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PART I

The use of weapons in law enforcement

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The use of firearms in law enforcement

STUART CASEY-MASLEN

In no field is the price of incompetence so high as in armed operations ... No subsequent action, no recrimination and no compensation can bring to life the innocent citizen or the police officer needlessly killed. Nothing will destroy confidence in the police more thoroughly than the apparently ill-trained and ill-disciplined policeman who kills or maims the innocent or who, through his incompetence, fails to protect the public from a dangerous offender.

Colin Greenwood, *Firearms Control: A Study of Armed Crime and Firearms Control in England and Wales*, 1972, p. 3¹

Introduction

Although written more than forty years ago, the remarks by Greenwood, a former British police officer, still resonate today. Innocent people have been killed, families have been laid low by tragedy, riots have erupted (sometimes inflicting a wide toll of death and destruction), and careers needlessly blighted as a result of the action of an armed police officer firing shots under extreme pressure. As Squires and Kennison observe, a decision made in seconds can have repercussions for years.² This chapter reviews the use of firearms during law enforcement under international human rights law. It does so particularly in light of the duty both to respect and to protect the right to life, for although death is by no means certain as a result of most uses of firearms, the risk is obvious and serious.³

The author would like to thank both Pierre Gobinet, Researcher at Small Arms Survey, Geneva, for his comments on a draft of this chapter (which does not necessarily reflect the views of the Small Arms Survey), and Charlie Beene for his suggestions and clarifications.

¹ Colin Greenwood, *Firearms Control: A Study of Armed Crime and Firearms Control in England and Wales*, Routledge, London, 1972, p. 3.

² Peter Squires and Peter Kennison, *Shooting to Kill?: Policing, Firearms and Armed Response*, Wiley-Blackwell, UK, 2010, p. 3.

³ Common to all firearms is that the severity and extent of a wound are determined not by the amount of kinetic energy possessed by a bullet but by the amount of this energy that is lost

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The use of firearms for law enforcement purposes needs to be clearly and strictly defined in national legislation, just as it is by international law. Further, given an ever-increasing recourse to private security service providers for protection of lives and livelihoods, the application of international norms and standards to such companies is also discussed. Finally, since a number of private citizens have shot and killed other private citizens, allegedly in self-defence or to prevent unlawful violence, the international legal considerations are also reviewed briefly.

A Fundamental principles governing the use of force in law enforcement

As the Preface to this book notes, the action of law enforcement may demand the use of force, including the use of weapons. One might argue that law enforcement is a duty inherent in the notion of sovereignty, not only a power derived from it. To be lawful, however, the use of force for law enforcement purposes – and any concomitant use of a firearm – must be both necessary and proportionate. Furthermore, any use of a weapon, including a firearm, where death or serious injury results must be followed by an independent investigation to determine the legality of that use of force and to ensure accountability for any unlawful acts. Instruction in the law and effective training in the lawful use of force, including in the appropriate use of a range of both lethal and ‘less-lethal’ weapons, are key to ensuring that law enforcement personnel respect the law while they discharge their duty to promote compliance by others.

in body tissue. The major determinants of the amount of kinetic energy lost by a bullet in the body are:

- The kinetic energy possessed by the bullet at the time of impact with the body,
- The shape of the bullet,
- The angle of yaw at the time of impact (the deviation of the long axis of the bullet from its line of flight; as soon as a bullet leaves the barrel, it begins to yaw),
- Any change in the presented area of the bullet in its passage through the body,
- Construction of the bullet, and
- The biological characteristics of the tissues through which the bullet passes.

Vincent J. M. Di Maio, *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques*, CRC Press, Boca Raton, 2000, pp. 46, 142. Punch claims that as many as two-thirds of those shot by police in the USA survive their injuries. Maurice Punch, *Shoot to Kill*, Policy Press, Bristol, 2011, pp. 1, 83, citing J. Timmer, *Politiegeweld*, Kluwer, Alphen aan de Rijn, 2005. Even a shot to the head is not necessarily fatal. In April 2012 William Lawlis Pace died aged 103. He had held the Guinness World Record for living the longest with a bullet in the head. It was almost ninety-five years since he was shot, accidentally, by his older brother with their father's .22 calibre rifle. Doctors had left the bullet inside his head for fear that

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Article 3 of the 1979 Code of Conduct for Law Enforcement Officials⁴ (hereafter, the 1979 Code of Conduct) identifies the most fundamental principles governing the use of force by the police (or those exercising police powers),⁵ namely that force may be used ‘only when strictly necessary’ and ‘to the extent required for the performance of duty’. This provision neatly encapsulates two core principles of the international law of law enforcement, namely ‘necessity’ and ‘proportionality’.⁶ The official commentary on Article 3 emphasises:

that the use of force by law enforcement officials should be exceptional;⁷ while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used ... In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

Based on these intertwined concepts of necessity and proportionality, the Code further stipulates that the use of firearms is considered ‘an extreme measure. Every effort should be made to exclude the use of firearms, especially against

surgery could cause brain damage. Associated Press, ‘Man, 103, dies – after 95 years with bullet in head’, *Guardian*, 27 April 2012, p. 29.

