



‘Towards professional use of lethal force by police in South Africa’

Presentation to the Public Dialogue Seminar organised by the Centre for Conflict Resolution ‘Shoot to kill: License to murder or effective crime prevention strategy’, 21 April 2010, Centre for the Book, Cape Town.

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Note: For an audio file of the seminar proceedings, including the speech by Deputy Minister of Police, Fikile Mbalula, this presentation, and questions from the floor go to:

http://www.ccr.org.za/index.php?option=com_phocadownload&view=category&id=66:&Itemid=92

Introduction

The first thing that we need to talk about for the purposes of this evening’s discussion is a question of terminology. ‘Shoot to kill’ as far as I understand is a label which has been applied by the media as a way of flagging stories dealing with the use of lethal force by police. These

stories have tended to deal with one or more of the following three things. Some of them have dealt with incidents involving police use of lethal force. Some have dealt with a proposed amendment to Section 49 of the Criminal Procedure Act – the law dealing with the use of force for arrest. Some of them have dealt with one or other of a number of rhetorical statements made by senior officials about how police should use their firearms. As far as I understand most of these official statements have not used the term ‘shoot to kill’ though the label is not necessarily a complete misnomer as some of these statements have indeed encouraged police to kill.

Nevertheless my understanding is that the term in many ways confuses the issue before us and in this presentation I will understand my topic to be the use of lethal force by police in South Africa. The presentation will address three issues:

- The purpose of the use of lethal force;
- The risks, or negative consequences, associated with the use of lethal force by police;
and
- Proposals on the way forward.

The purpose of the use of lethal force

I do not know when it was that laws of this kind first came into being but for many decades at least South Africa has had a law in place authorising the use of lethal force for purposes of arrest. This law, Section 49 of the Criminal Procedure Act, was the subject of an amendment passed by Parliament in 1998¹ and is, it appears, due to be amended again soon. In addition the common law institutionalises the principle that people are allowed to use force to defend themselves or others against threats. Where these threats are of a serious nature, such as threats of death or grave bodily harm, the common law therefore also authorises the use of lethal force.

¹ The amendment was however only brought into force in 2003.

Lethal force is force which has the potential to cause death or serious bodily harm. Where lethal force is used for defence its purpose will be to bring an end to the threat which is posed by the assailant. In arrest situations the purpose of the use of lethal force is to prevent the suspect's flight. In neither of these situations is it correct to say that the purpose of the use of lethal force is to kill the person whom the use of force is directed at.

The laws which govern the use of lethal force are therefore not 'shoot to kill' laws. However contrary to the common notion that police training involves techniques for wounding rather than killing people, police training in countries like the United States and Canada, and I assume in South Africa, directs police officers to aim for the chest area or what is known as the 'centre of mass'. 'Research examining shooter accuracy overwhelmingly debunks the Hollywood myth of police officers as sharp shooters who can wing suspects in the shoulder or leg or shoot weapons out of suspects' hands'.² The unpleasant truth is that where police shooters are on target there will be a good chance that their bullets will be fatal. Though this is not their purpose, the laws which authorise the use of lethal force are therefore laws which authorise police (and in fact civilians) to kill other people. Of course in all situations where there are reasonable alternatives to the use of lethal force police are required to make use of these alternatives though this is not to suggest that police should recklessly expose themselves to danger in doing so.

The risks of police lethal force

My view is that it is necessary for police in South Africa to be provided with firearms and with the authority to use them. I do not think I need to spend much time on motivating for why this is so. At the very least it is necessary for them to be able to defend themselves and enforce the law against people who are willing to use violence to prevent them from doing so.³ At the same

² White, M (2006) Hitting the target (or not): Comparing characteristics of fatal, injurious, and noninjurious police shootings. *Police Quarterly*, Vol. 9(3): 303-330.

³ Alongside the issue of the use of lethal force for defence there is also the question of the use of lethal force for arrest. See in this regard the recent Centre for the Study of Violence and Reconciliation 'Submission on the draft amendment of Section 49 of the Criminal Procedure Act, available at http://www.csvr.org.za/index.php?option=com_content&task=view&id=1318&Itemid=200.

time it is obvious that providing police with firearms carries with it major risks. These risks may be divided roughly into nine categories as follows:

- Firstly, the victims of well intentioned shootings by police sometimes include bystanders (and it might be added fellow police officers).
- Secondly, a number of people are killed every year in accidents involving police officers where firearms are unintentionally discharged.
- Thirdly, partly related to the fact that they have firearms with them while off duty, there is a problem of police officers using firearms to settle personal disputes. This includes the use of firearms against intimate partners (often female but sometimes male). The victims of these incidents of the use of force – it should be noted – sometimes include other police officers – another factor contributing to the police death toll.

Statistics of the Independent Complaints Directorate for the last four years indicate that 18%, or 2 out of every 11, fatal shootings by police fall into these first three categories. In the year from April 2008 to March 2009 this meant that 100 of the 568 people shot dead by police were either bystanders, intimate partners or others killed in arguments with police officers, or people killed in firearm accidents.

