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Current Human Rights Challenges

Policing of Assemblies: Use of Force and Accountability

Seminar Report, May 2017

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The Geneva Academy platform on Current Human Rights Challenges provides a space, via annual expert seminars, for discussion among those who are at the forefront of securing the promotion and protection of human rights in contemporary practice.

While the first Expert Seminar in 2016 was aimed at a comprehensive overview of issues relating to the right to life, the 2017 seminar focused specifically on the rights affected by the use of force by law enforcement officials during the policing of assemblies. Topics discussed included the implications of 'public order policing' for the right to life, comparisons between the practices of law enforcement units in different countries, and analysis of the current technological and legal developments in the field, both in terms of their potential advantages and the threats they might engender. Exploring the challenges and opportunities of new technologies, including 'less-lethal' weapons and unmanned systems, from the perspectives of both the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment gave a new focus to the seminar. The second day focused on the problems related to torture and other cruel, inhuman or degrading treatment in an 'extra-custodial' setting, which diversified the discussions.

Recent regional documents, such as the African Commission on Human and Peoples' Rights' *General Comment No.3 on the Right to Life* (2015) and its *Guidelines for the Policing of Assemblies by Law Enforcement Officials* (2017) and the Council of Europe's *European Convention on Human Rights and Policing* (2015) were used as reference points, complementing older documents such as the *Basic Principles on the Use of Force and Firearms and the Code of Conduct for Law Enforcement Officials* (1990). A number of new instruments are also of relevance such as the *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* (General Assembly resolution 69/194, annex, of 18 December 2014); the *United Nations Standard Minimum Rules for the Treatment of Prisoners*, known as the *Nelson Mandela Rules* (General Assembly resolution 70/175, annex, of 17 December 2015). A number of participants drew attention to the utility of the 2016 joint report of the two UN Special Rapporteurs on the proper management of assemblies, and the importance of implementing its recommendations.

The 2017 seminar brought together experts and practitioners in the United Nations and regional systems, diplomats, academics, and civil society representatives. Participation was limited to approximately 45 participants. Some of the participants had opposing or divergent views regarding the purpose of the seminar, querying, for example, why (in terms of the Human Rights Council resolution) 'peaceful protest' was singled out from the general practice of law enforcement, or why 'peaceful protest' is different from any other assembly. These exchanges helped shape the debate and better define the possible outcome, as outlined below in point II.

I. CONCISE SUBSTANTIVE SUMMARY OF THE DISCUSSIONS

A. DAY ONE

The seminar started with an introduction and discussion on the general principles governing the use of force by law enforcement officials in the context of assemblies from the perspective of both the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment.

Several potential situations were outlined and considered, and the following points were highlighted:

- Principles such as necessity, proportionality and precaution apply whenever the use of force is contemplated

- The importance of a graduated use of force and, conversely, the possibility of de-escalating use of force
- Temporal necessity: both in terms of the concept of 'imminent' necessity and in terms of stopping the use of force when no longer necessary

The second session was composed predominantly of law enforcement professionals and provided an opportunity for them to share their views 'from the field'. It was underlined that the police has a duty to **facilitate** the enjoyment of the right to peaceful assembly, but also noted that this must be balanced with the need to use force in certain circumstances (sometimes to facilitate the enjoyment of the right by others).

It was noted that there is no categorical threshold of 'seriousness' concerning circumstances that may justify the **use of force** during a given police or law enforcement operation. This can result in uncertainty about when to start the use of force and what force should be used by law enforcement officials, albeit guided at all times by broad principles of necessity, proportionality, and precaution

It was noted that there are no practical gender-particularities concerning use of force against men and women. Participants highlighted that certain work has been conducted regarding the impact of female law enforcement officials on levels of police violence. They also noted that LGBT 'pride' events often pose challenges –around the world– from a policing-of-assemblies perspective.