⁴ Adopted by United Nations (UN) General Assembly Resolution 34/169 of 17 December 1979. Melzer affirms that it is ‘widely recognized as an authoritative guide for the use of force by State agents engaged in law enforcement activities’. Nils Melzer, *Targeted Killings in International Law*, Oxford Monographs in International Law, Oxford University Press, 2009, p. 196.

⁵ According to the official commentary on Article 1 of the 1979 Code of Conduct:

- (a) The term ‘law enforcement officials’, includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.
- (b) In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

Commentary on Article 1, 1979 Code of Conduct, available at: www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx (accessed 29 August 2013).

⁶ According to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, ‘while the proportionality requirement imposes an absolute ceiling on the permissible level of force based on the threat posed by the suspect to others, the necessity requirement imposes an obligation to minimize the level of force applied regardless of the level of force that would be proportionate’. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, annexed to UN doc. A/66/330, 30 August 2011, §29, citing the former Rapporteur, as set out in UN doc. A/61/311, §41. In the view of a former Special Rapporteur on torture, ‘disproportionate or excessive exercise of police powers amounts to cruel, inhuman or degrading treatment and is always prohibited’. Report of the Special Rapporteur on the question of torture, Manfred Nowak, UN Commission on Human Rights, UN doc. E/CN.4/2006/6, 23 December 2005, §38.

⁷ Notwithstanding the use of the term ‘exceptional’, in Poland alone, for example, police officers are said to be conducting as many as four million interventions each year that require the use of force. Emil W. Plywaczewski and Izabela Nowicka, ‘The Use of Force by Police

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children.’⁸ The use of firearms is elaborated on in the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (hereafter the 1990 Basic Principles).⁹ The 1990 Basic Principles provide that:

Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.¹⁰

The steps that should be followed before, during, and after the use of firearms are also clearly spelt out in international standards. Article 11 of the 1990 Basic Principles states that national guidelines for the use of firearms should:

- specify the circumstances under which police officers are authorised to carry firearms and prescribe the types of firearms and ammunition permitted;
- ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
- prohibit the use of any firearms or ammunition that cause unnecessary injury or present an unnecessary risk;
- regulate the control, storage, and issuing of firearms and ammunition, including through the establishment of procedures to ensure that police officers are accountable for firearms and ammunition issued to them;
- require that warnings are given, ‘if appropriate’, when firearms are to be discharged; and
- provide for a system of reporting and investigation whenever police officers use firearms in the performance of their duty.

Governments and law enforcement agencies are also called upon to equip law enforcement officials with ‘various types of weapons and ammunition that

in Poland’, in Joseph B. Kuhns and Johannes Knutsson (eds.), *Police Use of Force: A Global Perspective*, Praeger, Santa Barbara, 2010, p. 21.

⁸ Commentary on Article 3, 1979 Code of Conduct.

⁹ Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. A UN General Assembly resolution adopted the same year welcomed the Basic Principles and invited governments ‘to respect them and to take them into account within the framework of their national legislation and practice’. Operative Paragraph 4, UN General Assembly Resolution 45/166, adopted without a vote on 18 December 1990. In the view of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, these standards are ‘authoritative statements of international law that set out the principles on the use of force by the police’. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, annexed to UN doc. A/66/330, 30 August 2011, §36. See also, e.g., Jelena Pejic, ‘Conflict Classification and the Law Applicable to Detention and the Use of Force’, Chapter 4 in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, p. 110. Pejic states that the Basic Principles are ‘arguably customary law’.

¹⁰ Principle 4, 1990 Basic Principles.

