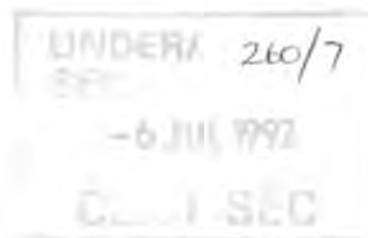


FROM: S J LEACH
 SECURITY POLICY AND OPERATIONS DIVISION
 3 JULY 1992

4331

cc PS/PUS (B&L)
 PS/Mr Fell
 Mr Ledlie
 Mr Thomas
 Mr Steele
 Mr Alston
 Mr Bell
 Mr Lyon
 Mr McClelland
 Miss Mills
 Mr Rickard
 Mr Perry
 Mrs Collins
 Mr Huggins
 Mr McIlroy
 Mr Bentley - HOLAB



MM
 230/7

1. PS/Mr Mates (B&L)
2. PS/Secretary of State (B&L)

~~as JSW~~

in Quill

no sign

USE OF LETHAL FORCE BY THE SECURITY FORCES

This submission sets out briefly the background to the concerns about the law and practice relating to the use of lethal force by the security forces, and invites Ministers to consider how they wish to proceed.

Background

2. In recent years a number of fatal shootings by members of the security forces, both in Northern Ireland and elsewhere (eg Gibraltar), have given rise to controversial and damaging publicity and have led to widely expressed concerns, by no means confined to one section of the community. (Nor indeed to Northern Ireland: opinion in the Irish Republic and the United States is highly sensitive to these issues.) These concerns have focussed particularly on the adequacy of the existing law governing the use of lethal force, and, as separate but related issues, the guidance given to members of the security forces on the use of lethal force and the arrangements for investigating controversial incidents. In

view of the centrality to our anti-terrorist strategy of obtaining and maintaining community confidence in the security forces, it is clearly most important that these concerns are addressed. During the passage of the EPA last year and on some subsequent occasions (though not as far as I know since the Election), Ministers have publicly confirmed that lethal force issues were kept under consideration.

The Current Law

3. The relevant law in Northern Ireland, which is similar to that applying in England and Wales, is the common law of murder and manslaughter, together with section 3 of the Criminal Law Act (NI) 1967, which permits such force as is 'reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders'. (The guidance to soldiers set out in the Yellow Card sets stricter standards but is not legally binding.) It has been argued that section 3 in particular is too broadly drawn, and that overall the law in this area provides neither sufficient prior restraint on the use of lethal force by members of the security forces, nor a suitable framework for possible prosecution after the event. For a conviction to be obtained - and currently the only possible criminal sanction for excessive force which results in death is a charge of murder - it must be established both that force is unreasonable in the circumstances and that there was an intention to commit a criminal act. It is a defence for the accused to show that he honestly believed that the use of lethal force was justified, even if, objectively, it was not. In simple terms, the intentional use of deadly force in self-defence or the prevention of crime is either justified, in which case no crime is committed, or it is not, in which case the killer is guilty of murder. Accordingly, if a member of the security forces uses excessive force which kills someone, he will either be guilty of murder, which carries a mandatory life sentence, or he will be acquitted. Either result gives rise to controversy.

4. Apart from the difficulties for the prosecution in making a case for murder, the Courts have refused to consider any crime other than murder where a member of the security forces deliberately uses deadly force. As a result, only a few prosecutions have been brought, only one of which was successful.

Proposed Solutions

5. Suggestions for change have been put forward by a number of reputable bodies, including the House of Lords Select Committee and the Law Commission, while the Irish have also raised the subject periodically through the Secretariat; work was set in hand on a joint paper which was to have been presented to the March 1992 IGC, though in the event this did not happen. In general the proposals have concentrated on three areas:

- a. amendment of the law on murder and manslaughter, perhaps by reducing the extent to which 'honest belief' can be a complete defence regardless of circumstances or by introducing determinate sentences for murder (Lord Colville);
- b. introduction of a new intermediate homicide offence, perhaps where 'excessive' force is used, eg unjustifiable or culpable homicide (SACHR, Criminal Law Revision Committee, House of Lords Select Committee, Lord Colville); and
- c. introduction of statutory Codes of Practice (with either or both criminal and disciplinary sanctions), so as to define more precisely the circumstances in which the use of lethal force could be justified (SACHR).