Concerns were expressed that, in some jurisdictions, the available **remedies** after a use of force are restricted only to a certain range of serious issues. In some cases, complaint commissions or other bodies have protocols for determining what amounts to 'excessive' force.¹

It was also highlighted that within law enforcement there is a general responsibility to guarantee and facilitate the rights of persons within an assembly, and there clearly arise instances where their use of force is governed not by any law around assemblies but rather by the broader standards on use of force in **self-defence or defence of others**, for example where certain participants are posing a direct bodily threat to others.

There was also a debate on the distinction (in some jurisdictions) between a *gathering* (unorganized manifestation) and a demonstration, peaceful protest, or assembly (organized manifestation); some of the participants suggested that the legal framework for these is different. In particular, the difference between the two may require national review to determine whether the rules for use of force need to be the same in both situations, while maintaining the need to respect the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment in all circumstances.

Much discussion was dedicated to the question of training of law enforcement officials, including the different types of training, the necessary frequency and intensity, and how to ensure that it is as effective as possible. A distinction was highlighted between the training routinely given to civilian police, military police, and police in peacekeeping missions where, in the latter the peacekeepers might have to cope with a corrupted local practices which are contrary to the international law. A dilemma might therefore raise: comply with the international law or support local authorities and this particular situation must be also subject of the training.

¹ For further reflections on this topic, see Academy [In-Brief N°6, Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council](#).

Several participants drew attention to the fact that, at the global level, the Human Rights Committee is currently drafting a new **General Comment on the right to life (Article 6 ICCPR)**, which involves consideration of various dimensions of the use of force by law enforcement. The issues currently under review by the members of the Committee include:

- Duty to respect life, to prevent arbitrary deprivations, to exercise due diligence, to undertake investigations into potentially unlawful deaths, and to pursue accountability where they are found to have occurred
- The extent to which these duties extend to all threats that may result in loss of life
- 'Less-Lethal' Weapons: that these can result in risk to life when improperly deployed, that use must be restricted to law enforcement agents, and be strictly regulated
- Self-defence: force used in self-defence must be reasonable, a method of last resort, and proportionate to the threat faced
- Potentially-lethal force exercised in the protection of property cannot be proportionate
- Training of law enforcement officers should include not only practical training but also the inculcation of standards
- Right to life includes inherent obligation to investigate (arising from Article 6 itself not only from Article 2)

The Human Rights Committee has no plan to complete a general comment on freedom of assembly (though their recent one on freedom of expression has some overlap); an as yet un-reviewed section of the rapporteurs' draft of the current general comment provides an opportunity for discussion of other rights.

Participants discussed the revised **Minnesota Protocol** and its guidance on the conduct of investigations into potentially unlawful deaths. It was noted that this is an expert document (as was the original version, from 1991), and as such was not presented to, or adopted by either the Human Rights Council or by the Commission on Crime Prevention and Criminal Justice. In addition to the wide range of practical guidance regarding the actual conduct of an investigation, the Minnesota Protocol sets out the full scope of the State's duty to investigate:

- The State has responsibilities with respect to the right to life both prospectively and retrospectively: to prevent arbitrary deprivations of life and to investigate potentially unlawful deaths
- Duty to Investigate – what triggers it and what is its scope?
 - Triggered when the State knows or should have known of any potentially unlawful death, not only when there is a formal complaint or allegation
 - This includes all cases where a State agent has caused the death (or is alleged to have done so), and therefore includes all cases where the use of force by a law enforcement official has caused the death, or may have contributed to it

- This is a minimum standard – in many jurisdictions an investigation will be triggered into use of force by law enforcement without a death having been caused (but usually in that instance only as a result of a complaint)
- The Minnesota Protocol does not prescribe a particular form of investigative mechanism, but does highlight that if a special mechanism is established it must not undermine accountability by, for example, unduly delaying or avoiding criminal prosecutions
- All investigative mechanisms need to be prompt, effective and thorough, independent and impartial, and transparent

The seminar then continued by introduction and general discussion on how the standards governing the use of force in the context of public order policing can be operationalised so as to ensure effective compliance and accountability in practice.

