage in 'tough on crime' politics of this kind in post-1994 democratic South Africa was the second Minister of Safety and Security, Steve Tshwete. Soon after being appointed to the office of Minister in June 1999, Tshwete made a speech to a gathering of police in Soweto at which he gave his endorsement to the use of heavy handed measures by police in addressing crime. "We are going to deal with criminals as a bulldog deals with a bull" he said.

Charles Nqakula, who took office after Tshwete's death in April 2002, was in general more moderate with his pronouncements on crime. But he did make some intemperate remarks. The remark of his that caused the greatest outrage was at the end of May 2006 when he referred to people who complained about levels of crime as 'whingers', suggesting that they should leave South Africa. In addition, less than a month later, following an incident in which twelve people, including four police officers, were killed in the suburb of Jeppestown in

Johannesburg , he caused a bit of a stir when he said "Anyone who points a firearm at police will be killed by police officers".

Nqakula's deputy, Susan Shabangu, caused much greater controversy just two years later. Addressing an anti-crime meeting in Pretoria in April 2008, she said, "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."

To make sure she was understood, she added, "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."

Shabangu's speech amounted to a dramatic break from anything that any senior ANC leader had ever said about policing and the use of lethal force. Nevertheless, it was never repudiated by her. Indeed, shortly after her speech, Jacob Zuma, who had recently become the president of the ANC, but who was not yet president of the country, gave his backing to what she'd 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."

Just over a year later, following the general election of April 2009, Zuma, as newly-elected president of the country, would appoint Shabangu as Minister of Mineral and Energy Affairs. It is unclear what role, if any, her comments of April 2008 played in the decision, but she was certainly not being punished for them.

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When Jacob Zuma became president, killings by police in South Africa were already at the highest level yet recorded in South Africa in the post-apartheid period. Statistics from the Independent Complaints Directorate show that 556 people were killed by police in the year ending March 2009. The number of people shot dead had doubled in just three years. The biggest driver of this increase was increasing rates of killings by police in KwaZulu-Natal. From the year ending March 2008, to that ending March 2009, the number of people killed in shootings by police in KwaZulu-Natal almost doubled.

In many ways, the politics of lethal force in democratic South Africa mimic those of the apartheid period, when government never wavered from its indifference to police killings. If anything, the crime wave that broke in the 1990s, and which include a substantial number of killings of police officers, meant that indifference had come to extend far beyond government. In a poll conducted in late 2009 for instance, 54% of respondents endorsed the liberal use of lethal force by police.

It would only be in exceptional cases that killings by police would generate political controversy.

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Nathi Mthethwa succeeded Charles Nqakula as Minister of Safety and Security. He took office in the wake of the resignation of Thabo Mbeki and the appointment of Kgalema Motlanthe as president, following the 'palace coup' in September 2008. When he was appointed, Mthethwa had already served Zuma loyally. As ANC Chief Whip in the national assembly, he had played a leading role in the campaign by Zuma's allies against the Scorpions, the investigative unit that had been pursuing Zuma on corruption charges.

At first, Mthethwa was appointed as Minister of Safety and Security. But on Zuma's ascension to the presidency, in May 2009, a decision was made to rename the Ministry: henceforth he would be known as the Minister of Police. It was a change in name intended to signal a toughening of policy and approach.

Immediately on taking office, Mthethwa raised issues about the standards to be applied by the police in using force. Initially his engagement with the issue appeared to be motivated by a concern with the problem presented by heavily armed cash-in transit gangs. These gangs were not only armed with automatic weapons, but were also understood to include former South African, Zimbabwean and Mozambican combatants amongst their number. During a briefing of Parliament's select committee on security on 12 November 2008, Mthethwa described those involved in cash-in-transit heists as "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."

Referring to the task forces and units responsible for responding to CIT heists, he then said that,

> *"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 – to fight fire with fire. There's no other way on that."*

Mthethwa's engagement with questions about the use of force has been very persistent. It has in some respects also been more considered than the type of opportunistic populism demonstrated by Tshwete. The new ANC administration of which he was part had recognised crime as a key concern. Indeed, dealing with crime had been one of five core priorities in the ANC's 2009 election manifesto. It seems that Mthethwa shaped his approach partly by listening to the SAPS. He understood from them that there were various legal and operational problems that police officers faced in deploying force. Prominent amongst these were uncertainties about how and when lethal force could be used.

At the time of his November 2008 briefing in Parliament, Mthethwa had already taken on board the issue of legislative reform, telling 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." Barely seven months later, he initiates steps to have the law amended.

