17 September 2018

Thomas Probert (Institute for International and Comparative Law in Africa, University of Pretoria), and
Kamelia Kemileva (Geneva Academy of International Humanitarian Law and Human Rights)

Dear Thomas Probert and Kamelia Kemileva,

Re: Request for inputs on the draft Geneva Guidelines on Less-Lethal Weapons in Law Enforcement

It has been kindly brought to our attention that you are seeking comments on a draft set of guidelines relating to the design, procurement, training and lawful use of less-lethal weapons (LLWs), in the context of law enforcement and the use of force. We have had an opportunity to review the draft Guidelines and have several comments and observations to make, if there is still time for them to be considered.

Preliminary contextual comments on the work of the Socio-Economic Rights Institute of South Africa (SERI) and its interest in policing matters

1. SERI is a non-profit human rights organisation that works with communities, social movements, individuals and other non-profit organisations in South Africa and abroad. We develop and implement strategies intended to challenge inequality and realise socio-economic rights.

2. SERI has various thematic areas, one of which is titled “political space”. It is through our political space work that we have conducted litigation, research and advocacy on issues relevant to the Geneva Guidelines process.

3. SERI has been involved in various cases across the country involving protests and police action in response to those protests. This is because in the various communities with whom we work, people often encounter police action during service delivery and other protests. Affected communities have included:

   a. The community of Thembelihle, an informal settlement in Lenasia, Johannesburg, which has on various occasions encountered police action during their protests. SERI has represented them in court as a result of the police action;
b. The community of Cato Crest, Durban, where police responded to service delivery protests in 2013 and subsequently with excessive force, including involving the shooting of three protestors. In one of those incidents, a minor child was fatally shot by the police. SERI acts for the victims and families in their civil claims against the Minister of Police; and

c. Since September 2015, SERI has represented numerous students and other persons, who were arrested and/or injured during the #FeesMustFall protests (see further below).

2. In a sustained intervention, SERI continues to represent 36 families of the miners who died on 13 and 16 August 2012, during the period of a labour strike in the platinum mining area of Marikana. The deceased mine workers were killed by police in circumstances predominantly involving the latter’s use of lethal force. Thus, the question of public order policing in post-apartheid South Africa has never been as confronting as it was through the events at Marikana. We represented the families throughout the subsequent judicial Commission of Inquiry (2012-2014), where we made submissions relevant to the issue of public order policing, and we continue to represent them in their civil claims against the State.

3. In addition to SERI’s representation of the 36 families affected by the policing operations at Marikana, SERI made a submission in October 2017 to the Panel of Experts on Public Order Policing, established by the then South African Minister of Police in the wake of the findings and recommendations made by the Marikana Commission of Inquiry. Although the Panel completed their report in April 2018, it had still not been made public, as of 17 September 2018.

4. In our experience, the police approach to crowd control or public order policing has far-reaching effects, including for the realisation of the various rights, which SERI, in partnership with others, seeks to promote and protect.

a. Although the main issue in the Marikana protests concerned salary increments and a dispute with a major employer, the conduct of the policing operations in response to the protests was a key aspect of the Commission’s inquiry, due in part to the high level of fatalities and injuries from those operations.

b. Likewise, the protests in Cato Crest were concerned with service delivery and the provision of housing, yet because of the injuries and the death resulting from the police response, those protests could not be discussed without public order policing being a central issue.

c. Similarly, while the #FeesMustFall protests concerned tertiary education fees, the manner in which police used force in response to the protests, resulting in serious injuries to protestors and bystanders, meant that SERI’s interventions have included a consideration of public order policing practices and the use of LLWs.
5. SERI is concerned with socio-economic rights, which we interpret to include and intersect with various situations such as precarious and informal work and the provision of basic services. We also understand keenly that our clients – and people in the position of our clients – often resort to protest action in a bid to have their voices heard by the authorities or other repositories of power. It is through this connection that the protection of the right to peaceful protest, and associated rights, is fundamental to SERI’s work and the state of public order policing in South Africa of equal concern.

Comments on aspects of the draft Guidelines in light of the above:

1. We welcome and concur with the strong emphasis in the opening sections of the draft Guidelines on the following issues:

a. That there are risks of harm, including serious or even fatal injuries, where Less Lethal Weapons (LLWs) “are not used in accordance with specifications, general principles on the use of force, and fundamental human rights”; and

b. That the intention of the Guidelines is to promote amongst a wide range of users of LLWs “accountability for the design, production, testing, transfer, deployment and use of such weapons”; and to accomplish this outcome within in the context of the UN Human Rights Council’s encouragement of States to establish protocols for the ‘training [on] and use of non-lethal weapons, bearing in mind that even less-lethal weapons can result in risk to life”; ¹

c. That in the conduct of law enforcement operations, the duty of law enforcement agencies is to “facilitate” and protect the right of peaceful assembly; and that the duty of States is in turn is to provide “protective” equipment for law enforcement officials to minimize their risk of injury or their unnecessary resort to the use of force;²

d. That the Guidelines has included a strong iteration of the general principles on the use of force by law enforcement officials, involving legality, necessity, proportionality, non-discrimination and the principle of pre-caution; ³ and

e. That the Guidelines have provided indicators for steps to entrench the accountability of law enforcement officials for “any decision to use force”, with the steps required including:

i. the clear identification as much as possible of all weaponry used in an operation to assist later investigations;

ii. the prompt and comprehensive reporting of operations involving the use of force;

¹ Draft Geneva Guidelines, pp. 4-5.
² Draft Geneva Guidelines, pp. 5-8.
³ Draft Geneva Guidelines, pp. 8-10.
iii. the exclusion of "obedience to a manifestly unlawful order from a superior" as justification for the use of force, and the holding of government or other authority responsible if "they encourage or promote unlawful behavior". 4

In SERI’s experience the failure by the authorities to ensure that the above accountability measures are implemented systematically or at all, including at the level of internal post-operation reviews and lesson-learning, leaves victims of the unlawful use of force further traumatised and potentially discouraged from exercising their rights. The Guidelines could elaborate further on the above steps, including with illustrations of ‘best practice’ on internal accountability processes.

