

NATIONAL INSTRUCTION 1/2016

THE USE OF FORCE IN EFFECTING AN ARREST

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CHAPTER 1: BACKGROUND AND DEFINITIONS

1. Background

The purpose of this instruction is to regulate the use of *force* by a member to effect the arrest of a *suspect* as provided for in section 49 of the *Criminal Procedure Act*.

2. Definitions

In this instruction, unless the context indicates otherwise, —

- (a) “**authority to arrest**” means authority conferred by legislation to arrest a person;
- (b) “**commander**” means every Provincial or Divisional Commissioner and includes every *commander* at any level;
- (c) “**Criminal Procedure Act**” means the *Criminal Procedure Act*, 1977 (Act No. 51 of 1977);
- (d) “**force**” means any form of *force* which is applied to the body of a *suspect* and which is not of a trivial nature;
- (e) “**IPID**” means the Independent Police Investigative Directorate;
- (f) “**IPID Act**” means the Independent Police Investigative Directorate Act,

2011 (Act No. 1 of 2011);

- (g) **“lethal force”** means any *force* which is likely to result in the death of the *suspect* and includes the use of a firearm to shoot at a *suspect* (irrespective of which body part of the *suspect* was aimed at) (also referred to as *“deadly force”*);
- (h) **“suspect”** means a person reasonably suspected of having committed an offence; and
- (i) **“the Act”** means the South African Police Service Act, 1995 (Act No. 68 of 1995).

CHAPTER 2: GENERAL PRINCIPLES

3. The use of force to effect an arrest and the use of force in private defence

The use of force to effect an arrest is clearly distinguishable from the use of force in **private defence**. A situation may arise in which, while the member attempts to arrest the suspect, the suspect (or someone else) threatens to immediately use force against the member or another person. In such a case, the member is entitled to act in **private defence** (use force) to protect himself, herself or the other person. However, the purpose of using force in these circumstances will be to protect himself, herself or the other person and not to arrest anyone. Section 49 of the *Criminal Procedure Act* will accordingly not apply. The rules of the common law relating to private defence will apply.

4. The authority to arrest and the manner of effecting an arrest

- (1) A member may only arrest a person if he or she has the authority (power) to arrest that person. Legislation (the *Criminal Procedure Act* in particular) authorises a member to effect the arrest of a person in certain limited circumstances. Every member must acquaint himself or herself with the legislation that empowers a member to arrest a person and must, in particular, make sure that he or she understands the circumstances outlined in the legislation that must be present before a person may be arrested.
- (2) The requirements for effecting a lawful arrest are dealt with in Standing Order (General) 341. Only those aspects of arrest relating to the use of *force* are addressed in this instruction.
- (3) Section 39(1) of the *Criminal Procedure Act* provides that an arrest shall be effected with or without a warrant and *unless the person to be arrested submits to custody*, by actually touching his or her body or, if the circumstances so require, by forcibly confining his or her body.
- (4) Although section 39(1) authorises a member to “*forcibly confine*” the body of a person in the process of arresting the person, this is only permissible if the person **does not submit to custody and**

circumstances so require. Later in court, a member may be required to explain the circumstances that were present, which required him or her to “*forcibly confine*” the body of the person that he or she was arresting. Such circumstances may include the person attempting to evade the arrest by running away, verbally threatening, portraying threatening conduct, etc.

- (5) Section 39(1) therefore empowers a member *to use force to effect an arrest in certain limited circumstances only*. The purpose of using *force* must be “**to confine**” the body of the person to be arrested and may only be used if that person *does not submit himself or herself to custody and circumstances* require that *force* be used. A member who uses *force* for any other purpose (such as to punish or teach the suspect a lesson), may himself or herself be guilty of an offence, such as assault, assault GBH, attempted murder, etc.
- (6) It is obvious that section 39(1) of the *Criminal Procedure Act* envisages that **no force** will normally be required or be necessary to effect an arrest. However, in those limited circumstances in which *force* is necessary “*to confine*” the body of the person to be arrested, the purpose of using *force* **may only be to confine the body of the person to be arrested**. The use of *force* for any other purpose is accordingly not permissible (unlawful). Once the *suspect’s* body has been confined, the use of *force* must immediately stop.
- (7) Section 39(1) authorises the use of force in order to confine the body of a person to be arrested. Section 39(1) of the *Criminal Procedure Act* does not authorise the use of a firearm. Section 49 of the *Criminal Procedure Act* applies to the use of a firearm.