One of the key problems that the SAPS faced was that laws regulating the use of force were profoundly ambiguous in relation to the circumstances, other than immediate threats to life, in which SAPS members were entitled to use lethal force. The SAPS legal department could not therefore tell SAPS members whether or not they were entitled to use lethal force if there was no other way to prevent the flight of fleeing cash-in-transit members or other people suspected of serious violent crimes. A ready solution was at hand as the Constitutional Court had provided guidelines for the use of lethal force in a 2001 judgment, and a law based on these guidelines would clearly authorise the use of lethal force in these circumstances. Amending the law was consistent with what Mthethwa wanted to achieve, not only because it provided greater clarity, but because it expanded police powers to use lethal force.

Mthethwa's support for police efforts to change the relevant law has now culminated in the amendment of the Criminal Procedure Act by Parliament. There is little pleasure to be had in the irony that the amendment passed its final hurdle in the parliamentary process, approval by the National Council of Provinces, on 16 August 2012, the same day as the Marikana massacre. (The amendment was signed by President Zuma on the 13th September and came into effect 12 days later.)

CHAPTER THREE
Fear Factor

One of the priorities of the South African government under Zuma's leadership has been to pursue the task of addressing crime more vigorously. In his first State of the Nation address in June 2009, Zuma spoke of the need for more "operational energy in police work". The ANC leadership, it seems, wanted to enable the police to deal more decisively with violent crime and, more generally, to deal with the lack of public respect for police authority. According to one press article, this approach emphasised bringing the 'fear factor' back into policing to ensure public respect for the police.

The appointment of Mthethwa, and that of Bheki Cele as National Commissioner in July 2009 was intended to give effect to this agenda. Cele, who'd been the MEC in charge of policing in KwaZulu-Natal, had a reputation for tough talk and provocative statements about the use of force. After his appointment he did nothing to dampen this reputation. In an address to the Pretoria Press Club in September 2009, for example, Cele said that "the only language that R5s understand is R5s," adding that, "the police do not have to think twice and lose their lives".

The defining features of President Zuma's first months in office were an increase in rhetoric of this kind, not only by Mthethwa and Cele, but by other members of the ANC leadership, including Zuma himself. Though they did not necessarily make use of the term, and while some police leaders including Cele have sought to distance themselves from those words, these pronouncements were labelled by the media 'shoot to kill'. For example, in an interview with the *Sunday Independent* newspaper, Mthethwa indicated 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." He ascribed this, somewhat implausibly, to their fear of "the media and some human rights practitioners".

Meanwhile, Mthethwa's deputy, Fikile Mbalula, said that the police would show "no mercy" to criminals. Following the killing by police of seven 'would-be robbers' at a cash depot in Polokwane, then president of the ANC Youth League, Julius Malema, said "That's very perfect. Shoot to kill – that's what we need."

In order to maximise public sympathy, the issue was frequently presented as being about the fact that large numbers of police were being killed and that this was because they

hesitated in using lethal force. Mthethwa for instance presented this as one of the reasons why it was necessary to amend the law governing the use of force despite the fact that nothing in it prevented police officers from acting in self-defense. In fact, to the extent that there was any legal confusion about the use of force, it had nothing to do with the right to defend oneself when attacked (which everyone enjoys). Nevertheless, at a specially convened meeting with more than 1 000 police station commissioners, President Zuma also pursued this approach. Reflecting his ignorance of the issue, Zuma said that part of the problem was that in life-threatening situations police were required to fire warning shots. There is no requirement anywhere in South African law or police regulations for warning shots to be fired in the face of an immediate threat to one's life.

The language of self-defense sometimes mutated into the language of warfare. "We are," Mthethwa said at one point, "at war with criminals". Mbalula too, said that government will be "taking the war to the criminals". And, linked to the idea of a war in crime was the idea of collateral damage: the public would have to accept that some of those who would be killed by the police would not be criminals. This became increasingly important following two widely publicised incidents where innocent people – a young woman, Olga Kekana, and a three year old boy, Atlegang Phalane – were killed by the police in separate incidents. Thus, on 12 November 2009, Mbalula told the parliamentary press gallery that it was regrettably unavoidable that civilians would be killed in the cross-fire between police and criminals.

