

ACADEMY IN-BRIEF No. 6

Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council

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Introduction

Determining with precision the circumstances in which agents of the state – the police in particular – may deprive citizens of life is at the heart of assessing a state’s respect for the right to life. As the Human Rights Committee wrote in its first General Comment on the right to life under the International 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.’¹ As a result, the use of force by law enforcement agencies has been high on the agenda of the Human Rights Council for many years.

This In-Brief proposes to examine the key issues of human rights that are affected by law enforcement agencies’ use of force and to identify how the Council could further promote respect for international standards governing policing. What are the main standards and how are they understood? Do they enjoy widespread support among states and international organisations, including during counterterrorism operations? Would it be warranted to set out in more detail how the standards should be applied?

Section One of the In-Brief summarizes existing international law governing the use of force for purposes of law enforcement. It identifies areas of general agreement and issues of particular contention. With respect to the right to life, such issues include the circumstances in which a law enforcement official may have recourse to the use of firearms and may even intentionally kill.

Section Two discusses the extent to which the UN human rights machinery, and the Human Rights Council in particular, have addressed the use of force for purposes of law enforcement. For example, two Council resolutions on peaceful protest (HRC/RES/25/38 of March 2014 and HRC/RES/31/37 of March 2016) contain important references to the legality of use of force (see Annexes 1 and 2). As requested by the 2014 resolution, the Special Rapporteurs on extrajudicial, summary and arbitrary executions and on rights to freedom of peaceful assembly and of association compiled practical recommendations for the proper management of assemblies which were submitted to the Council in early 2016. These also considered the policing of demonstrations in accordance with international human rights law. In addition, over the years, reports by the

¹ Human Rights Committee (HRCtee), General Comment No. 6 on Article 6, the right to life, Sixteenth session (1982), §3.

United Nations Special Rapporteurs on extrajudicial, summary and arbitrary executions and on torture and other cruel, inhuman or degrading treatment or punishment have examined the legality of use of force by the police and other law enforcement agencies.

Finally, building on normative achievements inside and outside the Human Rights Council, Section Three suggests how the Council and the UN special procedures could pursue their support for the right to life by continuing to address law enforcement concerns and challenges. This In-Brief does not address the rules that govern the conduct of hostilities in an armed conflict, but its recommendations would apply to acts of law enforcement that occur *during* situations of armed conflict.

1. The International Law of Law Enforcement

A. Sources and Status of Norms

One may refer today to the law of law enforcement,² a body of international law derived from a combination of customary rules and general principles of law.³ Many of the rules governing the use of force were first articulated in two instruments elaborated under the auspices of the United Nations (UN) Crime Congress:⁴ the 1979 Code of Conduct for Law Enforcement Officials⁵ and the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁶

Many of the key norms set out in these texts are widely regarded as binding international law. For instance, both the European Court of Human Rights and the Inter-American Court of Human Rights have cited the 1990 Basic Principles as authoritative statements of international rules governing use of force in law

² See S. Casey-Maslen (ed), *Weapons under International Human Rights Law*, Cambridge University Press (CUP), 2014, pp xvi–xvii.

³ The primary and secondary sources of international law are set out in Art. 38(1)(b) and (c) of the 1945 Statute of the International Court of Justice. Customary law and general principles of law are both primary sources of law, along with treaties.

⁴ Every five years, policy-makers and practitioners working in crime prevention and criminal justice gather for the UN Crime Congress to help shape the agenda and standards of the United Nations on crime prevention and criminal justice. The work of the Crime Congress is supported by the UN Office on Drugs and Crime in Vienna.

⁵ The 1979 Code of Conduct for Law Enforcement Officials was adopted by UN General Assembly Resolution 34/169 of 17 December 1979. In para 1 of the resolution, the Assembly decided to 'transmit it to Governments with the recommendation that favourable consideration be given to its use within the framework of national legislation or practice as a body of principles for observance by law enforcement officials'.

⁶ The Basic Principles were adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990. In its Resolution 45/166, adopted without a vote on 18 December 1990, the UN General Assembly welcomed the Basic Principles and invited governments to respect them (§4).

enforcement.⁷ Similarly, in its draft new General Comment on the right to life (not yet finalized when this In-Brief was completed), the Human Rights Committee states that ‘all operations of law enforcement agents should comply with relevant international standards, including the Code of Conduct for Law Enforcement Officials ... and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), and law enforcement agents should undergo appropriate training designed to inculcate these standards so as to ensure, in all circumstances, the fullest respect for the right to life’.⁸

B. The Three General Principles Governing Use of Force

In so far as it governs use of force, the law of law enforcement has three main components: necessity, proportionality, and precaution.⁹ These norms are binding on all states as general principles of law.¹⁰ Necessity and proportionality set limits on how and when force may be used lawfully during policing actions. Law enforcement officials must comply with both principles: failure to respect either principle will usually mean that a victim’s human rights have been violated by the state. In contrast, the principle of precaution applies upstream; it requires states to ensure that law enforcement operations are planned and conducted so as to minimize the risk of injury.

1. The Principle of Necessity

The principle of necessity holds that force used for the purpose of law enforcement must be necessary in the circumstances. Article 3 of the 1979 Code of Conduct stipulates that law enforcement officials may use force ‘only when strictly necessary’. The accompanying official commentary emphasizes that any use of force by law enforcement officials should be ‘exceptional’. It follows that in

⁷ See, e.g., European Court of Human Rights (ECtHR), *Benzer v Turkey*, Former Second Section, Judgment, App no 23502/06, 12 November 2013 (as rendered final on 24 March 2014), §90; and Inter-American Court of Human Rights (IACtHR), *Cruz Sánchez et al v Peru*, Judgment (Preliminary Objections, Merits, Reparation, and Costs), 17 April 2015, §264. The Court refers to the 1979 Code of Conduct in the same paragraph.

⁸ HRCttee, Draft General Comment No. 36 on Article 6, the right to life, draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs, CCPR/C/GC/R.36/Rev.2, 7 September 2015, §19.

⁹ See, e.g., Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, §§59–73.

¹⁰ S. Casey-Maslen and S. Connolly, *Police Use of Force under International Law*, Cambridge University Press, forthcoming (2017), Ch. III.

many instances force will not be legally permissible and non-violent means should therefore be used to ensure compliance.¹¹ Non-violent means include persuasion, negotiation, and mediation, backed by the inherent authority of a law enforcement official who is acting on behalf of the state. More controversially, the Article may also imply that a law enforcement official should wait for appropriate resources to arrive, for instance when he or she seeks to effect the arrest of someone suffering from mental health issues.¹²

A second element of the principle of necessity is that each use of force, whatever its nature and extent, must be for a legitimate purpose. As Article 3 of the 1979 Code of Conduct stipulates, law enforcement officials may use force only to the extent required for the performance of their duty. The accompanying official commentary clarifies that law enforcement officials may use such force, and no more, ‘as is reasonably necessary under the circumstances’ to prevent crime or to effect or assist in the lawful arrest of criminals or suspected criminals. The Council of Europe’s European Code of Police Ethics of 2001 similarly stipulates that the police may use force ‘only to the extent required to obtain a legitimate objective’.¹³

Accordingly, force must never be used vindictively or as a form of extrajudicial punishment. It may never be applied in a discriminatory manner, or against an individual who offers no resistance. In all circumstances, force must cease to be applied when the need for further violent action has passed (for example, when a suspect is safely and lawfully detained). Discriminatory practices, for example against minorities, are ‘in principle arbitrary’ and therefore a violation of international law.¹⁴ Self-evidently, unlawful forms of arrest or detention are not legitimate law enforcement purposes.

A third, critical element of the principle of necessity affirms that, when some level of force is needed, no more than the minimum force that is reasonably necessary in the circumstances is to be used.¹⁵ This means that even potentially violent suspects should be arrested rather than killed, whenever this is reasonably

¹¹ As 1990 Basic Principle 4 provides: ‘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.’

¹² See, e.g., ECtHR, *Shchiborshch and Kuzmina v Russia*, First Section, Judgment, 16 January 2014 (as rendered final on 2 June 2014).

¹³ European Code of Police Ethics, adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, §37, <http://polis.osce.org/library/f/2687/500/CoE-FRA-RPT-2687-EN-500>.