- Fourth: Police sometimes regard themselves as above the law. Their firearms are then used to administer 'street justice'. Where police acknowledge responsibility for these killings they then portray them as legally justified by, for instance, placing a firearm next to the body of the person who has been killed and claiming that lethal force was used in self-defence.
- Fifth: As a result of errors on the part of police innocent people are sometimes wrongly targeted by police in the mistaken belief that they are suspects wanted for violent crimes. Police sometimes also kill people whom they mistakenly believe are about to shoot them. Again, once the error is realised, steps may be taken to cover up the killing.
- Sixth: As a result of the fact that they are in possession of firearms police sometimes engage in foolhardy actions which expose themselves and their colleagues to danger;

- Seventh: Risks associated with the possession of firearms by police officers include the fact that police are sometimes targeted for their firearms contributing to the number of attacks on and killings of police officers
- Eighth: The problem of police suicides is closely connected to the access which police have to firearms particularly when they are off duty.
- Ninth: The responsibility of police for using lethal force and potential dangers to them are closely connected to the problems of police stress and compromised mental health.

The risks associated with having an armed police service therefore are partly to do with the potential for summary executions or 'street justice', and the use by police of firearms to settle personal scores, but also, amongst other things, have to do with the consequences of putting firearms in the hands of young police officers who are often relatively immature, inexperienced, hot-headed and/or afraid, and are prone to errors of judgement.

Though the situation in the early years of the past decade was far from ideal these risks have been compounded in recent years by the deterioration of standards of recruitment, training and supervision which are a by-product of *en masse* recruitment. In the six year period from April 2003 to March 2009 the SAPS has recruited roughly 78 000 new members of staff, though as a result of attrition (retirements, deaths, dismissals etc) the total increase in the number of SAPS personnel in this period has been in the region of 51 000. According to ICD figures, the number of deaths as a result of police action linked to constables has increased dramatically in recent years. The total number linked to constables in the 2008-09 financial year (roughly 263) was 3.5 times greater than the number recorded four years earlier in 2004-05 (estimated at 75).⁴

The way forward

In the light of the above it is obvious that everything reasonably possible needs to be done to ensure that the possession and use of firearms by police in South Africa is consistent with

⁴ The ICD annual report indicates that in 2008-09, the police officers under investigation in relation to 43% of the 612 deaths as a result of police action were constables. In 2007-08 the total number of deaths as a result of police action was 490 with constables allegedly responsible for 45%.

standards of professional policing. This includes amending Section 49 of the Criminal Procedure Act. The issues in this regard do not only relate to clarifying the law but also to ensuring that it is informed by appropriate principles.

However the legal amendment will not clarify numerous issues around which there is currently confusion and which contribute not only to unreasonable or unjustified shootings which place members of the public in danger, but also undermine the safety of police officers. There is therefore a need for the SAPS to introduce a formal use of force policy which would clarify the following issues:

- **The safety of bystanders** – it needs to be emphasised to police officers that the interest in preventing dangerous suspects from fleeing does not take precedence over the need to protect innocent members of the public from harm.
- **Warning shots** – many professional police agencies forbid the use of warning shots on the basis of the danger which these pose to members of the public. Statements made by the President and the Commissioner of Police during 2009 have alluded to the issue of warning shots but unfortunately have not contributed to clarity around when, if at all, they should be used.
- **Verbal warnings** – in situations where police officers are legally justified in using lethal force against a fleeing suspect police officers should where possible give verbal warnings to fleeing suspects prior to the use of lethal force against them.
- **The use of lethal force against moving vehicles** – many professional police agencies discourage the use of lethal force against a moving vehicle. The SAPS should at least emphasise to its members the dangers in this regard – if it does not forbid the use of lethal force altogether in these types of circumstances.
- **Whether police are expected to carry firearms while off-duty in order to intervene in crimes which they may encounter** – For many years the consistent pattern has been that the majority of police officers are killed while off-duty. It is believed that many of these police are killed when they intervene in crimes which they encounter while off-duty. Many professional police agencies advise their members against such

interventions motivating that they should see their obligations in such situations as, where possible, to call in support.⁵ SAPS members should also be advised that they are not required to make armed interventions in crime situations while they are off duty. If they do encounter such situations their main responsibility should be to immediately call in on-duty police officers. This would remove the current ambiguity about whether it is necessary for them to carry firearms while they are off duty. If they wish to carry firearms while off-duty for self-defence this then becomes their choice rather than something they are obliged to do.

- **Reporting and investigation of shooting incidents** - The SAPS has a standing order which requires members to report all shooting incidents and that these incidents be investigated by a member of the SAPS of officer rank. However this standing order has fallen into disuse or at least is inconsistently applied. The result is that, other than in the case of fatal shootings, which are supposed to be investigated by the ICD, there is frequently no oversight over the use of lethal force by police.