CHAPTER 3: WORDING OF SECTION 49

Section 49 of the *Criminal Procedure Act* reads as follows:

“Use of force in effecting arrest

- (1) *For the purposes of this section —*
 - (a) *'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect;*
 - (b) *'suspect' means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and*
 - (c) *'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.*

- (2) *If any arrestor attempts to arrest a suspect and the suspect resists the attempt or flees or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if —*
 - (a) *the suspect poses a threat of serious violence to the arrestor or any other person; or*
 - (b) *the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.”*

CHAPTER 4: REQUIREMENTS FOR THE USE OF FORCE

5. Prerequisites for the use of force

- (1) Section 49 of the *Criminal Procedure Act* provides that *force* may only be applied to a person ***if it is clear that an attempt to arrest him or her is being made***. Section 49 therefore requires that it must be “clear” to the *suspect* that an attempt to arrest him or her is being made.
- (2) The section does not stipulate how it should be made clear to the *suspect* that an attempt to arrest him or her is being made. The section merely requires that it should be made clear to the *suspect* that an attempt to arrest him or her is being made. Insofar as this may be reasonably possible, a person attempting to arrest the *suspect* must verbally inform the *suspect* that an attempt is being made to arrest him or her. (Words such as “**STOP, POLICE!**” will usually be sufficient.)
- (3) *Force* may only be used if the *suspect* ***resists the attempt or flees or resists the attempt and flees***. The degree of resistance that the *suspect* offers will usually determine the degree of *force* that may be applied to overcome the resistance and to prevent the *suspect* from fleeing. Usually, grabbing the *suspect* and pinning him or her to the ground should be sufficient to confine the body of the *suspect*.
- (4) The circumstances must be such that ***the suspect cannot be arrested without the use of force***. A member may be required in court to explain what the circumstances were that made it impossible to arrest the *suspect* without the use of *force*.
- (5) *Force* may only be used after the *suspect* has been *warned* that *force* will be used unless he or she stops the resistance or attempts to flee, but fails or *refuses* to do so.
- (6) The only exception is where the unlawful action immediately endangers the life of a person or persons and requires immediate action.

CHAPTER 5: MINIMUM FORCE AND PROPORTIONALITY

6. Minimum force reasonable in the circumstances

- (1) In terms of section 13(2)(b) of *the Act*, a member shall, where the use of *force* is authorised by law, use only the minimum *force* which is reasonable in the circumstances.
- (2) This principle entails that the desired objective with the use of the *force* (ie to effect the arrest, overcome the resistance to the arrest, or stop the *suspect* from fleeing or to protect life or property) and the means (the person or persons and the equipment available) to achieve the desired objective, must be considered.
- (3) Where it is reasonably foreseeable that a specific duty may require the use of *force* (such as an arrest where a warrant has been obtained) or the control of a gathering, an assessment of the risk must be made before performing the duty. Adequate personnel and equipment must, as far as reasonably possible, be deployed to ensure that the duty can be performed with the use of the minimum *force*. All the surrounding circumstances must be considered, such as the place where the duty is to be performed, the *suspects* likely to be encountered, whether they will be armed, travelling in a motor vehicle or on foot, etc.
- (4) If a *suspect* is encountered during the performance of routine duties, alternatives to obtain the desired aim must be considered (to illustrate: if a *suspect* flees, but is known to the member, it is not necessary to use *force* to arrest him or her if he or she can safely be arrested later). If the use of *force* is inevitable in order to obtain the desired aim, the minimum *force* must be used and the use of *force* must be discontinued as soon as the aim has been achieved. It is, for instance, not permissible to beat a *suspect* who merely offers passive resistance or to continue handling a *suspect*, who offers forceful resistance, roughly, but becomes subdued after the minimum *force* or another form of persuasion has been used. Members are expected to behave in a professional manner and are expected to not lose their tempers.

- (5) *Force* must always be used with the greatest circumspection. If *force* is used, members are expected to exercise self-control, patience and restraint, and consider all options before resorting to physical violence. The killing of a *suspect* is dealt with separately in Chapter 6. It is, however, important to always keep in mind that the use of *force* might result in the death of a *suspect*. The *IPID* will investigate all deaths resulting from police action in terms of section 28(1)(a) and (b) of the *IPID Act*. Should it be established that the death of a *suspect* resulted from the negligence of a member, such member, and in appropriate circumstances, the member's *commander*, may be criminally prosecuted.