¹⁴ See HRC/RES/31/37, OP2, Human Rights Committee, General Comment no 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, §17.

¹⁵ See Commentary (a) on Art. 3, 1979 Code of Conduct; and Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, §59.

possible,¹⁶ and that force used ‘must be in keeping with the level of resistance offered’.¹⁷ For example, in the 1982 case of *Suarez de Guerrero v. Colombia*, the Human Rights Committee found that the state had violated the right to life when law enforcement officers shot and killed a group of suspected terrorists, instead of arresting them as they could certainly have sought to do in the circumstances.¹⁸ The Committee stated that:

The police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant. In the case of Mrs. Maria Fanny Suarez de Guerrero, the forensic report showed that she had been shot several times after she had already died from a heart attack. There can be no reasonable doubt that her death was caused by the police patrol.

... For these reasons it is the Committee’s view that the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to article 6 (1) of the International Covenant on Civil and Political Rights.¹⁹

According to the European Court of Human Rights, ‘in respect of a person who is ... confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is, in principle, an infringement’ of the right to freedom from torture and inhuman or degrading treatment.²⁰ In consequence, each use of force needs to be justified and justifiable. This also means that, when the need for force ends, no further force may be applied.

¹⁶ N. S. Rodley, ‘Integrity of the Person’, in D. Moeckli et al (eds), *International Human Rights Law*, Oxford University Press (OUP), 2010, p 223.

¹⁷ IACtHR, *Nadege Dorzema et al v Dominican Republic*, Judgment (Merits, Reparations and Costs), 24 October 2012, §85(iii). See also N. S. Rodley with M. Pollard, *The Treatment of Prisoners under International Law*, 3rd edn, OUP, 2011, p 499.

¹⁸ HRCtee, *Suarez de Guerrero v Colombia*, Views, Comm no R.11/45, 9 April 1981, Supp No. 40 (A/37/40) at 137 (1982).

¹⁹ *Ibid*, §13.2 and 13.3.

²⁰ ECtHR, *Bouyid v Belgium*, Grand Chamber, Judgment, 28 September 2015, §§88, 100.

2. The Principle of Proportionality

Application of the principle of proportionality to the use of force in law enforcement is much misunderstood. It is sometimes confused with the duty to use minimum necessary force (which, as described above, is part of the principle of necessity) or misinterpreted to mean that a law enforcement official is only entitled to use the same level and type of violence as a criminal suspect. In fact, proportionality ‘sets a maximum on the force that might be used to achieve a specific legitimate objective’.²¹ According to the commentary on Article 3 of the 1979 Code of Conduct, referred to above: ‘In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved’.²²

Proportionality comes into play when the principle of necessity has been met, but when acting in accordance with the principle of necessity may render necessary force unlawful. As 1990 Basic Principle 5 stipulates: ‘Whenever the lawful use of force and firearms is unavoidable, law enforcement officers shall ... act in proportion to the seriousness of the offence and legitimate objective to be achieved.’

An example of disproportionate use of force would be to use a firearm to stop an unarmed thief from escaping. If the circumstances are such that a police officer at the scene can only prevent a robber from escaping by using his or her firearm, the principle of proportionality may intervene to render its use unlawful. As the European Court of Human Rights has held, an escaping suspect who does not pose a threat to life may not be shot ‘even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost’.²³

3. The Duty of Precaution

The third principle acts as a precursor to the principles of necessity and proportionality. The authorities have a duty to plan law enforcement operations in a manner that minimizes the risk that its law enforcement agencies and officials may kill or injure a member of the public (or another law enforcement official). According to 1990 Basic Principle 5(b), whenever lawful use of force and firearms is unavoidable, law enforcement officials must ‘minimize damage and injury’

²¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, §66. Its meaning is therefore to be distinguished and differs from the notion of proportionality in other branches of international law, such as *ius ad bellum* or international humanitarian law.

²² Commentary (b) on Art 3, 1979 Code of Conduct.

²³ ECtHR, *Nachova v Bulgaria*, Grand Chamber, Judgment, 6 July 2005, §95.

and 'respect and preserve human life'. However, as the Special Rapporteur on extrajudicial, summary or arbitrary executions has written: 'Once a situation arises where the use of force is considered, it is often too late to rescue the situation. Instead, in order to save lives, all possible measures should be taken "upstream" to avoid situations where the decision on whether to pull the trigger arises, or to ensure that all the possible steps have been taken to ensure that if that happens, the damage is contained as much as is possible.'²⁴

The precautionary principle was first enunciated by the European Court of Human Rights in its 1995 judgment in the *McCann* case. The Court stated that it 'must carefully scrutinise ... not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force'.²⁵ In a similar vein, the Inter-American Court of Human Rights has held that proportionality 'is also related to the planning of preventive measures, since it involves an assessment of the reasonableness of the use of force. Thus, it is useful to analyze the facts rigorously to determine ... whether the violations could have been avoided with the implementation of less harmful measures...'²⁶

The need to use force may also be obviated, or at least minimized, by equipping police forces appropriately with 'self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation'.²⁷ Failure to provide its law enforcement agencies and officials with appropriate defensive equipment may mean that a state has violated its duty of precaution, for instance when this leads inevitably or predictably to use of excessive force.²⁸

²⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, §63.

²⁵ ECtHR, *McCann et al v UK*, Grand Chamber, Judgment, 27 September 1995, §194.

²⁶ IAmCtHR, *Nadege Dorzema et al v Dominican Republic*, Judgment (Merits, Reparations, and Costs), 24 October 2012, §87.

²⁷ 1990 Basic Principle 3.

²⁸ In January 2016, the United States (US) Police Executive Research Forum (PERF) published valuable guidelines on the use of force. Guiding principle 28 stated that: 'Personal protection shields may support de-escalation efforts during critical incidents, including situations involving persons with knives, baseball bats, or other improvised weapons that are not firearms'. See PERF, *Use of Force: Taking Policing to a Higher Standard: 30 Guiding Principles*, Critical Issues in Policing Series, 29 January 2016, Guiding Principle 28 (bold emphasis removed).

C. Specific Rules on Use of Certain Weapons

1. Specific Rules on Use of Firearms

It is evident that the principles of necessity and proportionality have particular implications for any use of firearms. In addition to these principles, which apply to any use of force, specific provisions in both the 1979 Code of Conduct and the 1990 Basic Principles cover the use of firearms.²⁹ Establishing the circumstances under which a law enforcement official may lawfully open fire on a citizen remains a highly sensitive area for states, especially in the context of counterterrorism operations. At the same time, because use of force creates a risk to life, it engages essential international legal standards. Moreover, when a police officer opens fire when he or she is not entitled to do so, or is perceived by the public to have used excessive or unnecessary force, this can trigger a violent public reaction.

The precise legal rule to be applied depends on whether a law enforcement official shoots ‘to stop’ a suspect or with intent to kill. The rules are not always reflected in domestic law and practice, and have sometimes been misunderstood or mischaracterised by commentators.

A. Shooting ‘to stop’

The official commentary on Article 3 of the 1979 Code of Conduct states that: ‘Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.’ In contrast to the hortatory nature of the guidance in the Code of Conduct, the 1990 Basic Principles describe the specific rules that govern use of firearms in law enforcement. Principle 9, in particular, declares:

Law enforcement officials shall not use firearms against persons except 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

²⁹ It would seem that *use* of firearms includes brandishing as well as discharging them. Evidence to support this assertion is found in the 1990 Basic Principles, Principle 11 of which stipulates that rules and regulations on the use of firearms by law enforcement officials should include guidelines that ‘(b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm’, and ‘(e) Provide for warnings to be given, if appropriate, when firearms are to be *discharged*’ [added emphasis]. See Casey-Maslen and Connolly, *Police Use of Force under International Law*, Ch. IV.

authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

This provision means that, under the law of law enforcement, four scenarios permit the lawful use of firearms. Each use remains lawful only if less extreme means are, or will be, unsuccessful.

- In self-defence or to defend others from an imminent threat of death or serious injury.
- To prevent a particularly serious crime involving a grave threat to life.
- To enable a person resisting arrest to be arrested if he or she is about to commit a particularly serious crime that involves a grave threat to life.
- To prevent a person resisting arrest from escaping where he or she is about to commit a particularly serious crime that involves a grave threat to life.