Still, concerns that the police were being encouraged to act outside the law were mounting, and on the same day as Mbalula's address to the parliamentary press gallery, Zuma issued a statement intended to dampen these anxieties. "No police officer has permission to shoot suspects in circumstances other than those provided for by law," the statement read. "The law does not give the police a license to kill." Mthethwa followed suit shortly thereafter. With Mbalula at his side, he told the National Press Club in Pretoria that "trigger-happy police" had no place in the force.

Towards the end of 2009, the use of this tough rhetoric about the use of force stopped. It no longer formed part of the rhetoric of the South African government, except in the form of a series of unusual pronouncements that would be made by Mthethwa starting in July 2011. But the agenda that Mthethwa was tasked with promoting was not restricted to law reform and rhetoric. In his November 2008 address to the select committee on security, Mthethwa had also used the fact that there had been no prior warning of the xenophobic violence that had occurred in May that year to argue for the strengthening of the crime intelligence division of the SAPS. Richard Mdluli, who had earlier assisted Zuma to avoid prosecution, was appointed head of crime intelligence in mid-2009. This was despite the fact that he was suspected of murder. The appointment itself was made by means of an irregular procedure that involved four cabinet members.

Mthethwa also initiated the re-militarisation of the SAPS, a process symbolised by the reintroduction of military ranks. This was announced in October 2009, and caused considerable controversy when it came into force early in 2010.

In November 2011, Mthethwa expressed his belief that the 'fight fire with fire' approach that he had called for in 2008 had been decisive in reducing crime. On 13 September 2012, four weeks after the Marikana massacre, Zuma also defended the approach that his government had taken. He told parliament that the militarisation of police ranks "had empowered the police to act decisively", and that this had resulted in a lower crime rate.

CHAPTER FOUR
Operational Response Services

By 2007, SAPS leadership had already decided to provide a more decisive response to the problem presented by cash-in-transit gangs. In December that year, SAPS units killed 11 members of a cash-in-transit gang at an ambush in Hammanskraal, with police spokesperson, Phuti Setati, saying that the operation involved "a joint effort between the task force, hi-tech unit and the organised crime unit." According to a press report five of the men "died with their hands above their heads, a sign of surrender".

Hammanskraal lies about 100 km north-east of Marikana.

More actions of this kind would follow, particularly after the 'palace coup' of September 2008. The following year there were a number of reports of large numbers of killings in ambushes by police. At the end of February 2009, for example, the press reported that "four heavily armed robbers have been killed, and three others, including a policeman injured in a gun battle after police foiled a truck hijacking and armed robbery". The incident occurred at the Hartebeeshoek Skeerport service road intersection. The report indicated that police involved included those from a number of units including the Special Task Force. "Evidence of the ferociousness of the shootout", the report said, "could be seen from the scores of bullet shell casings that littered the... intersection".

The intersection lies roughly 30 km south-west of Marikana on the other side of the Magaliesburg mountain range.

In September 2009, the Special Task Force, the Hi-Tech Projects Unit and the Pretoria Bank Robbery Reaction Unit killed six "heavily armed gunmen wielding semi-automatic assault rifles" in an operation just east of Pretoria. Other incidents of this kind were reported in the Durban area, where, in April 2009, members of the National Intervention Unit and Special Task force (amongst others) were involved in an incident in which alleged robbers, two police officers, and a truck driver who happened to be passing through the area were killed. In July 2011, the National Intervention Unit was also involved in an incident near Pietermaritzburg in which six suspected robbers were killed.

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Armed robberies involving heavily armed gangs were not the only problem that pre-occupied the new police leadership. Starting in mid-2004, the country saw large numbers of community and labour protests, many of which involved significant levels of violence. A new group of specialised units – the Tactical Response Teams – was created in 2009 with a mandate that combined the "combating of crime and maintenance of public order". Their task was to "act as a force multiplier" when required, including during the policing of protests.

In January 2011 the Operational Response Services component of the SAPS was moved out of the 'crime prevention' division and re-established as a full police division in its own right. The then head of Operational Response Services was transferred to the position of Western Cape Provincial Commissioner, to be replaced by Lieutenant-General Malewa. The units that comprise the division include the Special Task Force, the National Intervention Unit, the Public Order Police and the Tactical Response Teams. It is believed that all of these units were part of the SAPS operation at Marikana.

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Barely a month after the division was formed, its units were being linked to cases of brutality.

On 27 February 2011, newspapers published CCTV footage of TRT members assaulting patrons at a bar called Catz Pajamas in Johannesburg. Video taken by a cellphone shot ten days prior to this in the township of Wesselton outside Ermelo showed, in the words of one report, "a young man rolling on the ground while being trailed by armed TRT members". According to the man who captured the footage, "the youngster in the clip was coming from the nearby shops with a female friend when he was summoned to the officers' vehicle, questioned and allegedly shot at several times with rubber bullets. He was then forced to roll on the dusty street for a considerable distance."