Other measures which can be implemented with a view to improving the professionalism of policing in South Africa include:

1. **Strengthening and supporting police in their ability to engage with armed suspects effectively.** In addition to questions of training and equipment one of the key issues here relates to the responsibilities of station commissioners, and others involved in a management or supervision function at police stations, in relation to the use of force. The current system has been taken over wholesale from the apartheid period and

⁵ See for instance the quote "Police officers traditionally have considered their responsibility for off-duty action to include aggressive-intervention (termination of crime and arrest of suspects) and not just careful observation and notification of on-duty police. The arming of off-duty police ... facilitates such aggressive action. But police frequently are at a tactical disadvantage while off duty, being out of radio communication with other officers and usually not having the opportunity to plan a course of action as they travel to a suspected crime scene. Nor do off-duty officers have the same perceived legitimacy to intervene that on-duty officers have when they are summoned to a disturbance by a civilian complainant. ... Moreover, off-duty officers who happen to be socializing in a tavern when armed robbers enter may be in no condition to outdraw the hold-up men, yet the presumed imperative to take police action may prompt an ill-advised confrontation" W Geller and M Scott (1992) *Deadly Force – What we know*. Washington: Police Executive Research Forum. p: 460.

is highly legalistic. A more sophisticated system would demand a much more proactive role from police managers in monitoring the use of force by their members and supporting them in applying high standards in relation to the use of lethal and non-lethal force. Managers would also be required to more actively assess the type of resistance or threats which police officers are likely to face in their precinct areas and take this into account in, for instance, deciding on the size of patrol groups or the need for 'backup' to be quickly available.

2. **Improving information on the circumstances of killings of police.** One of the products of the slash and burn approach to specialised units which has been applied in the police under the leadership of the former national commissioner was the closure of the unit responsible for promoting police safety. As a result the SAPS has lost the ability to analyse the killings of police. Such information should be used to inform police officers about the kinds of circumstances where they are most at risk and assist them in better understanding how to protect themselves. The SAPS should produce statistics on the circumstances in which SAPS members are killed, using a method of categorisation based on that used in Federal Bureau of Investigations data on killings of police in the US. This will contribute to a greater understanding of the situations in which SAPS members are most at risk.

3. **Strengthening investigations of incidents involving the use of lethal force** – this pertains not only to the investigation of deaths as a result of police action by the ICD but also to improving investigations by the SAPS itself of non-fatal uses of lethal force. Such investigations may be used not only to established whether shootings are legal or not but to identify examples of good practise in dealing with potential use of force situations.

4. **Monitoring of firearm usage:** The establishment of proper systems for monitoring firearm usage by SAPS members so that the organisation can exercise proper control over such usage.

It goes without saying that any attempt to ensure professional use of lethal force by police in South Africa requires the investment and backing of leadership figures. Their goal should be that police use of lethal force combines a 'proper combination of prudent restraint and prudent use of force'⁶. The concern to prevent unjustified or unnecessary shootings by police needs to be integrated with the concern for police safety and effectiveness. Towards this end 'the values of .. police culture need to be purposefully shaped' encouraging 'a high respect for human life among officers and encouraging responsible (but not foolhardy) restraint in the use of force'⁷

The issue is not one of escalating a war against criminals but of winning over communities to respect for the police. Respect for police on the basis that police uphold high standards of integrity and professionalism is necessary to build greater respect for the law in South Africa. To paraphrase the international policing scholar, David Bayley: the great effectiveness multiplier in the use of state power against violence is the allegiance and support of the public. In order for police to gain this support police should use lethal force in a professional manner and act in accordance with accepted standards of human rights.⁸

The victims of police shootings are not only violent criminals but include an unknown number of innocent victims, whether they are victims of mistaken identity shootings, are killed in disputes or arguments with police officers, or are bystanders. These victims are consistently drawn from amongst the ranks of the disadvantaged in South Africa. In more explicit terms – they tend to be young black men. Part of the historical legacy of police brutality in South Africa is the brutalised current South Africa which we live in. Statements which fail to inculcate amongst police the attitude that their use of lethal force must be shaped by the highest regard

⁶ W Geller and M Scott (1992) *Deadly Force – What we know*. Washington: Police Executive Research Forum. p. 405 at footnote 1.

⁷ Ibid:pp 405-406

⁸ The original wording is 'The great effectiveness multiplier in the use of state power against violence is the allegiance and support of the public. In order for governments to gain public support, responsibility for security should be entrusted , to police deployed among the population, who minimise the use of force, and who act in accordance with accepted standards of human rights' D Bayley. *The police in war: Fighting insurgency, terrorism and violent crime*. Notes for presentation to the conference 'Politics, theory and methods of policing research: Innovation and trends. Monkey Valley Conference Centre, Noordhoek, 30-31 January 2010. The statement has been abbreviated but also modified partly in relation to the statement by Geller and Scott, also quoted above, that the goal of managing police use of force is not merely to 'minimise the use of force' but to combine 'prudent restraint and prudent use of force' so as to integrate the concern with police effectiveness, and the concern for police safety into the concern to protect human life'.

for human life are merely reproducing the apartheid-era South African message that this group of people may be brutalised with impunity.