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would allow for a differentiated use of force and firearms.¹¹ The 1990 Basic Principles specifically envisage that, in order to minimise recourse to firearms, law enforcement officials should be provided with appropriate ‘non-lethal’ incapacitating weapons as alternatives, ‘for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons’.¹² Yet, more than two decades later, even some well-funded and equipped police forces still resort to firearms for lack of appropriate alternatives. On 11 August 2012 New York police officers approached a man in Times Square who appeared to be smoking marijuana. The man pulled out an 11-inch (28-centimetre) knife¹³ and ran.¹⁴ He appeared to have mental health problems.¹⁵ According to the *New York Times*:

The police gave chase, eventually cornering him near 37th Street and Seventh Avenue and killing him in a fusillade of bullets after, police officials said, he ignored orders to drop his weapon and lunged at officers ... Paul J. Browne, the chief police spokesman, said officers used pepper spray six times to try to halt the man,¹⁶ who repeatedly threatened officers with a kitchen knife with a six-inch blade.¹⁷

Police officials cited in the *New York Times* claimed that two officers fired a total of twelve shots at the man, Darrius H. Kennedy, after he ignored their orders to drop the knife he had been waving. At least seven bullets struck Mr Kennedy,

¹¹ Punch notes that over a ten-year period, forty-one people who were not carrying a live firearm were shot by police in Britain, and fifteen of these people died. Seven of those shot had no weapon at all. Punch, *Shoot to Kill*, p. 46.

¹² Principle 2, 1990 Basic Principles. The ‘possibility’ for law enforcement officials to be equipped with ‘self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation’ is also noted, ‘in order to decrease the need to use weapons of any kind’. See, generally, Chapter 2 in this book with regard to ‘non-lethal’ weapons where they are referred to, more accurately, as ‘less-lethal’.

¹³ See, e.g., Associated Press, ‘New York City police shoot knife-wielding man near Times Square’, *Guardian*, 12 August 2012. The knife was variously referred to as a ‘butcher’s knife’ and a ‘machete’ in other media reports.

¹⁴ See, e.g., Emily Anne Epstein and Associated Press, “‘Shoot me! Shoot me!’: Machete-wielding man killed by police in front of shocked tourists in Times Square after officers fired at least TEN times”, *Daily Mail*, 11 August 2012.

¹⁵ Squires and Kennison cite evidence that ‘criminals’ are ‘not necessarily the main recipients of police bullets. On the contrary, persons with mental or personality disorders, persons under the influence of drink, drugs or severe emotional distress ... are more frequently shot by police officers. In the USA, the label “suicide by cop” has been developed to account for the actions taken by depressed or disturbed persons provoking police officers into shooting them’. Squires and Kennison, *Shooting to Kill?*, p. 20.

¹⁶ It is, however, well known that someone under the influence of drugs may not be affected by pepper spray.

¹⁷ Colin Moynihan and Marc Santora, ‘Police fatally shoot knife-wielding man in Times Square’, *New York Times*, 11 August 2012.

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three of which hit him in the chest.¹⁸ It is perhaps surprising that other, ‘less-lethal’ weapons, notably a Taser, were not used on the suspect with a view to disarming and arresting him. According to a police source, none of the officers at the scene had Tasers or other similar devices.¹⁹ Subsequently, New York Police Department Commissioner Raymond Kelly claimed that officers had no choice but to open fire once confronted by Mr Kennedy: ‘There was an officer on the way there with a Taser. They were en route, but unfortunately the situation developed too quickly for them to arrive at the scene.’²⁰

B Intentional use of lethal force

The right to life is the ‘supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.’²¹ Accordingly, the use of deadly force by law enforcement officials is subjected to the most stringent restrictions under international human rights law. According to the Human Rights Committee, for example, which monitors the application and implementation of the 1996 Covenant on Civil and Political Rights:

The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.²²

Similarly, as the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated: ‘There consequently have to be very good reasons and safeguards if the power to use deadly force is placed in the hands of (sometimes young and inexperienced) police officers. It has been said that this entails making “godlike decisions without godlike wisdom”’²³

¹⁸ Patrick McGeehan, ‘Officials defend fatal shooting of a knife-wielding man Near Times Sq,’ *New York Times*, 12 August 2012. US police officers are generally trained to aim for centre mass, not the limbs of a suspect, when using firearms.

¹⁹ McGeehan, ‘Officials defend fatal shooting of a knife-wielding man near Times Sq,’ *New York Times*, 12 August 2012.

²⁰ Cited in Mark Hughes, ‘NYPD commissioner defends Times Square shooting,’ *Daily Telegraph*, 13 August 2012.

²¹ Human Rights Committee, General Comment No. 6: ‘The right to life (Article 6),’ Sixteenth session, 1982, §3. Tomuschat argues that it is a general principle of international law. Christian Tomuschat, ‘The Right to Life – Legal and Political Foundations,’ in Christian Tomuschat, Evelyne Lagrange, and Stefan Oeter (eds.), *The Right to Life*, Brill, Leiden, 2010, p. 16.

²² Human Rights Committee, General Comment No. 6: ‘The right to life (Article 6),’ Sixteenth session, 1982, §3.