The backdrop to this incident was a violent protest in Wesselton that had started on Monday, 14 February, and which included the blockading of access routes to the township by the burning of tyres, the smashing of traffic lights and road signs, and the stoning of a police vehicle. Media were warned to stay away from the area after protestors 'rushed towards' a television crew. An initial report in *Beeld* said that "protests were related to the community being unhappy about the ANC's candidate lists for the local government elections". A subsequent police intelligence report on the causes of the violence, compiled by a commander in the 'Mpumalanga counterterrorism unit', linked the protests to a local pressure group, the Msukaligwa Concerned Citizens (MCC).

The MCC, the report said, were angry with Sibusiso Sigudla, a local strongman and ally of Mpumalanga premier David Mabuza, who, they claimed, had imposed his preferred candidates during the process of compiling the ANC regional list in advance of the forthcoming local government elections. Sigudla was also alleged to have imposed himself as the sole representative of the ANC on tender and employment decisions around Ermelo. In January

2011, the MCC handed over a memorandum of complaints to the municipal manager of Msukaligwa, Ace Dlamini, who promised to respond in seven working days. He didn't live up to this promise, however, and, on Sunday, 13 February, a community meeting was held to discuss their demands. It concluded that the ANC's local leadership had failed the community.

According to a press report more than 160 TRT members were deployed to the township when protests began on the Monday. By the Wednesday, protests had died down as people felt their outrage had been communicated; they were, it was said, tired of protesting. Residents were also expecting the arrival of police commissioner, General Bheki Cele, who visited Wesselton that day. Despite the relative calm, police imposed a curfew, enforcing it by firing rubber bullets at people in the street and *sjambokking* them. According the man who captured the cell-phone footage "They didn't want anybody on the streets that day. That guy wasn't the only one [who was assaulted]. A lot of people were being ejected from shops and forced to roll on the ground." The police were also conducting door-to-door raids, on one occasion arresting an 80-year-old-woman.

Two people, Solomon Madonsela and Bongani Mathebula were killed by police during the protest. In a statement on the protests, Minister Mthethwa said, "Police have a mandate to protect law-abiding citizens". Referring to "those who find themselves on the wrong side", he said, "We shall have no leniency on them." A subsequent press report indicated that the operation not only involved TRT members but also other units including the National Intervention Unit. The units deployed were not just from Mpumalanga but included units from Limpopo and Gauteng.

Press reports indicate that the ferocity of police action in suppressing the protests was equaled in their dealings with people arrested. This included the alleged use of torture, including electric shocks, wrapping detainees' heads in plastic, and holding their heads under water. Charges arising from these were laid with the ICD. Dumisani Mahaye, who was accused of leading the protests was quoted as saying, "After we were arrested for the protests we were divided into groups of four and taken to the radio control room in the Ermelo police station where we were tortured into confessing things we did not know about". He said that they had confessed to all the things they were told to say because they were told that they were going to get killed. The 'facts' that they were forced to confess to were allegedly of a political nature: that certain ANC leaders in Mpumalanga, who were opposed to provincial premier Mabuza, had paid him to instigate the protests. Mahaye alleged that the police were "being used by unscrupulous leaders to fights their political battles".

Mayaye's claims were consistent with information provided by a local ward councilor, Bongani Phakathi, who told the *Mail & Guardian* that the day after the protest erupted, he had met the Ermelo station commissioner, Colonel Zachariah Nyathi. Nyathi, he said, told him he was suspected of being behind the protests. He had handed himself over to police crime intelligence in Pretoria on 16 February because he felt he could not trust the Mpumalanga police. He had heard, he said, that some of them had been seen with regional ANC members. Despite having handed himself over, he was then interrogated for 14 hours by the head of the

Hawks in Mpumalamga, General Simon Mapyane. While he was being interrogated, national police commissioner Cele was addressing Wesselton residents. Cele said that police wanted to arrest certain individuals and that one of them had already handed himself over to the police.