The geographical scope of the proposed changes also varies, with some arguing for a UK-wide change, and others maintaining that any new offence should be limited to Northern Ireland and/or to the security forces.

6. There are difficulties with all these approaches, and in particular with those proposals which involve a change to the general criminal law on homicide. This, of course, is similar in England, Wales and Northern Ireland, and any changes in Northern Ireland could have potentially far-reaching implications outside the Province, and beyond the anti-terrorist campaign. Similarly, there are problems with proposals which suggest that there are instances involving the use of firearms where some force might be justified but lethal force is excessive. On the other hand, while the proposed solutions might not end completely the controversy surrounding the use of lethal force, their introduction would certainly go a considerable way towards increasing public confidence by demonstrating the accountability of the security forces for their actions. In particular, it would provide reassurance to the Nationalist community, where disquiet over a number of fatal incidents involving the security forces has been greatest. Nevertheless, while a change in the law might result in an increase in prosecutions, the introduction of a lesser offence, with a corresponding reduction in penalty, could lead to criticism that there was one law for the security forces and another for everyone else. Equally, there is a vociferous section of Nationalist opinion, largely at the Republican end of the spectrum, for whom no use of lethal force by British security forces, however justified objectively, is ever acceptable.

7. Any changes in the law will of course have a significant impact on individual members of the security forces, and could affect the conduct of the anti-terrorist campaign more widely, including the tasking and conduct of particular operations. These aspects will need careful consideration. Many feel that too much restraint is already imposed on the security forces and that a change in the law (with a likelihood of more prosecutions), or a stricter Code of Practice, could make their task more difficult, and, indeed more hazardous, and could have an adverse effect on morale. This would be particularly so if the courts (freed from the mandatory life sentence for murder) awarded long fixed-term sentences, which eliminated any possibility of early release as in the Thain case

(1984). The judge in that case found that Private Thain did not honestly believe that he was justified in opening fire; he was convicted of murder, but released on licence after 26 months.

Investigations/Inquests

8. It should be noted that there might be pressure for any study of the law relating to lethal force also to address some associated issues which have been the focus of concern. Thus for example, all fatal shooting incidents involving the security forces are investigated by the police; those involving the RUC are also supervised by the ICPC. The DPP provides a further independent element in the process. Controversial incidents nevertheless frequently lead to calls for a public inquiry rather than a police investigation or for an officer from an outside force to head the investigation. Demands are also made for the police officers/soldiers involved to be suspended from duty pending the outcome of the investigations; this tends not to happen both for operational reasons and because of a presumption of the innocence of those involved until proved otherwise. Concern about the investigation of fatal incidents, however unfounded, tends to be exacerbated by the perception in some quarters that the inquest system in Northern Ireland, with its limited range of findings and the fact that security force witnesses directly involved in incidents do not give evidence in person, is unsatisfactory. Inclusion of these issues within the terms of reference of a study of the law on lethal force would of course make it an even more complicated exercise.

Recent Developments

9. While the profile of this issue is currently fairly low - perhaps because of the absence of controversial killings in recent months and the fact that several members of the security forces involved in fatal shootings are currently awaiting trial for murder, thus assuaging nationalist concerns that the existing law is inadequate - this will inevitably change when another incident

occurs. A recent development which may raise the issue, at least in legal circles, is the fact that the Law Commission, as part of its revised strategy for the codification of the whole of the criminal law in England and Wales, has recently sent to the Home Office as a consultation paper a draft Criminal Law Bill about non-fatal offences against the person. Some of the Commission's proposals on general defences may, however, have implications for the homicide law, including the use of lethal force in public or private defence. We are in the process of commenting to the Home Office on the consultation paper, (basically to the effect that nothing in their response to the Commission should prejudge Ministerial decisions on the way ahead in this area); but it is just possible, albeit unlikely, that the Home Office's formal reply to the Commission at the end of July could spark a renewed debate.

