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"LETHAL FORCE"

The Problem

Fatal shootings by the security forces in Northern Ireland, especially but not only when the person killed is unarmed, or not a terrorist, can generate intense controversy. They are often criticised, at home and abroad, as evidence of a "shoot to kill" policy. And, when the policeman or soldier involved is either not prosecuted - or even when he is, but is acquitted, or, when convicted, rapidly released from prison - these accusations are often intensified, while allegations of a "cover up" may be added. Administrative arrangements, whereby those involved are not, for example, immediately handed over to the policemen investigating the shooting, or not transferred immediately to other duties do not allay such concerns. In short, whatever the rights and wrongs of particular fatal shootings, the way they are now handled gives grounds for concern - primarily, though again not exclusively, amongst Nationalists. Confidence in the impartiality of the security forces, and our commitment to the defeat of terrorism under the rule of law suffers accordingly.

2. This is unsatisfactory; and, during the passage of the Emergency Provisions Bill, Ministers committed themselves, several times, to the further consideration of these issues - as ones which went beyond the immediate scope of our Bill. (Indeed, so far as the state of the law on reasonable force is concerned - of which the use of "lethal force" by the security forces is a particular application - it has implications for the criminal law throughout the United Kingdom.)

3. So long as there remains a terrorist problem in Northern Ireland, and given what Ministers have said and the fact that SACHR and the Opposition will not let the matter drop, these problems will not go away. Inaction is not, therefore, an option. At the very least, we need to review thoroughly all the issues.

Purpose of Minute

4. This minute, therefore:

(a) itemises the inter-related aspects of a multi-faceted and sensitive issue; and,

(b) solicits views on the way ahead (including how to give effect to Ministerial commitments to Parliament).

5. The issues fall into three broad categories dealt with, briefly, in turn below:

(a) the law;

(b) sanctions; and,

(c) practice.

The Law

6. The power to use (any) force derives from Section 3(a) of the Criminal Law (NI) Act 1967:

"A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large."

7. This means that in Northern Ireland (as in England and Wales) if a policeman or soldier shoots and kills someone in circumstances where, if charged, his defence is that he thought, for instance, the person was about to shoot him but he was mistaken, he can only be convicted of murder if his defence is not believed; or acquitted on the grounds of self-defence.

8. This "all or nothing situation" does not, it is argued, do justice to the situation which occurs when members of the security forces in Northern Ireland, who are always armed, have to make snap decisions about, say, somebody who is trying to escape, or acting in a threatening way after a suspicious incident. The policeman or soldier may <u>think</u> it necessary to shoot, in order to protect his colleagues or effect an arrest. That decision could lead to prosecution - conviction for murder entails a mandatory life sentence; acquittal means just that. Either conclusion leads to further dispute. The policeman or soldier, his family and friends - and a significant section of the community - argue that it is monstrous that a minor misjudgement in reacting to a split second emergency, should lead to a conviction for murder and a sentence of life imprisonment. While the reactions to acquittal (or a 'failure' to prosecute) are equally predictable. (Moreover, a life sentence imposed in these circumstances comes up for review in the normal way - but the circumstances could, as in the case of Private Thain, lead to an early release. That decision, by the Secretary of State or Home Secretary, is easily perceived as a "re-sentencing process". The victim's family will see a life sentence for murder translated into a very short imprisonment. The defendant, though released - even re-engaged in the security forces - remains on supervision for the rest of his life, and his record accompanies him in seeking jobs and so on.)

9. Against this background, Lord Colville, at least in the past, SACHR, and others, including the House of Lords Select Committee on Murder, have urged a middle course (deriving ultimately from a decision by the Australian courts). Courts in some other jurisdictions (but not England and Wales) are now apparently prepared to direct a jury that where the necessary criminal intent was proved and the issue resolved on the validity and assertion of self-defence (which, if successful means that the killing was not unlawful), the jury could nevertheless consider whether the self-defence involved an excessive use of force. If so, they should be entitled to return an alternative verdict of manslaughter - and the trial judge entitled to pass a sentence which had regard to all the circumstances of the case (including, one assumes would be the case in Northern Ireland, that the killing was the result of a split second decision).