Phakathi is quoted as saying that in his interview with Mapyane, "I explained my reasons for not cooperating with the Mpumalanga police, including the fact that I was asked about my relationship with politicians not aligned to the chairperson of the ANC in the province [David Mabuza]". Phakathi says that "Mapyane asked me where I worked and where I got the money from to fund the protest. He asked me about my relationship with Fish Mahlalela and Mbombela mayor Lassy Chiswayo". (Mahlalela and Chiswayo are Mpumalanga politicians who at that time were regarded as opponents of Mpumalanga premier, David Mabuza.)

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Police action in Wesselton attracted some press coverage, but there was little general public awareness of it. Matters would be different a couple of months later when, on 13 April 2012, police officers killed Andries Tatane, in a protest in Meqheleng near Fickburg in the Free State. Tatane, an activist, was due to stand as an independent candidate in the local government elections the following month.

Tatane, who was unarmed, was killed by members of the Operational Response Services Division. The killing is very striking in that the force used by police seems massively disproportionate to any resistance that Tatane may have been offering.

Unlike any of the killings in Wesselton, the killing of Tatane was partly captured by television cameramen. When it was aired on national television, this prompted widespread outrage. Perhaps because this was unavoidable, the officers involved were arrested and brought to trial for murder. (The case has been postponed repeatedly and is scheduled to resume in December 2012.)

In the wake of Tatane's killing, police leadership came under sustained and severe criticism. Allegations of police brutality had already been discussed by the Portfolio Committee on Police in February 2011, and the growing number of documented incidents of police brutality fed into a climate of criticism of heavy handed police behaviour. In an apparent attempt to rebut this criticism, Minister Mthethwa and General Cele initiated a PR offensive around the issue of police killings, which remained at high levels despite having fallen in recent years.

In the early hours of Sunday, 22 May, two police officers, Warrant Officer Gurswin Matthee, 39, and Constable Cannon Cloete, 23, were killed in Kraaifontein, a suburb of Cape Town. In a statement issued later that day Cele said, "This attack is a clear indication that there are cold-blooded criminals out there that have no value or thought for human life and we must deal with them doggedly".

"I have attended funerals of my police officers every weekend in the past four weeks and I cannot help but state that community outcry on the killing of our officers is seriously lacking" he continued.

A few days later, at Constable Mathee's funeral, Cele lashed out at critics of the police, "Who are they to call us brutal? Those who sit with their books in air-conditioned offices while our officers have to go out there and respond to violent activities such as heists, armed robberies and hijackings."

Mthethwa, too, made a statement on police killings, stipulating that the police work "within the framework of the law", and insisted that members should fight crime "fearlessly". He added that "This is a people's war and in the end the people shall win this war".

Then, at a national summit on killings of police on 8 July 2011, 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".

As far as can be established, this was the first time that 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. But there is another possibility. Whilst the use of excessive force by Operational Response Services in Wesselton had not caused too many political ripples, the killing of Tatane had turned into a political nightmare for government. Mthethwa therefore realised that the continuing use of excessive force by police during demonstrations would be likely to be costly politically. Seen in this light, the speech might be understood to be part of an attempt to rein in Operational Response Service members in relation to their use of force. And, since it seems to have been accompanied by an order preventing the police from using live ammunition at public protests, the approach seems to have been effective: apart from Tatane, and the deaths at Wesselton, eight others were killed by the SAPS during demonstrations between February and early June 2011; after that date, and until the police operation in Marikana, there are no other recorded killings by police during demonstrations.

Mthethwa again referred to 'maximum force' in a speech he gave in May 2012, in which he again contrasted it with the need to use 'minimum force' at demonstrations. Then at the beginning of August 2012, he began to promote the idea more vigorously and explicitly. Speaking to students at the University of the Witwatersrand on the sidelines of a meeting of the newly formed Black Lawyers Association (BLA) on Friday 3 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 waiver in continuing to let them feel the heat and that we squeeze them with maximum force."

"If there is no life-threatening situation," he was quoted as saying, "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". But, he said, if the police are pushed to a situation where medium force is required, then they should use rubber

bullets. “The point,” he said, “is that there is no need to be heavy-handed with people who are not harming people”.

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.”

Five days later, in an address in Mpumalanga on Wednesday, 8 August, he revisited his July 2011 speech from the summit on police killings using the exact 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.”

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Mthethwa’s four public statements in which he has used the term, and endorsed the use of ‘maximum force’ are completely consistent with each other. On their own they might have been taken to imply that this was merely Mthethwa’s personal view (albeit that should be taken seriously, since he was the Minister of Police). But the term ‘maximum force’ would make a another appearance in the statement issued by the National Commissioner, the country’s most senior police officer, immediately the day after the Marikana killings. This may be taken to imply that, subsequent to July 2011, a police use of a force doctrine had emerged in terms of which police would be required to use ‘minimum force’ when policing protests, but which endorsed the use of ‘maximum force’ in confrontations with violent criminals. Oddly enough, however, the theory and practice of policing, at least in democratic societies, recognises no such animal as a doctrine that endorses the use of ‘maximum force’.