10. Also relevant to our consideration of this issue is the case of Paul Kelly, shot and killed by the UDR in an apparent joy-riding incident in January 1985. This case, which is discussed in more detail in Mrs Collins' submission of 2 July, has recently been taken to the European Court of Human Rights by Kelly's father, who is challenging the 'use of force' powers contained in section 3 of the Criminal Law Act 1967. Government observations on the case were submitted in May 1992. No ruling by the Court is expected for some months yet.

Inter-Departmental Working Group

11. In view of the complexity of the problem, the former Secretary of State took the view that all the issues involved should be rigorously examined in a non-public way, to reassure both the Government and, subsequently, its critics, that the law and practice governing the use of lethal force is appropriate; or, failing this, to identify what changes are needed. He believed that the best way forward would be to establish an Inter-Departmental Working Group. The Prime Minister agreed in March that a group as proposed by Mr Brooke should be set up.

12. As any changes in the law relating to lethal force will have implications for the rest of the UK, the composition of any working group is for debate. There would be some attractions in having a Cabinet Office-led group, with membership including the NIO, the Ministry of Defence and the Home Office. Representatives of the Attorney General's Office and the Scottish Office would also be invited to attend. (The alternative of an NIO-chaired committee would require additional resources if either SIL, CJPB or SPOB were to take on the role of servicing the group.) If Ministers wish this option to be followed we would plan to propose to the Cabinet Office that they take the lead.

13. Although the principal issue to be considered by the Working Group would be the relevant criminal law, it would remain to be determined whether its remit should cover all relevant issues, including the investigation of shooting incidents, the removal from active duty of personnel involved, and guidance to and the training and discipline of members of the security forces, including the possibility of replacing the Yellow Card with a statutory Code of Practice.

14. Mr Brooke subsequently spoke to the Attorney General and the Home Secretary of the day about the formation of the Inter-Departmental Group and received favourable responses. He also discussed the proposal with the then Defence Secretary who did not, at that time, give his full commitment to the proposal. The General Election intervened before matters could be taken further.

Alternative Approaches

15. Other options for taking this issue forward which the previous Secretary of State considered included the establishment of a publicly-announced independent review of the issues by a respected legal figure; a similar review conducted in private by a distinguished independent lawyer; and an in-house review by officials, but with terms of reference and a clear remit to report back to the Secretary of State within a set timescale. (While this

would enable further consideration to be given to the issues within the A.O., no final decisions could be taken without the involvement of other Departments.) Although Mr Brooke decided, for the reasons set out above, that an Inter-Departmental Group was the most appropriate vehicle, these other avenues could be reopened.

Conclusion

16. The issues raised by the use of lethal force by the security forces are both highly technical and extremely sensitive. The intrinsic importance of the subject, past Ministerial commitments to consider the issue, and the continuing interest of outside bodies, including the Irish, point to the need for us to consider these issues in a structured and formal way. The main option for doing so is to pursue the proposal to establish an inter-departmental committee; but other possibilities would be to appoint an outside figure to conduct either a public or private review; or to continue internal consideration of the issues, reporting to Ministers within a set timescale. This last option could, of course, be a preliminary to an inter-departmental committee. (Since the proposal for an inter-departmental committee has been approved by the Prime Minister, the adoption of a different route would require the Secretary of State to go back to No.10 to seek endorsement of a revised approach.)

17. Officials would be grateful to know how the Minister of State and Secretary of State wish this issue to be taken forward.

[Signed SJL]

S J LEACH
SHA Ext 2201