Each of these scenarios assumes that firearms are to be discharged, not with the intention to kill, but only to stop a suspect ('shooting to stop'). They also assume that it is not lawful under any circumstances to use firearms merely to protect property; doing so violates international law. This last standard is not accepted or respected in all states, however; as Section Two illustrates, positions are evolving.

The default situation that justifies the recourse to firearms is one that occurs when a law enforcement official or member of the public faces an imminent threat of death or serious injury. To pose such a threat, a suspect does not need to wield a firearm. Wielding a knife, iron bar, or even a baseball bat, driving a car at someone, or applying a lethal chokehold, can all be sufficient threats, depending on the situation. However, 'serious injury' should be construed narrowly to mean injury that is potentially fatal. Rape may also amount to a sufficient threat.

According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, 'an imminent or immediate threat' should be understood to mean 'a matter of seconds, not hours'.³⁰ It may be that the notion of imminence under the law of law enforcement should be construed even more tightly, limited to a second or even a split second. Given its consequential importance, this issue is one that requires normative confirmation.

The second, third, and fourth scenarios set out in Basic Principle 9 concern a grave threat to life only (i.e. not threats of serious injury). These scenarios, which are contentious, apply to situations where use of firearms is necessary but the threat

³⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, §59, citing UN docs. A/68/382 (§§33–37) and A/HRC/14/24.

to life is not imminent. Some argue that imminence is implicit, or should be read into the caveat 'only when less extreme means are insufficient to achieve these objectives', but this is unpersuasive. Another view is that these scenarios no longer reflect international law. The latter opinion would have serious consequences for counterterrorism operations, however. It would imply, for instance, that states such as Belgium and France violated international law when they took certain actions during policing or counterterrorism operations in the last two years.

An example of a grave but not imminent threat to life would occur if a serial killer escaped from a high-security prison, or if an individual drove through a roadblock when a terrorist attack was feared. Such examples are truly exceptional and the standard is especially strict. It does not allow criminal suspects to be shot in the back, or firearms to be used when the threat is to property alone. The Special Rapporteur on extrajudicial, summary or arbitrary executions stated in a 2010 report on Nigeria that the risk of escape by an alleged violent criminal 'who presents no *direct* threat to the lives of others, cannot justify shooting to kill'.³¹

Indeed, it is important to reiterate that permitted exceptions to the imminent threat requirement do not authorise shooting with intent to kill, and provide that there must be no feasible alternative to using a firearm. If these conditions are not met, the action will be unlawful. Circumstances do exist, however, in which it may not be unlawful to shoot to stop an individual when the threat to life is grave but not imminent. In *M. D. v Turkey*, for example, the European Commission on Human Rights considered that the shooting of a terrorist bombing suspect who was escaping met the terms of the exception set out in Article 2(2)(b) of the European Convention on Human Rights, namely 'to prevent the escape of a person lawfully detained'.³²

B. Shooting 'to kill'

A specific and higher standard applies to firearm use that is intended to be lethal (i.e. when a law enforcement official shoots to kill). According to the final sentence of Basic Principle 9, such an action 'may only be made when strictly unavoidable

³¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Nigeria, E/CN.4/2006/53/Add.4 (2006), §47 [added emphasis].

³² European Commission on Human Rights, *M. D. v Turkey*, Decision, 30 June 1997.

in order to protect life'.³³ The Special Rapporteur on extrajudicial, summary or arbitrary executions has termed this the 'protect life' principle, according to which 'a life may be taken intentionally only to save another life'. He describes this as 'the guiding star of the protection of the right to life'.³⁴ This standard governs situations where it is the deliberate intention of law enforcement to cause death. Examples would occur if police shot dead a suicide bomber who was on the point of detonating a bomb in a busy railway station, or killed a hostage-taker who was preparing to kill one or more hostages.

Under this higher standard, imminence is an integral element of the test of lawful use of force. Unless a suspect is honestly believed to be on the point of pulling the trigger of a firearm aimed at a hostage's head, or about to detonate a bomb, it asserts that intentional lethal use of force is not strictly unavoidable to protect life. As with the grave threat to life standard discussed above, the shoot to kill rule has particular relevance for counterterrorism operations, both at home and abroad. It would apply, for example, to the use of armed drones.

2. Specific Rules on Use of 'Less-Lethal' Weapons

The 1990 Basic Principles refer specifically to 'non-lethal incapacitating weapons' in two of the 26 principles. This term is inappropriate, because the weapons covered are not non-lethal in practice: they can and do kill. For this reason, the term 'less-lethal' is widely preferred, in this In-Brief as well. The less-lethal category includes a wide array of weapons, ranging from traditional police batons to pepper spray, tear gas, conducted electrical weapons (such as Tasers®), rubber and plastic bullets, and water cannon.

Basic Principle 2 calls on governments and law enforcement agencies to 'develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms'. 'Various types of weapons and ammunition' should include, inter alia, 'non-lethal incapacitating weapons for use in appropriate situations' with the aim of 'increasingly restraining the application of means capable of causing

33 The Spanish text of the 1990 Basic Principles mistranslates the standard: 'sólo se podrá hacer uso intencional de armas letales cuando sea estrictamente inevitable para proteger una vida' translates as 'lethal weapons may only be used intentionally when this is strictly unavoidable in order to protect life', a very different meaning to the one intended. It links 'intention' to the use of firearms rather than to killing with them. The French version correctly translates the meaning of the English version: 'ils ne recourront intentionnellement à l'usage meurtrier d'armes à feu que si cela est absolument inévitable pour protéger des vies humaines'.

34 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, §70.

death or injury to persons'. The rationale for less-lethal weaponry, therefore, is not only to replace firearms in certain circumstances but to reduce the number of injuries that law enforcement officials inflict when they use force in other instances.

The Basic Principles do not endorse the use of less-lethal weapons unequivocally, however. Principle 3 states: 'The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled'. There is concern about possible lack of discrimination, therefore, although the reference to careful control over the use of less-lethal weapons should be interpreted more broadly to include the risk of death and injury to intended targets.

Given the wide range of less-lethal weapons currently in use, some of which did not even exist when the Basic Principles were elaborated at the end of the 1980s, further guidance is needed. This issue, expressly recognized by the Human Rights Council, is discussed further in Sections Two and Three.

D. Use of Force in High-Risk Environments

The rules governing use of force are particularly likely to be violated when an individual is in custody or people are engaging in public protest. In the former case, asymmetries of power and vulnerability make unnecessary use of force more likely, while protests that target the police or the authorities test the capacity of the police to maintain the impartiality that their function requires.

1. Custodial Settings

Persons in custody are in an especially vulnerable position.³⁵ The authorities have a clear duty under international human rights law to both respect and protect detainees who are at particular risk of unlawful use of force, whether at the hands of other detainees or at the hands of law enforcement officials responsible for their custody. The human rights most at risk of violation in custodial settings are the rights to life and to humane treatment. The state must not itself commit violations, including through its agents, and must protect detainees' rights against infringement by third parties, whether these are other inmates or private security personnel. Any use of force by custodial officials must respect the principles of necessity and proportionality.

³⁵ ECtHR, *Bouyid v Belgium*, Grand Chamber, Judgment, App no 23380/09, 28 September 2015, §83.

The Nelson Mandela Rules are revised rules on the minimum treatment of prisoners. Originally adopted in 1955, they were endorsed by the UN General Assembly in December 2015. Rule 1 stipulates:

All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.³⁶

The 1990 Basic Principles state that ‘Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened’.³⁷ In similar terms, the Nelson Mandela Rules say that ‘Prison staff shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Prison staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the prison director’.³⁸

2. Protest

The rights to freedom of peaceful assembly and association are integral to a democracy and are therefore repressed harshly in autocratic regimes. As a rule of thumb, it can be said that the freer a regime, the more civic space it offers. The 1990 Basic Principles expressly govern use of force during assemblies, including demonstrations. However, this is one area where the standards in the 1990 Basic Principles fall some way short of international human rights law.

36 The Standard Minimum Rules for the Treatment of Prisoners were originally adopted in 1955. Principle 1 of the 1990 Basic Principles for the Treatment of Prisoners similarly provides that ‘All prisoners shall be treated with the respect due to their inherent dignity and value as human beings’.