10. It is also immediately apparent that, were such a verdict available, the DPP's prosecution policy might differ. In circumstances where prosecution for murder could result in the conviction for manslaughter on the grounds of excessive force, the DPP might be more willing to initiate a prosecution, knowing that the lesser verdict was a possibility. (In a similar way, a prosecution for causing death by reckless driving can collapse into a conviction for careless driving.) Equally, however, the DPP might, instead of bringing a prosecution for murder in a particular case, bring a charge of manslaughter only, on the grounds that excessive force had been used in a particular case.

11. This is not the place to analyse the difficult legal issues involved; my intention is to draw attention to problems which, in collaboration with colleagues in other Departments, we need to resolve over coming months. Even if our final verdict is that a change in the NI (or even UK) law of murder/manslaughter is undesirable, this needs to be argued for - rather than, so far as Northern Ireland is concerned, simply assumed. If the law itself does not command confidence, then it is less likely that the application under it of "lethal force" will be acceptable to those

who are open to rational persuasion. Hence our first question is: 'whether the current law of murder/manslaughter in Northern Ireland is satisfactory; if not, how can it be improved; and what are the likely costs and benefits of change?'.

Sanctions

12. At present, policemen and soldiers are, like any other citizen, subject to the sanctions of the criminal law. So far as the Army is concerned (and the RUC has comparable Force Orders), the rules under which they may open fire are summarised in the "Yellow Card". (There are other, closely related, rules of engagement for: eg, firing from helicopters; the use of PBRs etc). This Card has no legal force; but it summarises the Army's understanding of the existing law. If that law is unsatisfactory, then the Yellow Card will be also - although there is no reason to doubt that it is comfortably within the existing law.

13. But, irrespective of the adequacy of the law (and associated Yellow Card and Force Orders), critics - including the SACHR - argue that: it does not sufficiently discourage the security forces from opening fire; it carries, in itself, no disciplinary (or criminal) sanctions; and it suffers from not being within the public domain. SACHR has, accordingly, produced its own, revised draft based on the existing law and the UK's obligations under International Law, and proposed that breaches of what they (and the official Opposition) urge should be a Statutory Code should be a criminal offence.

14. There are debating answers to all such points - frequently given during the passage of our Bill. But, if our interest is in convincing the public in Northern Ireland that soldiers (and policemen) are indeed restrained in opening fire, then there remains a case to answer for:

(a) publishing (a revised version of?) the Yellow Card (and comparable RUC Force Orders); and,

(b) considering the possibility of a statutory Code of Practice (whose breach would attract disciplinary sanctions).

15. Even when a soldier has killed someone in circumstances where the DPP has decided no criminal prosecution, whether for murder or manslaughter, is justified, disciplinary action may still be taken against the soldier concerned (as following the killing of Mr McAnespie at Aughnacloy).

Practice

16. Whatever the legal and/or disciplinary framework in which security force operations are conducted, there are several variously difficult administrative problems affecting a number of agencies, both before and after shootings have taken place. Thus, so far as the security forces are concerned, questions include:

(a) the planning of operations. (The view was expressed, for instance, by Prof Hadden at the recent Irish Association Conference that these could be so planned that, wholly within the law, members of the security forces might shoot and kill suspected terrorists - although it might have been possible to plan operations so that the latter were arrested);

(b) training (and, possibly more important, the service ethos) on the use of weapons. This could vitally affect the way in which eg the Yellow Card is applied in specific circumstances; and

(c) the follow-up to a shooting.

17. (c) includes such issues as the immediate availability of policemen and soldiers to the RUC investigating a shooting (a point to which the SACHR attaches the highest importance); the thoroughness of the subsequent police investigation - you are familiar with the way in which the ICPC can supervise RUC investigations into shootings by policemen, and why for the present there is no comparable "independent" element - other than the RUC themselves - into the investigation by the RUC of Army shootings; and the alleged desirability of the immediate transfer (or

suspension) of any soldier or policeman involved in a shooting to other duties - albeit in ways which did not impute any stigma of guilt, or complicity to a policeman or soldier.