²³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, annexed to UN doc. A/66/330, 30 August 2011, §14, citing quotation from Elizabeth Wicks, *The Right to Life and Conflicting Interests*, Oxford University Press, 2010, p. 130. The 1990 Basic Principles do not take a position on whether police officers should be routinely armed or not. Under Principle 19, ‘Those law enforcement officials who are required to carry

In its approach to regulating the intentional use of lethal force in law enforcement, international human rights law has infused the standards in the 1990 Basic Principles. According to Basic Principle 9: 'In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.' Thus, an important distinction is drawn between the potentially lethal use of firearms per se and the intentional use of lethal force. In neither case is a threat merely to property (i.e. not to any person) sufficient for the use of firearms.²⁴

Firearms may, however, be used 'in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.'²⁵ But, as we have seen, the threshold of an imminent threat of serious injury is not sufficient justification for an intentional killing: it must be 'strictly unavoidable in order to protect life'. This is by no means an academic distinction. Firing into the legs of a suspect at a distance and firing into their head at point-blank range are actions that will probably not lead to the same outcome.²⁶

Strict respect for international norms governing the use of lethal force by states varies. The threshold for the intentional lethal use of force has been interpreted less restrictively by both domestic US jurisprudence (relating to police powers) and the Inter-American Commission on Human Rights (in the context of counterterrorism operations).²⁷ In the 1985 case of *Tennessee*

firearms should be authorized to do so only upon completion of special training in their use.' In most states, police officers routinely carry firearms on patrol; notable exceptions are China, Ireland, New Zealand, Norway, and the UK.

²⁴ As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions notes, 'protection of property cannot be invoked as a justification for the use of potentially lethal force unless it is somehow linked to the defence of life (e.g. protecting a hospital or acting in other cases where destruction could endanger lives, as is the case with nuclear plants, etc.)'. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, annexed to UN doc. A/66/33030, August 2011, §43.

²⁵ Principle 9, 1990 Basic Principles (author's emphasis).

²⁶ Punch notes that the Netherlands police are trained to fire at the limbs, the explicit purpose being not to kill but to incapacitate in order to apprehend. He describes this as a 'shoot to live' approach. Punch, *Shoot to Kill*, p. 58. This is not, though, common practice among police forces worldwide.

²⁷ Principle 8 provides that: 'Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.' Furthermore, however, the Inter-American Commission appears to confuse the situations in which *firearms may be used* (imminent threat of death or serious injury, as stated above) with those in which *intentional lethal force* may be employed. Indeed, in support for its claim that law enforcement officials may use lethal force where

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v. *Garner*,²⁸ which remains the state of the law on the intentional use of lethal force in the United States of America (USA),²⁹ the US Supreme Court stated that:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.³⁰

The Court noted that the US common law rule allowing the use of whatever force is necessary to effect the arrest of a fleeing felon could no longer be applied literally given changes in the legal and technological context.³¹ Another

strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, it cites Basic Principle 9, which as we have seen limits the intentional use of lethal force to where it is strictly unavoidable in order to protect life. For differing views on this issue, see, e.g., Nils Melzer, 'Keeping the Balance between Military Necessity and Humanity: a Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', *International Law and Politics*, vol. 42, no. 3 (2010), 831–916, p. 903; Melzer, *Targeted Killings in International Law*, pp. 62, 197; and Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford Monographs in International Law, Oxford University Press, 2011, p. 238.

²⁸ US Supreme Court, *Tennessee v. Garner*, 471 US 1 (Judgment of 27 March 1985). The case involved the fatal shooting by a police officer of an unarmed 15-year-old boy. The suspect, who was shot in the back of the head with a .38 calibre pistol loaded with hollow point bullets, was fleeing a suspected burglary. On his person was found ten dollars-worth of money and jewellery he had apparently stolen from the house.

²⁹ Indeed, it is claimed that the decision in *Tennessee v. Garner* reduced the number of police killings in the USA by 16 per cent in the ensuing years. Abraham N. Tennenbaum, 'The Influence of the Garner Decision on Police Use of Deadly Force', *Journal of Criminal Law and Criminology*, vol. 85, no. 1 (1994), 241–60, cited by P. A. J. Waddington and Martin Wright, 'Police Use of Force, Firearms and Riot-control', in Tim Newburn (ed.), *Handbook of Policing*, 2nd edn, Routledge, London, 2011, p. 483. Waddington and Wright caution, however, that such instances are 'rare exceptions to the normal impotence of formal accountability mechanisms'. *Ibid.*

³⁰ The Court cited with approval the model penal code whereby: 'The use of deadly force is not justifiable ... unless: (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.' American Law Institute, Model Penal Code §3.07(2)(b) (proposed Official Draft 1962), cited in *Tennessee v. Garner* at §166, note 7.

³¹ Whereas felonies were formerly capital crimes, few are today, and many crimes previously classified at common law as misdemeanours are now felonies.