37 Basic Principle 15. The Basic Principles were adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and welcomed by the UN General Assembly in Resolution 45/166, adopted without a vote on 18 December 1990 (operative §4).

38 Rule 82(1), 2015 Nelson Mandela Rules. See also: the UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment; the Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted by the African Commission on Human and Peoples’ Rights; the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted by the Inter-American Commission on Human Rights; and the revised standards for law enforcement agencies, issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The default position is not problematic. According to Basic Principle 12, every person is entitled to participate in lawful and peaceful assemblies. By 'lawful' the drafters of the Basic Principles seem to have meant under *domestic* as opposed to international law. In such cases, where the authorities have granted permission to hold an assembly (or have not opposed it), the task of law enforcement is to facilitate the event, including when it is a peaceful protest against the regime in power. This implies that law enforcement officials should be trained to facilitate assemblies in accordance with human rights law. This should include training in "soft skills" such as effective communication, negotiation, and mediation, allowing law enforcement officials to avoid escalation of violence and minimize conflict'.³⁹

For the authorities, it is more challenging to manage spontaneous demonstrations or protests that occur in response to an event or series of events. Some states require prior notification or even prior approval of all public assemblies. It has been recommended that law enforcement authorities 'as far as possible, protect and facilitate spontaneous assemblies, as they would any other assembly'.⁴⁰ In the 2007 *Bukta* case,⁴¹ a chamber of the European Court of Human Rights held that Hungary had violated the European Convention on Human Rights because the police had moved participants in a peaceful assembly away from the target of their protest, even though the police had heard a 'loud noise' that they feared was a threat to the security of the Hungarian Prime Minister and the visiting Romanian Prime Minister.⁴²

The police in this case were acting on the basis of domestic legislation, which required demonstrators to inform the authorities of an assembly at least three days in advance and gave the police powers to disperse any assembly that took place without prior notification. In the Court's view, however, in 'special circumstances', when an immediate response to a political event in the form of a demonstration might be justified, 'a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction

³⁹ Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, 4 February 2016, §42 (hereafter, 2016 joint report on peaceful protest by two Special Rapporteurs).

⁴⁰ *Ibid.*, §23.

⁴¹ ECtHR, *Bukta et al v Hungary*, Second Section, Judgment, App no 25691/04, 17 July 2007 (as rendered final on 17 October 2007).

⁴² *Ibid.*, §10.

on freedom of peaceful assembly'.⁴³ The Court found 'no evidence to suggest that the applicants represented a danger to public order beyond the level of the minor disturbance which is inevitably caused by an assembly in a public place'. It reiterated its view, previously expressed in a case brought against Turkey,⁴⁴ that

Where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention [ECHR] is not to be deprived of all substance.⁴⁵

In determining whether or not an assembly is 'peaceful', the Special Rapporteurs on freedom of assembly and on unlawful killings have argued that the peacefulness of an assembly should be presumed and that the term 'peaceful' should be interpreted broadly. 'Regard must be given to the manner in which the assembly is held and to the intentions of the participants.'⁴⁶ The 2010 Guidelines on Freedom of Peaceful Assembly, issued by the Organization for Security and Co-operation in Europe (OSCE)'s Office for Democratic Institutions and Human Rights (ODIHR), state that:

An assembly should be deemed peaceful if its organizers have professed peaceful intentions and the conduct of the assembly is non-violent. The term 'peaceful' should be interpreted to include conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties.⁴⁷

Under international law, it is not clear whether or not an assembly may be considered peaceful if a substantial number of participants carry weapons (such as a stick or baton) for self-defence. Arguably, provided no violent acts occur, the assembly should still be considered peaceful if weapons are not visible and do not include knives or *a fortiori* firearms.

Of greater concern and dispute are situations in which members of the public assemble for the purpose of protesting, even though no approval has been granted, as domestic law often requires. In the 1990 Basic Principles, Principle 13 governs the use of force during unlawful but non-violent assemblies:

⁴³ *Ibid.*, §36.

⁴⁴ ECtHR, *Oya Ataman v Turkey*, Second Section, Judgment, App no 74552/01, 5 December 2006 (as rendered final on 5 March 2007).

⁴⁵ ECtHR, *Bukta et al v Hungary*, Judgment, §37, citing *ibid.*, §42.

⁴⁶ 2016 joint report on peaceful protest by two Special Rapporteurs, §18.

⁴⁷ OSCE ODIHR, *Guidelines on Freedom of Peaceful Assembly*, 2010, §1.3.

In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

Such situations are especially contentious because there is uncertainty as to the precise scope and definition of ‘unlawful’. The wording of the Principle also suggests that the appropriate law enforcement response to such assemblies is to disperse them. Arguably, following the evolution of international human rights law since 1990, dispersal of a non-violent assembly is generally unlawful unless there are both objective grounds for its dispersal *and* the measures taken are proportionate. This issue was put before the Human Rights Council in 2016 by the Special Rapporteurs on freedom of assembly and on unlawful killings in their compilation of best practices in the management of assemblies. In any event, dispersal of a peaceful gathering may involve or invoke violence, and the risk of excessive or indiscriminate use of force is typically heightened.

E. Application of Norms

The law of law enforcement, at least in so far as it regulates use of force, governs the acts of any agency exercising law enforcement powers on behalf of or within a state. Its scope of application is therefore extremely broad, and applies both in peacetime and during situations of armed conflict. As the 1990 Basic Principles and the 1979 Code of Conduct both make explicit, “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’.⁴⁸

It is further stipulated that ‘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’.⁴⁹ Law of law enforcement rules govern the police and any other law enforcement agency, state security force, paramilitary force (such as a *gendarmérie*), or military force that engages in acts of law enforcement.

The rules similarly apply to any private security company to which the state or one of its organs has delegated police powers. When a private security company operates under a private contract, it is of course bound by domestic law (as is any law enforcement official). However, as the Special Rapporteur on extrajudicial, summary and arbitrary executions wrote in 2016, ‘states must adopt a clear

⁴⁸ See, e.g., 1990 Basic Principles, note 1.

⁴⁹ *Ibid.*

legislative framework for the use of force by law enforcement or other individuals that complies with international standards, including the principles of necessity and proportionality'.⁵⁰ The Special Rapporteur further stated that 'before and during any use of force by private security personnel, all reasonable precautionary steps to protect life and prevent excessive violence must be taken, including the provision of appropriate equipment and training, the proscription of inappropriate weapons, and careful planning of individual operations'.⁵¹

50 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on the right to life and the use of force by private security providers in law enforcement contexts, A/HRC/32/39, 6 May 2016, §75.

51 *Ibid.*

2. The UN Human Rights Machinery and the Use of Force for Law Enforcement

Under customary and conventional international human rights law, a state must ensure that its law enforcement agencies and officials respect and protect the right to life. The UN human rights machinery has made an important contribution in this area. In two resolutions in 2014 and 2016 that addressed the use of force in the context of law enforcement, the Council called on states to ensure that their domestic legislation and procedures are ‘consistent with their international obligations and commitments’⁵² and ‘effectively implemented by officials exercising law enforcement duties, in particular applicable principles of law enforcement, such as the principles of necessity and proportionality....’⁵³ These were valuable normative statements.

The Council has also addressed the legality of recourse to firearms, including in the context of assemblies, and questioned whether less-lethal weapons, especially Tasers, comply with human rights law. This section describes some of the action that has been taken to promote implementation of the right to life in the context of law enforcement.

A. International Standards on the Use of Firearms

In both country-specific and thematic resolutions, the Human Rights Council has indirectly affirmed the international standards that regulate use of firearms during law enforcement. With respect to Eritrea, for example, on 1 July 2016 the Council reiterated earlier calls to ‘end, and to confirm the end to, the practice of shooting to wound or kill citizens attempting to cross the border to flee the country’.⁵⁴

⁵² A/RES/HRC/31/37 on the promotion and protection of human rights in the context of peaceful protests, 12 April 2016, OP4.

⁵³ A/RES/HRC/25/38 on the promotion and protection of human rights in the context of peaceful protests, adopted on 28 March 2014 by 31 votes to 9, with 7 abstentions, OP10.