18. The role of the NIO seems more straightforward: it is primarily one of ensuring that Ministers are fully apprised of the circumstances, with a view, if necessary, to almost immediate Parliamentary statements. OP LEVY is a comparatively recent innovation, which seems to be working well, for meeting this requirement. It will, however, before too long be due for an initial review. In the meantime, it should not be too readily assumed that the Secretary of State has no locus to seeking a report from the Chief Constable on any particularly difficult, or controversial shooting. (He has the legal power under the Police Act 1970 (Section 18(2)) to seek Reports from the Chief Constable on any matter.)

19. Then there is the practice of the DPP. He doe not make public the basis of his prosecution decisions. It is, therefore, difficult to reach a judgement as to whether - and if so how - a change in the law on murder/manslaughter is even, in principle, desirable. Equally, we cannot make a judgement on whether the DPP's practice is satisfactory or not. Once again, I would argue against assuming that the Secretary of State has no locus. To the extent that a decision not to prosecute may give rise to perceptions that there is a "cover up" in particular cases, then, other things being equal, damage is being done to the effectiveness of our security policy which, I make no apology for repeating, is based on defeating terrorism under the rule of law (which also requires being seen to operate under it).

20. Finally, there is the further complex of difficult questions surrounding inquests in Northern Ireland. However, the fact that inquests continue to have the spotlight on them in the way they now do, is, at least in part, a reflection of the fact that other elements in the system have not allayed unease in the circumstances of particular shootings. If we could achieve greater confidence, by whatever changes in law and practice in the areas sketched above,

the inquest process might become less controversial. However, we should not begin by assuming that, once the House of Lords has pronounced on outstanding issues, the system will be adequate in "confidence terms".

The Way Ahead

21. One useful side effect of the Bill has been to draw attention to the need for a synoptic approach to this most difficult of all "confidence issues". It is also a subject on which agencies outside the NIO, including the RUC and Army, are likely to have strong views. Hence, before approaching them formally, the NIO needs to become clearer in house what we believe the problems to be (and where solutions may lie). I emphasise however, that at this stage it is the comprehensive review which matters. That may well throw up new problems or novel solutions. None of us who has been most closely concerned with these problems over recent months is committed to any particular option or course - except that the issues do now need to be addressed thoroughly, objectively and together.

22. I offer, therefore, for your consideration and that of colleagues, the production of a "scene setting paper" identifying:

(i) the factual background to the problems (statistics, with analysis, of shootings, public reactions etc). This area is one where rhetoric, emotion and political trouble-making too easily crowd out dispassionate analysis. Hence a reliable data-base will be more than usually valuable;

(ii) the main areas for discussion (with more detailed Annexes, perhaps on: law, sanctions, practice);

(iii) the options for change (not forgetting the "zero option");

(iv) further work needed.

23. In the light of this staff work, we should be clearer about what changes the NIO might like to see; and how to get them. My preliminary thought is that, a (possibly) revised version of the paper suggested above might serve as a "scene setting paper" for an Inter-departmental Working Group under your chairmanship. This, as well as including interests from within the NIO, would embrace the RUC, the Army (and MOD?), Law Officers (given their responsibility for the DPP - the DPP himself, if possible), and the Home Office (given potential implications of changes in the law etc for Great Britain). We would also need, in parallel, to maintain our dialogue with SACHR (without arousing their expections), while it will be instructive (and quite amusing) to find out from the Irish what happens on their jurisdiction.

Informing Ministers

24. We shall also need to broker our review with Ministers. I see advantage in telling them sooner rather than later of how we propose to take their commitments forward. I should be happy to draft a note (a much shorter version of this) explaining our plans; while SECRASP might have an interest in the paper I have suggested in para 22. This would reassure Ministers; lend impetus to our review - since we should be under a commitment to report back to Ministers; and strengthen our negotiating position outside the NIO.

The Next Steps

25. There is much here to discuss. We might start by an informal meeting, under your chairmanship, with this minute serving as an "annotated agenda".

(signed)

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