And in South Africa, if there were such a doctrine, it would be illegal.

CHAPTER FIVE
Maximum Force

The concept of maximum force has no currency in the field of policing. Indeed, it is unlikely that one would find a policy document for any police service in any democratic country that proposes that the police conduct their duties while deploying 'maximum force'. Nevertheless, the concept was used by the SAPS to explain their actions at Marikana. The statement issued the day after the massacre under the name of SAPS National Commissioner, Riya Phiyega, says that the police at Marikana "were forced to utilise maximum force to defend themselves".

In general it is not advisable to draw a straightforward line between pronouncements made by politicians on public platforms and what public servants understand and do. Many policy pronouncements are forgotten instantly. But the SAPS statement is highly unusual because, on its face, it amounts to an admission by the SAPS that they violated the law. 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".

The law says that the police must use minimum force; the police say they used maximum force. There are two implications. Neither is good. Neither is exclusive of the other. The first, possibility, is that some among the police leadership have come to embrace a doctrine of maximum force, at least in some circumstances. The other is that, when the phrase 'maximum force' is used by the Minister, it has been understood by the police to mean 'lethal force'. If this is so, what the police hear when their Minister speaks of the appropriateness of using 'maximum force' in fighting certain kinds of crime, is that they are encouraging to kill.

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How widely the term 'maximum force' is used in the SAPD is not clear. One revealing piece of information are some notes, made by a SAPS member, distressed by a new 'Firearms in law enforcement' course that he attended early in 2011. The notes make no reference to 'maximum

force'. But, he says, "The trainer kept saying, 'Shooting in the SAPS has been neglected for many years and they're finally encouraging people to shoot again.'"

And, in relation to the theory section, where members were supposedly instructed in the legal framework that should determine when and whether officers use lethal force or not, he notes that , despite being given "about 1 000 pages to read", the instructor "would just mark those pages on which we would be tested, and the rest would be ignored".

The police officer says of his course that "We were given a two hour lecture on the use of lethal force, half of which I'm pretty sure was incorrect. For example, the instructor told us that if a member is being assaulted by a big man, they have the right to shoot him dead immediately. Someone asked, 'But why not use pepper spray?', at which the instructor laughed and made a joke about 'you've obviously never been *donnered*'. He then reiterated that police could shoot at the slightest hint of threat."

About his exam at the conclusion of the course, the police officer says, "We were given a mound of paperwork to go through. We were given the questions and answers to a test on the Firearms Control Act, and told to copy – word for word – the answers out. We then marked '200/200' in red pen at the top of the pages, and put it in our official file. We went through a number of other tests for which the instructor gave us the answers without even reading the questions, and we then marked ourselves 100% for each of these too. We were also instructed to sign various forms which stated that we'd been informed of things we hadn't been informed of. This was a classroom including a brigadier, quite a few colonels and captains, and then all the rest – and nobody paused for a second to question our participating in this giant, organisationally sanctioned lie."

Whether or not the term maximum force was used, what was conveyed to the trainees was that certain types of actions on the part of an opponent could be used as a pretext for using force. Once they had been provided with such a pretext, there was no need for them to limit the amount of force used. This understanding may have been articulated by some of those who were guided by it as a concept of 'maximum force'. And, though the term may not have been used generally in firearms training, it is likely that the idea had gained considerable currency amongst the leadership, and potentially the members, of key units in the police. This may also help to explain why it was then used to explain the actions by the Operational Response Services units at Marikana.

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In his book, *Shoot to Kill*, an examination of the use of lethal force by police in the United Kingdom, Maurice Punch describes the trial of the police officer responsible for the killing of James Ashley in Sussex in 1998. The case involved a drug raid during the dead of night. The police officer who entered the darkened apartment where Ashley had been sleeping said that he had thought that Ashley was about to attack him. Ashley was not only naked but also unarmed. However, the presiding judge, Justice Anne Rafferty, instructed the jury to acquit the police

officer saying that those who should have been held responsible for the killing were not present in her court. “Those having responsibility for implementing, seeing good compliance and monitoring good practise as to the use of firearms,” she said, “bear a heavy responsibility for the death”.

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