⁵⁴ A/RES/HRC/32/24 on the situation of human rights in Eritrea, adopted on 1 July 2016, OP6(h).

Such acts are a serious violation of the right to life. This call followed a broader recommendation by the Special Rapporteur on human rights in Eritrea that the Government of Eritrea should:

Ensure that public order officials, including the military and the police, receive appropriate professional training for carrying out their public security duties, especially in relation to the use of force and firearms. Review rules of engagement to ensure their compliance with international law enforcement standards, such as the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms.⁵⁵

With respect to Israel, in its concluding observations the Human Rights Committee called upon Israel to take 'all necessary measures to prevent incidents of excessive use of force during law enforcement operations, including by ensuring that rules of engagement or open fire regulations of [Israel's] security forces in the West Bank, including East Jerusalem, and the Access Restricted Areas of Gaza, are consistent with article 6 of the Covenant and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials'.⁵⁶

In 2014, in its concluding observations on the United States, the same Committee expressed concern about the 'still high number of fatal shootings by certain police forces, including, for instance, in Chicago, and reports of excessive use of force by certain law enforcement officers, including the deadly use of tasers, which has a disparate impact on African Americans, and use of lethal force by Customs and Border Protection (CBP) officers at the United States-Mexico border'. It called on the US to '[s]tep up its efforts to prevent the excessive use of force by law enforcement officers by ensuring compliance with the 1990 Basic Principles ... and to ... [e]nsure that the new CBP directive on the use of deadly force is applied and enforced in practice'.⁵⁷

This new directive, issued in May 2014, merits attention. It stipulates that CBP officers may use deadly force 'only when necessary, that is, when the officer/agent has a reasonable belief that the subject of such force poses an imminent danger

⁵⁵ Report of the Special Rapporteur on the situation of human rights in Eritrea, Sheila B. Keetharuth, A/HRC/29/41, 19 June 2015, §76(e).

⁵⁶ HRCtee, Concluding observations on the fourth periodic report of Israel, CCPR/C/ISR/CO/4, 21 November 2014, §13(a).

⁵⁷ HRCtee, Concluding observations on the fourth periodic report of the United States, 2014, §11(a) and (b).

of serious physical injury or death⁵⁸. The directive followed an independent study of use of force by the CBP, which reported in 2013 that:

Two policy and practice areas especially need significant change. First, officers/agents should be prohibited from shooting at vehicles unless vehicle occupants are attempting to use deadly force – other than the vehicle – against the agent. Training and tactics should focus on avoiding positions that put agents in the path of a vehicle and getting out of the way of moving vehicles.

Second, officers/agents should be prohibited from using deadly force against subjects throwing objects not capable of causing serious physical injury or death to them. Officers/agents should be trained to specific situations and scenarios that involve subjects throwing such objects. The training should emphasize pre-deployment strategies, the use of cover and concealment, maintaining safe distances, equipping vehicles and boats with protective cages and/or screening, de-escalation strategies, and where reasonable the use of less-lethal devices.⁵⁹

The directive brought CPB standards for use of firearms into line with international standards; clearly, prior to it, CBP officers were entitled to use and discharge firearms in violation of the international law of law enforcement.

In many states, respecting and protecting the right to life during protests remains a similar challenge. In an important 2014 resolution, the Council noted that ‘lethal force may only be used as a last resort to protect against an imminent threat to life and ... not ... merely to disperse a gathering’.⁶⁰ It further affirmed that ‘nothing can ever justify the indiscriminate use of lethal force against a crowd, which is unlawful under international human rights law’.⁶¹

These issues were picked up in a compilation of best practices on the management of assemblies which two Special Rapporteurs prepared in 2015–16 at the request of the Human Rights Council.⁶² In their final report, submitted to the Council in February 2016, the Rapporteurs stated that ‘[a]utomatic firearms should not be used in the policing of assemblies under any circumstances’. Indeed, because every instance of use of force, especially potentially lethal force, needs to be

⁵⁸ US Customs and Border Protection, *Use of Force Policy, Guidelines and Procedures Handbook*, Office of Training and Development, HB 4500-01C, May 2014, p 3, s D(3), <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>.

⁵⁹ Police Executive Research Forum, *US Customs and Border Protection, Use of Force Review: Cases and Policies*, Washington DC, February 2013, p 2, <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

⁶⁰ A/RES/25/38, OP10.

⁶¹ Ibid, OP11.

⁶² 2016 joint report on peaceful protest by two Special Rapporteurs, §60.

justified and justifiable, firearms should never be set in fully automatic mode (where the gun keeps firing once the trigger is pulled until either the trigger is released or the magazine is empty). Firearms may be set in semi-automatic mode, because this mode requires an officer to pull the trigger on each occasion her or she discharges a round. It would be valuable to confirm that these rules reflect international law, for example in a future Council resolution.

Despite the rules set out in the 1990 Basic Principles, certain states continue to use firearms to disperse peaceful protests. In June 2016, the Committee Against Torture expressed concern over legislative amendments in the so-called Domestic Security Package adopted by Turkey in 2015. This package of legislation granted additional powers to the Turkish police, 'in particular the expanded power to use firearms against demonstrators'.⁶³ These powers allow police officers to discharge firearms to protect property where there is no threat to life, in violation of international standards.⁶⁴ With respect to Venezuela, the same Committee expressed similar concern 'about consistent reports of unwarranted use of firearms and riot control equipment against protesters and in residential areas'.⁶⁵ The Committee also noted that 'military units such as the Bolivarian National Guard were involved in controlling the demonstrations, although maintaining public order is not part of their duties and no state of emergency had been declared'.⁶⁶

The Human Rights Committee has likewise addressed use of force during protests. In April 2016, in its concluding observations on South Africa, the Committee called on the government to revise laws and policies on public order policing and the use of force, including lethal force, by law enforcement officials, to 'ensure that all policing laws, policies and guidelines are consistent with article 6 of the Covenant [on Civil and Political Rights] and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials'.⁶⁷ The Committee further called on South Africa to '[t]ake all measures necessary, particularly in terms of training and equipment, to prevent law enforcement and security forces from using excessive

⁶³ Committee Against Torture, Concluding observations on the fourth periodic reports of Turkey, CAT/C/TUR/CO/4, 2 June 2016, §15.

⁶⁴ See, e.g., Amnesty International, 'Turkey: Draconian reforms give police wide-ranging powers to repress dissent', 27 March 2015, <https://www.amnesty.org/en/press-releases/2015/03/turkey-gives-police-broad-powers-to-repress-dissent/>.

⁶⁵ Committee Against Torture, Concluding observations on the combined third and fourth periodic reports of the Bolivarian Republic of Venezuela, CAT/C/VEN/CO/3-4, 12 December 2014, §12.

⁶⁶ *Ibid.*

⁶⁷ HRCtee, Concluding observations on the initial report of South Africa, CCPR/C/ZAF/CO/1, 27 April 2016, §27(a).

force or using lethal weapons in situations that do not warrant recourse to such force'.⁶⁸

The Committee made similar recommendations to France. In August 2015, drawing France's 'attention' to the 1990 Basic Principles, it called for the adoption of 'effective measures, particularly in terms of training, to prevent law enforcement and security forces from using excessive force or non-lethal weapons in situations that do not warrant recourse to greater or lethal force'.⁶⁹

The Human Rights Committee's proposed new General Comment on the right to life, when finalized, should provide critical additional guidance on law enforcement standards with respect to the use of force. Its validation by the Human Rights Council, if this is feasible, would be of clear normative value.

B. Use of Tasers

The Committee Against Torture has specifically raised the use of Tasers® (and similar conducted electrical weapons) with a number of states parties to the 1984 Convention Against Torture.⁷⁰ In December 2014, the Committee noted Australia's statement that use of Tasers was 'tightly regulated and controlled in each jurisdiction' but expressed its concern at reports of cases of inappropriate or excessive use.⁷¹ It went as far as to suggest that Australia should 'consider abolishing their use', a measure that is not required by international human rights law. In any event, it advised Australia to ensure that Tasers are used 'exclusively in extreme and limited situations — where there is a real and immediate threat to life or risk of serious injury — as a substitute for lethal weapons and by trained law enforcement personnel only'.⁷² It further stated that the use of Tasers on children and pregnant women should be prohibited explicitly.⁷³

⁶⁸ *Ibid.*, §27(b).