Comments on the Draft Guidelines relating to specific LLWs which could pose risks of harm:

This last section of the Guidelines notes the State’s duty to ensure that specific acquired LLWs must be intended to meet legitimate law enforcement purposes and be compliant with international human right law. The duties arising from this include ensuring through relevant officials that the use and effects of such LLWs are monitored and appropriate policy and training developed and implemented, with techniques aimed at avoiding the use of force being at the heart of such training. 5 The Guidelines might usefully include cross-reference to best practice in these aspects from different jurisdictions.

SERI’s report on the policing of the student protests in South Africa6 documents instances of the police use of unlawful force, involving LLWs used against student protesters, human rights defenders and by-standers. In respect of specific LLWs reviewed in the Guidelines, we would like to note the following incidents and the conclusions reached as reported in A Double Harm7, which may be useful to cross-reference in the Guidelines:

1. Guidelines, Section 7.1.3: “pyrotechnic flash-bang grenades”, a disorientation device which is noted as not an LLW for public order policing purposes, but devices designed to help facilitate arrests in the course of high-risk operations. It is further noted in the Guidelines that their improper use "may cause serious burns or blast injuries and [with] a risk of fragmentation in certain cases". 8

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6 A Double Harm: Police misuse of force and barriers to necessary Health Care Services, Responses to student protests at the University of the Witwatersrand, September to November 2016 (ISBN: 978-0-63994368-0-2)
7 The conclusions were reached primarily on the basis of: interviews with the affected persons; medicolegal examinations of affected persons by an independent forensic pathologist and with access to their medical records, both processes with informed consent; referral to an independent ballistics expert to assess conclusions reached; witness evidence and audio-visual footage; and referral to law experts on conclusions reached under International and South African human rights law.
8 Guidelines, p.20
a. Please note a possible concurring example in Section 4.2 of A Double Harm,\(^9\) where the two victims, who were not posing a threat to the police or anyone else at the time, suffered severe thermal burns to their faces and other injuries when the device exploded over their heads as they ran together away from the police dispersal point. The injury evidence indicated that the explosion of the device occurred within several centimetres from their faces. This weapon is allowed under the South African Police Service National Instruction 4 of 2014 and relies on a massive disorienting sound from a double blast to cause panic and precipitate affected persons to run. SERI was reliably informed that the weapon, at a minimum was wrongly used; indicated a profound deficit of suitable training in correct weapon usage and deployment on the part of the police officer involved and an absence of appropriate command and control during the operation. There also remained the possibility that the weapon was deliberately misused.

2. Draft Guidelines, Section 8.5: “kinetic impact projectiles”, variously referred to rubber bullets, plastic bullets, baton rounds, attenuating energy projectiles, which “should only be used in direct fire against the lower body of a violent individual when a substantial risk exists of immediate serious injury to a law enforcement official or member of the public”. The Guidelines note risks of serious injury where the head or face is targeted, including fractures or damage to the eyes. There is also an “inaccurate”, indiscriminate aspect to the weapon which make the weapon inappropriate for dispersal purposes. The Guidelines state that the “use of LLWs to disperse an assembly is an indiscriminate tactic, and should only be considered a last resort.”

a. Please note possible concurring examples of the risks arising from the use of these weapons in response to protest gatherings in Section 4 of A Double Harm:

i. Section 4.3, where the police used rubber bullets indiscriminately to disperse an assembly after negotiations with the leaders of the protest group had broken down, injuring a human rights observer and damaging a health facility treating other injured students;\(^10\)

ii. Section 4.4, where police used rubber bullets without justification and indiscriminately in an attempt to deter first-aiders from providing assistance to injured students or to bystanders in the precinct area of a church; the parish priest suffered blunt force injury to his face when police fired rubber bullets directly at him from an armoured vehicle; and a bystander attempting to travel home amidst these police operations appeared to have been shot by a ricochet rubber

\(^10\) pp. 25-32
bullet which struck him in the right eye, causing permanent loss of sight.\textsuperscript{11}

iii. Section 4.7, where police unlawfully dispersed peaceful protestors attempting to negotiate with the police, who opened fire at them with rubber bullets at close range and without justification, resulting in serious injuries to a number of the protestors.\textsuperscript{12}

Expert opinion provided to SERI on these and other examples involving rubber bullets, as documented in \textit{A Double Harm}, suggested that the police had not been given specific training on the risks arising from the mis-use of the above weapon (in terms of proximity to the victim or from the ricochet effect) and that, furthermore, the particular firing mechanism made the weapon difficult to control in a crowd dispersal situation and inherently indiscriminate in its effects.

We hope that the above comments will be of assistance to you in the consultation process on the \textit{Draft Guidelines on Less-Lethal Weapons and Related Equipment in Law Enforcement}.

Sincerely

[Signature]

Stuart Wilson

Executive Director

\textsuperscript{11} pp. 32-43
\textsuperscript{12} pp. 56-59