7. Proportionality

- (1) The proportionality requirement involves a shift in emphasis. In the past, the law did not require that the harm done to reach the objective with the use of the *force* should be proportional in the circumstances. This has changed, proportionality will now always form part of the test to determine whether the *force* that was actually used in a specific instance, was legally permissible.
- (2) In exercising their powers, functions and duties, members are not allowed to indiscriminately use *force* to achieve even a legally permissible objective, but must ensure that the harm which may result from the use of the *force*, will be proportional in all the circumstances. This includes the seriousness and nature of the offence in respect of which the *suspect* is to be arrested, the conduct of the *suspect*, including any threats that the *suspect* makes, etc.
- (3) If the crime is not serious, such as crossing a road in violation of the rules of the road (jaywalking) or illegal parking, it is not permissible to use *force* to arrest the *suspect*, unless other circumstances, such as the conduct of the *suspect*, requires the use of that degree of *force* (the minimum *force*) necessary to confine his or her body.

- (4) If the crime is of a more serious nature, such as theft or damage to property, the minimum *force* necessary to effect the arrest, may be used.

- (5) Circumstances could, however, rapidly change and members must continuously consider and re-evaluate the circumstances, and act accordingly.

CHAPTER 6: THE USE OF LETHAL FORCE

8. Use of lethal force

- (1) The use of *force* to effect an arrest, which may result in the death of the *suspect*, will only be justifiable under the circumstances provided for in section 49 of the *Criminal Procedure Act*. The Constitution provides that "every person shall have the right to life".
- (2) Section 49(2) of the *Criminal Procedure Act* provides that "***in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if—***
 - (a) ***the suspect poses a threat of serious violence to the arrestor or any other person; or***
 - (b) ***the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.***"
- (3) Section 49(1) of the *Criminal Procedure Act* defines "***deadly force***" as "***force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.***"
- (4) Although section 49 addresses the justifiable killing of a *suspect* during the process of an arrest, attempted arrest or fleeing from arrest, the principles contained in the section will always be applicable where *force* is used, which might result in the death of a *suspect*. Thus, irrespective of the circumstances, lethal force may only be used where it would be justifiable in terms of section 49.
- (5) In the case of crimes against property, *irrespective of the value of the property*, the use of *lethal force* in order to effect an arrest will never be permissible. Property can never be more valuable than the life of a human being.

CHAPTER 7: COMMANDERS' RESPONSIBILITIES AND REPORTING INCIDENTS

9. Commanders' responsibilities

- (1) Every *commander* is responsible to ensure that all members under his or her command are properly trained in the principles relating to the use of *force*.
- (2) Taking into account the principles contained in this instruction and the equipment available, all *commanders* must ensure that contingency plans on the use of *force* are developed for the routine duties of members under their command. Whenever it is practically possible, the use of *force* should be planned in every instance where it is foreseeable that a specific duty may necessitate the use of *force*.
- (3) The contingency plan on the use of *force* by members during routine duties must reflect a careful and thorough consideration of the situations, which experience has taught will likely be encountered in the performance of the duties. The relevant Head of Legal Services must be consulted in the development of such plans. Members must be trained and periodically retrained in the contingency plans at local level and the use of *force* in general, to ensure that this instruction is adhered to.
- (4) A copy of the contingency plan must be provided to the Provincial Commissioner (in the case of a province) or the Divisional Commissioner (in the case of a division or in the case of the National Head of the Directorate for Priority Crime Investigation) who must keep record of all contingency plans in his or her province, division or directorate.

10. Reporting

- (1) If any person dies or is injured as a result of a police firearm being discharged, the responsible member must —
 - (a) immediately inform his or her *commander* or, if he or she is not available, the senior member at the police station of the area in

- which the incident had occurred;
- (b) safeguard the scene where the incident had occurred;
 - (c) provide or secure appropriate medical attention for any injured person; and
 - (d) ensure that *IPID* is notified of the incident, as required by the *IPID Act*.
- (2) The *commander* or other senior officer must respond to the scene, assess the situation, notify the nearest police station and, if appropriate, take control of the scene where the incident had occurred.