⁶⁹ HRCttee, Concluding observations on the fifth periodic report of France, CCPR/C/FRA/CO/5, 17 August 2015, §15.

⁷⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification, and accession by UN General Assembly Resolution 39/46 of 10 December 1984.

⁷¹ Committee Against Torture (CATCttee), Concluding observations on the combined fourth and fifth periodic reports of Australia, CAT/C/AUS/CO/4-5, 23 December 2014, §13.

⁷² *Ibid.*

⁷³ *Ibid.*

In its concluding observations on the United States, issued the same month, the same Committee was concerned about ‘numerous, consistent reports that the police have used electrical discharge weapons against unarmed individuals who resist arrest or fail to comply immediately with commands, suspects fleeing minor crime scenes, and even minors’. The Committee was ‘appalled at the number of reported deaths resulting from the use of electrical discharge weapons’.⁷⁴ It did not call on the US to cease use of Tasers, but observed that it needed ‘to introduce more stringent regulations’ to govern their use. The Committee proposed a standard similar to the standard it proposed for Australia and again stated that use of Tasers to subdue children and pregnant women should be formally prohibited.⁷⁵ The Committee was also ‘of the view’ that Tasers should be ‘inadmissible in the equipment of custodial staff in prisons or any other place of deprivation of liberty’.⁷⁶

C. Protocol on Less-Lethal Weapons

While a lot of attention has focused on the use of Tasers, other less-lethal weapons also generate widespread concern. In 2014, the Human Rights Council encouraged states to make ‘non-lethal weapons available to their officials exercising law enforcement duties’, while also encouraging ‘international efforts to regulate and establish protocols for the training and use of non-lethal weapons’.⁷⁷ The Council further underlined the ‘importance of thorough, independent and scientific testing of non-lethal weapons prior to deployment to establish their lethality and the extent of likely injury, and of monitoring appropriate training and use of such weapons’.⁷⁸

As noted in Section 1, the 1990 Basic Principles offer only general guidance on less-lethal weapons, especially when compared to the rules on use of firearms. The technology of less-lethal weaponry has also advanced significantly since the Basic Principles were drafted. In their joint 2016 report on the management of peaceful protest, the Special Rapporteurs on freedom of assembly and unlawful killings requested the UN High Commissioner for Human Rights to ‘convene an expert group to examine the application of the international human rights

⁷⁴ CAT/Ctee, Concluding observations on the combined third to fifth periodic reports of the United States of America, CAT/C/USA/CO/3-5, 19 December 2014, §27.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ A/RES/25/38, OP5.

⁷⁸ *Ibid.*, §15.

framework to less-lethal weapons and unmanned systems for law enforcement purposes, including with a focus on their use in the context of assemblies'.⁷⁹

D. Application of Human Rights Law to Private Security Companies

The application of law enforcement rules to use of force by private security companies deserves further consideration. In May 2016, Christof Heyns, then Special Rapporteur on extrajudicial, summary or arbitrary executions, affirmed in his final report to the UN Human Rights Council that states 'must adopt a clear legislative framework for the use of force by law enforcement or other individuals that complies with international standards, including the principles of necessity and proportionality'.⁸⁰ The United Nations, notably the Human Rights Council, should consider further the application of international human rights law to private security companies.

E. Arms Transfers and Human Rights Law

To secure respect for the right to life, finally, it will not be sufficient to address the rules that govern use of force by law enforcement agencies and officials. Access to firearms and less-lethal weapons is also an important issue. On 1 July 2016, the Human Rights Council adopted Resolution 32/12 on the impact of arms transfers on human rights. This resolution, adopted by 32 votes to 5 with 10 abstentions, urged all states

to refrain from transferring arms when they assess, in accordance with applicable national procedures and international obligations and standards, that such arms are sufficiently likely to be used to commit or facilitate serious violations or abuses of international human rights law...⁸¹

Clearly, a critical issue is the degree to which international standards are respected by the police and other law enforcement agencies in recipient states, particularly when such agencies are the intended end-users of weapons to be transferred. In addition, it is necessary to assess whether the weapons sought are lawful and

⁷⁹ 2016 joint report on peaceful protest by two Special Rapporteurs, §67(i).

⁸⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on the right to life and the use of force by private security providers in law enforcement contexts, A/HRC/32/39, 6 May 2016, §75.

⁸¹ A/HRC/RES/32/12 on the impact of arms transfers on human rights, 1 July 2016, OP3.

appropriate for law enforcement. Weapons that are cruel or inhuman in nature, such as stun belts or batons with spikes, have no place in law enforcement and should never be transferred. As noted above, assault rifles capable of firing in fully automatic mode should also not be used in law enforcement and therefore should not be transferred to a law enforcement agency, particularly the police.

Council resolution A/HRC/32/12 explicitly references the Arms Trade Treaty (ATT), which was adopted by the UN General Assembly in April 2013 and entered into force on 24 December 2014.⁸² Its language complements the obligations set out in the ATT but, unlike the ATT, seems to cover all law enforcement weapons. The ATT definition of arms in Article 2 effectively excludes many less-lethal weapons, such as Tasers.

Resolution A/HRC/32/12 requested the Office of the UN High Commissioner for Human Rights (OHCHR) to prepare a report for the thirty-fifth session of the Council evaluating the impact of arms transfers on the enjoyment of human rights, 'in order to provide States and other relevant stakeholders with elements to assess the relationship between arms transfers and human rights law that may guide them to strengthen efforts to effectively protect human rights'.⁸³ Due in early 2017, this report provides an opportunity to clarify several issues, including the application of human rights to private security companies that seek to procure weapons.

⁸² 'Recalling the principles and provisions relating to international human rights law and international humanitarian law, and to the promotion of responsible action by States, as contained in the Arms Trade Treaty adopted by the General Assembly on 2 April 2013, which entered into force on 24 December 2014, as well as in other relevant instruments' (A/HRC/RES/32/12, adopted on 1 July 2016, preambular para 10).

⁸³ *Ibid.*, §4.

3. The Future Role of the Human Rights Council

This final section sets out future roles that the Human Rights Council, and the special procedures that report to it, could play in promoting the right to life during law enforcement. There is no need to codify new law in relation to law enforcement principles, which remain both appropriate and fully pertinent.

However, as preambular paragraph 2 of Council Resolution A/HRC/RES/32/12 recalls, the Council has a mandate to act as a forum for dialogue on thematic issues in relation to all human rights. This role should not be underestimated: it creates a space in which the Council can promote the implementation of existing international standards governing the use of firearms for law enforcement. The Council, and the special procedures that report to it, should consistently reaffirm that states must respect the distinct standards that govern shooting 'to stop' and shooting 'to kill', including in counterterrorism operations. They apply to policing actions but also all drone strikes that cannot be categorized as hostilities in an armed conflict. Such strikes amount to intentional lethal use of force and may therefore only be authorized when their use is strictly unavoidable in order to protect life.

Certain elements of the law of law enforcement standards would benefit from clarification. To adequately protect the right to life, it will be important to elucidate the meaning of 'imminence' in standards that govern use of firearms. The use of warning shots before opening fire could also usefully be clarified: it remains controversial because state practice is contradictory and no consensus on this practice exists in international law. The new Special Rapporteur on extrajudicial, summary or arbitrary executions, Dr Agnes Callamard, could take the lead on these issues early in her mandate, following the important 2014 report by Professor Christof Heyns on use of force during policing. She could also helpfully reiterate that the police should never operate firearms in fully automatic mode in the course of law enforcement.

Given his expertise, the new Special Rapporteur on torture, Dr Nils Melzer, could contribute to the current debate on use of firearms and less-lethal weapons if he submitted a report on the use of force by law enforcement officials early in his mandate. It would be valuable to clarify under what circumstances the use of firearms amounts to torture.

It will also be important to elaborate detailed, practical guidance on what conditions define the necessary and proportionate use of less-lethal weapons. In this area, the Special Rapporteur on torture could help promote the rights both to life and humane treatment. Working with the OHCHR and the Special Rapporteur on extrajudicial, summary or arbitrary executions, he could coordinate expert input into the elaboration of distinct protocols on the procurement, testing, and use of tear gas and conducted electrical weapons, among other particularly hazardous less-lethal weapons. Compiled as 'best practices', or rules discerned from jurisprudence (in the manner outlined in this In-Brief), these inputs would assist the Council to consider the issue at a later stage.

The OHCHR is due to submit a report on arms transfers and human rights in early 2017. This should help to clarify and affirm standards on the export and procurement of weapons for use in law enforcement. A Council resolution on the basis of the report could underpin implementation of the Arms Trade Treaty and also help to fill gaps in the scope of that instrument as it pertains to policing weapons.

Another resolution adopted by the Council in 2016, on safeguards to prevent torture during police custody and pre-trial detention, requested the OHCHR to convene in 2017 an intersessional open-ended seminar to exchange national experiences and practices.⁸⁴ This will provide a valuable opportunity to raise some of the concerns that surround use of force in custodial settings, including the use of less-lethal weapons.

In the longer term, the creation of an expert group along the lines that were proposed by the Special Rapporteurs on freedom of assembly and on extrajudicial, summary or arbitrary executions in their joint 2016 report⁸⁵ could generate a critical mass of impartial evidence on weapons whose use in law enforcement is problematic from a human rights perspective.

⁸⁴ A/HRC/RES/31/31, 'Torture and other cruel, inhuman or degrading treatment or punishment: safeguards to prevent torture during police custody and pretrial detention', adopted on 24 March 2016, OP21.

⁸⁵ 2016 joint report on peaceful protest by two Special Rapporteurs, §67(i).

Annex 1: Human Rights Council resolution HRC/RES/31/37 of March 2016 on peaceful protest

The Human Rights Council,

Reaffirming the purposes and principles of the Charter of the United Nations,

Reaffirming also the Universal Declaration of Human Rights, and recalling the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and other relevant international and regional human rights treaties,

Recalling the Vienna Declaration and Programme of Action,

Recalling also its decision 17/120 of 17 June 2011 and its resolutions 19/35 of 23 March 2012, 22/10 of 21 March 2013 and 25/38 of 28 March 2014, on the promotion and protection of human rights in the context of peaceful protests,

Recalling further that States have the primary responsibility for the promotion and protection of human rights and fundamental freedoms, including in the context of assemblies, and to ensure that national legislation, policies and practices, as the national framework for the exercise of the rights to freedom of peaceful assembly, of expression and of association, are in compliance with international human rights law,

1. *Calls upon* all States to promote a safe and enabling environment for individuals and groups to exercise their rights to freedom of peaceful assembly, of expression and of association, recalls that all States have the responsibility in all circumstances, including in the context of peaceful protests, to promote, respect and protect human rights and to prevent human rights violations, including extrajudicial, summary or arbitrary executions, arbitrary arrest and detention, enforced disappearances, torture and other cruel, inhuman or degrading treatment or punishment, and sexual violence, and calls upon States to avoid the abuse of criminal and civil proceedings or threats of such acts at all times;

2. *Underlines* the necessity to address the management of assemblies, including peaceful protests, so as to contribute to their peaceful conduct, and to prevent loss of life of and injuries to protesters, bystanders, those monitoring such

protests and officials exercising law enforcement duties, as well as any human rights violation or abuse, to ensure accountability for such violations and abuses and to provide victims with access to a remedy and redress;

3. *Takes note with appreciation* of the compilation of practical recommendations for the proper management of assemblies based on best practices and lessons learned prepared by the Special Rapporteur on the rights to freedom of peaceful assembly and association and the Special Rapporteur on extrajudicial, summary or arbitrary executions,¹ in which they provide an analysis of the human rights involved before, during and after an assembly, including the rights to freedom of peaceful assembly, of expression, of association, and of religion or belief, the right to participation in the conduct of public affairs, the right to life, liberty and security of person, the right to be free from torture and cruel, inhuman or degrading treatment or punishment, as well as the right to an effective remedy for all human rights violations, and the respect for human dignity, bodily integrity, and privacy;

4. *Encourages* all States to give due consideration to the above mentioned compilation, which provides a useful tool for States on how to fulfil their obligations and commitments, including on how to operationalize them in their domestic laws, procedures and practices, to promote and protect human rights in the context of assemblies, including peaceful protests;

5. *Reaffirms* that all States must ensure that their domestic legislation and procedures relating to the rights to freedom of peaceful assembly, of expression and of association and to the use of force in the context of law enforcement are in conformity with their international obligations and commitments and effectively implemented, and must provide proper training for officials exercising law enforcement duties, including in the use of protective equipment and of less-lethal weapons;

6. *Encourages* all States to engage at the national and regional levels with relevant stakeholders, including assembly organizers, human rights defenders, civil society actors, national human rights institutions, as well as business enterprises and regional human rights mechanisms, on the management of assemblies, including, as appropriate, any follow-up to the compilation of practical recommendations;

7. *Stresses* the importance of international cooperation in support of national efforts for the promotion and protection of human rights and fundamental freedoms in the context of assemblies in order to raise the capacities of law enforcement agencies to deal with such assemblies in a manner that conforms to their international human rights obligations and commitments;

8. *Invites* States to seek relevant technical assistance, including from the Office of the United Nations High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and from other specialized agencies where appropriate, from relevant special procedures of the Human Rights Council and from regional human rights mechanisms;

9. *Invites* all States to consider making recommendations, as appropriate, to States under review, in the context of the universal periodic review, on the management of assemblies and the promotion and protection of human rights in such contexts;

10. *Encourages* the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on extrajudicial, summary or arbitrary executions and other relevant special procedures of the Human Rights Council, as appropriate, in the framework of their mandates, to continue to address in their work, the management of assemblies and the promotion and protection of human rights in such contexts;

11. *Decides* to remain seized of the matter.

*66th meeting
24 March 2016*

[Adopted by a recorded vote of 31 to 5, with 10 abstentions.* The voting was as follows:

In favour:

Albania, Algeria, Belgium, Botswana, Côte d'Ivoire, Ecuador, El Salvador, Ethiopia, France, Georgia, Germany, Ghana, India, Indonesia, Kenya, Kyrgyzstan, Latvia, Maldives, Mexico, Mongolia, Morocco, Netherlands, Panama, Paraguay, Philippines, Portugal, Republic of Korea, Slovenia, Switzerland, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland

Against:

Burundi, China, Cuba, Russian Federation, Venezuela (Bolivarian Republic of)

Abstaining:

Bangladesh, Bolivia (Plurinational State of), Namibia, Nigeria, Qatar, Saudi Arabia, South Africa, Togo, United Arab Emirates, Viet Nam]

* The delegation of the Congo did not cast a vote.

Annex 2: Human Rights Council resolution HRC/RES/25/38 of March 2014 on peaceful protest

The Human Rights Council,

Reaffirming the purposes and principles of the Charter of the United Nations,

Recalling the Vienna Declaration and Programme of Action,

Reaffirming the Universal Declaration of Human Rights, and recalling relevant international human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and relevant regional human rights instruments,

Reaffirming also that, consistent with the Universal Declaration of Human Rights, States Members of the United Nations have pledged to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms for all without distinction such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling Human Rights Council resolutions 12/16 of 2 October 2009 and 16/4 of 24 March 2011, on freedom of opinion and expression, 15/21 of 30 September 2010, 21/16 of 27 September 2012 and 24/5 of 26 September 2013, on the rights to freedom of peaceful assembly and of association, and 19/35 of 23 March 2012 and 22/10 of 21 March 2013, on the promotion and protection of human rights in the context of peaceful protests,

Recalling also Human Rights Council resolutions 21/12 of 27 September 2012, on the safety of journalists, 24/8 of 26 September 2013, on equal political participation, 22/6 of 21 March 2013, on protecting human rights defenders, and 24/21 of 27 September 2013, on civil society space: creating and maintaining, in law and practice, a safe and enabling environment,

Recalling further the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,

Recognizing that, pursuant to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, the rights to freedom of peaceful assembly, of expression and of association are human rights guaranteed to all, while their exercise may be subject to certain restrictions, in accordance with States' obligations under applicable international human rights instruments,

Recognizing also that any such restrictions must be based in law, in accordance with States' obligations under applicable international human rights instruments and subject to a competent, independent, impartial and prompt administrative or judicial review,

Recalling that States have the primary responsibility for the promotion and protection of human rights and fundamental freedoms, including in the context of peaceful protests, and to ensure that national legislation, policies and practices, as the national framework for the exercise of the rights to freedom of peaceful assembly, of expression and of association, are in compliance with international human rights law,

Acknowledging that peaceful protests can occur in all societies, including protests that are spontaneous, simultaneous, unauthorized or restricted,

Acknowledging also that participation in peaceful protests can be an important form of exercising the rights to freedom of peaceful assembly, of expression, of association and of participation in the conduct of public affairs,

Recognizing that peaceful protests can make a positive contribution to the development, strengthening and effectiveness of democratic systems and to democratic processes, including elections and referendums,

Acknowledging that peaceful protests can contribute to the full enjoyment of civil, political, economic, social and cultural rights,

Reaffirming that everyone has the right to life, liberty and security of person,

Reaffirming also that participation in public and peaceful protests should be entirely voluntary and uncoerced,

Stressing therefore that everyone must be able to express their grievances or aspirations in a peaceful manner, including through public protests, without fear of reprisals or of being intimidated, harassed, injured, sexually assaulted, beaten, arbitrarily arrested and detained, tortured, killed or subjected to enforced disappearance,

Deeply concerned about extrajudicial, summary or arbitrary executions, torture and other cruel, inhuman or degrading treatment or punishment of persons exercising their rights to freedom of peaceful assembly, of expression and of association in all regions of the world,

Expressing its concern about the number of attacks targeting human rights defenders and journalists in the context of peaceful protests,

Expressing its concern also at the criminalization, in all parts of the world, of individuals and groups for having organized or taken part in peaceful protests,

Stressing that peaceful protests should not be viewed as a threat, and therefore encouraging all States to engage in an open, inclusive and meaningful dialogue when dealing with peaceful protests and their causes,

Recalling that isolated acts of violence committed by others in the course of a protest do not deprive peaceful individuals of their rights to freedom of peaceful assembly, of expression and of association,

Recognizing that national human rights institutions and representatives of civil society, including non-governmental organizations, can play a useful role in facilitating continued dialogue between individuals taking part in peaceful protests and the relevant authorities,

Stressing the need to ensure full accountability for human rights violations or abuses in the context of peaceful protests,

Recalling the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,

Recalling also the importance of adequate training for officials exercising law enforcement duties assigned to deal with public protests, and of refraining, to the extent feasible, from assigning military personnel to perform such duties,

Bearing in mind that assemblies can be facilitated on the basis of communication and collaboration among protesters, local authorities and officials exercising law enforcement duties,

1. *Takes note with interest* of the summary of the seminar on effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests, held on 2 December 2013, prepared by the United Nations High Commissioner for Human Rights, in accordance with Human Rights Council resolution 22/10;¹

¹ A/HRC/25/32 and Corr.1.

2. *Recalls* that States have the responsibility, including in the context of peaceful protests, to promote and protect human rights and to prevent human rights violations, including extrajudicial, summary or arbitrary executions, arbitrary arrest and detention, enforced disappearances and torture and other cruel, inhuman or degrading treatment or punishment, and calls upon States to avoid the abuse of criminal and civil proceedings or threats of such acts at all times;

3. *Calls upon* States to promote a safe and enabling environment for individuals and groups to exercise their rights to freedom of peaceful assembly, of expression and of association, including by ensuring that their domestic legislation and procedures relating to the rights to freedom of peaceful assembly, of expression and of association are in conformity with their international human rights obligations and commitments, clearly and explicitly establish a presumption in favour of the exercise of these rights, and that they are effectively implemented;

4. *Urges* States to facilitate peaceful protests by providing protestors with access to public space and protecting them, without discrimination, where necessary, against any form of threat and harassment, and underlines the role of local authorities in this regard;

5. *Underlines* the important role that communication between protestors, local authorities and officials exercising law enforcement duties can play in the proper management of assemblies, such as peaceful protests, and calls on States to establish appropriate channels in that regard;

6. *Urges* States to pay particular attention to the safety and protection of women and women human rights defenders from acts of intimidation and harassment, as well as gender-based violence, including sexual assault, in the context of peaceful protests;

7. *Reaffirms* that States must take all appropriate measures for the safety and protection of children, including while they exercise their rights to freedom of peaceful assembly, expression and association, including in the context of peaceful protests;

8. *Calls upon* all States to pay particular attention to the safety of journalists and media workers covering peaceful protests, taking into account their specific role, exposure and vulnerability;

9. *Urges* all States to avoid using force during peaceful protests and to ensure that, where force is absolutely necessary, no one is subject to excessive or indiscriminate use of force;

10. *Calls upon* States, as a matter of priority, to ensure that their domestic legislation and procedures are consistent with their international obligations and

commitments in relation to the use of force in the context of law enforcement and are effectively implemented by officials exercising law enforcement duties, in particular applicable principles of law enforcement, such as the principles of necessity and proportionality, bearing in mind that lethal force may only be used as a last resort to protect against an imminent threat to life and that it may not be used merely to disperse a gathering;

11. *Affirms* that nothing can ever justify the indiscriminate use of lethal force against a crowd, which is unlawful under international human rights law;

12. *Calls upon* States to investigate any death or significant injury committed during protests, including those resulting from the discharge of firearms or the use of non-lethal weapons by officials exercising law enforcement duties;

13. *Also calls upon* States to ensure adequate training of officials exercising law enforcement duties and, where applicable, to promote adequate training for private personnel acting on behalf of a State, including in international human rights law and, where appropriate, international humanitarian law;

14. *Encourages* States to make protective equipment and non-lethal weapons available to their officials exercising law enforcement duties, while pursuing international efforts to regulate and establish protocols for the training and use of non-lethal weapons;

15. *Underlines* the importance of thorough, independent and scientific testing of non-lethal weapons prior to deployment to establish their lethality and the extent of likely injury, and of monitoring appropriate training and use of such weapons;

16. *Stresses* the importance of international cooperation in support of national efforts for the promotion and protection of human rights and fundamental freedoms in the context of peaceful protests, in order to raise the capacities of law enforcement agencies to deal with such protests in a manner that conforms to their international human rights obligations and commitments;

17. *Underlines* the necessity to address the management of assemblies, including peaceful protests, so as to contribute to their peaceful conduct, and to prevent loss of life and injuries to protestors, bystanders, those monitoring such protests and officials exercising law enforcement duties, as well as any human rights violation or abuse;

18. *Recognizes* the importance of documenting human rights violations and abuses committed in the context of peaceful protests, and the role that can be played by national human rights institutions, civil society, including non-

governmental organizations, journalists and other media workers, Internet users and human rights defenders, in this regard;

19. *Urges* States to ensure accountability for human rights violations and abuses through judicial or other national mechanisms, based on law in conformity with their international human rights obligations and commitments, and to provide victims with access to a remedy and redress, including in the context of peaceful protests;

20. *Requests* the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions to prepare, from within existing resources, a compilation of practical recommendations for the proper management of assemblies based on best practices and lessons learned and, in the preparation of the compilation, to seek the views of States, relevant United Nations agencies, in particular the Office of the High Commissioner and the United Nations Office on Drugs and Crime, intergovernmental organizations, other relevant special procedures mandate holders, national human rights institutions, non-governmental organizations and other relevant stakeholders, such as practitioners, and to submit the compilation to the Human Rights Council at its thirty-first session;

21. *Decides* to continue its consideration of this topic, as well as next steps, at its thirty-first session under agenda item 3.

*56th meeting
28 March 2014*

[Adopted by a recorded vote of 31 to 9, with 7 abstentions. The voting was as follows:

In favour:

Argentina, Austria, Benin, Botswana, Brazil, Burkina Faso, Chile, Costa Rica, Côte d'Ivoire, Czech Republic, Estonia, France, Gabon, Germany, Indonesia, Ireland, Italy, Japan, Kazakhstan, Maldives, Mexico, Montenegro, Morocco, Peru, Philippines, Republic of Korea, Romania, Sierra Leone, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America

Against:

China, Cuba, India, Kenya, Pakistan, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam

Abstaining:

Algeria, Congo, Ethiopia, Kuwait, Namibia, Saudi Arabia, United Arab Emirates]

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