In a session about the challenges posed by **new weapons technologies**, different types of weapons were reviewed and discussed. It was contended that the binary separation of lethal and non-lethal weapons should be abandoned, but there was no final agreement on a working definition of a 'less-lethal' weapon.

The following questions, among others, were considered:

- How best to ensure that only appropriate weapons are deployed (i.e. not those that are inherently cruel or serve no legitimate law enforcement purpose, or that pose a significant risk of being used in such a way) and, where they are deployed, how to ensure they are used in a proportionate, lawful, accountable fashion, and only when strictly necessary
- How can we best build on recent progress? – To take advantage of the Special Rapporteur on torture's very helpful focus on extra-custodial use of force; to implement the recommendations of the Heyns and Kiai's report?
- How to build on a 2011 resolution by the Third Committee of the UN General Assembly, which calls upon all States to: 'take appropriate effective legislative, administrative, judicial and other measures to prevent and prohibit the production, trade, export, import and use of equipment that has no practical use other than for the purpose of torture or other cruel, inhuman or degrading treatment or punishment'
- How to build on Article 14 of the Robben Island Guidelines (2002), which notes 'States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment'
- Does the availability of a less-lethal weapon act as a restriction of use of force in comparison to the unique availability of a lethal weapon?

It was highlighted that, in policing there should be a human face that takes a decision to use or not to use force – even more so than in armed conflict. Remote control is therefore a challenge, but complete autonomy would be a bridge too far – including for reasons linked to human dignity. A comparable context would be judges determining parole approvals of

criminals, even if computers could determine better whether a person is more likely to reoffend: we have this human notion of justice that should include a human judge rather than a computer doing it.

Some of the most inherently disproportionate technologies are envisaged (and in some cases used) in detention facilities – i.e. stun belts or vests – and are not something used in assembly settings. Even in the case of weapons have a legitimate purpose, there may still be the reason that they are (or should be) banned, especially if the harm caused by these weapons tends to outweigh any discernible benefits, which would render them inherently disproportionate. Likewise, the repeated use over time of a weapon that law enforcement know is inaccurate or ineffective, could amount to disproportionate force.

Additional questions were raised: What about weapons that are so likely to be used unlawfully that there is a presumption against their lawful use because it is so easy to use them in a way that is disproportionate? Is there potential to draw on less injurious weapons? What criteria may mean certain types of weapons should give rise to such a presumption – i.e. that there are less injurious means/methods? Of course, any weapon can be used in an unlawful manner – but are there certain means that will always cause unnecessary harm (such as spiked batons), and that are therefore inherently unlawful?

There are currently no international agreed standards of what amounts to a ‘less-lethal’ weapon. Very often the industry define some standards which are not discussed publicly but emerge out of internal testing and willingness to create new technologies and weapons which can be sold to law enforcement forces. There is also a need for some kind of standardisation for testing/trialling regimes for weapons designed for a law enforcement setting.

The reporting on the use of weapons by law enforcement officials, including within the context of the policing of assemblies is also problematic. In some jurisdictions such reporting is mandatory, which seems like an example of good practice. However, there are also diverse pressures on law enforcement officials in the aftermath of an operation, and in the context of an assembly it is not always clear who precisely should be responsible for preparing the report.

Finally, it was highlighted that some weapons forbidden by international humanitarian law (such as blinding or deafening weapons) are produced (with a lower intensity power) and are sometimes deployed indiscriminately or repeatedly by law enforcement, without any consideration given to the short- or long-term harm that they may cause.

B. DAY TWO

The second day's discussion was based on questions relating to the following:

- Can extra-custodial use of force amount to torture or other cruel, inhuman or degrading treatment or punishment (CIDTP)?
- Implications of certain means (including less-lethal weapons such as Tasers, robots, drones, riot control agents etc.) in relation to the prohibition of torture or CIDTP.
- What is the interrelation between the prohibition of torture or CIDTP and the right to life with regard to the extra-custodial use of force?

- What is the interrelation between the prohibition of torture or CIDTP and justifications such as self-defence and defence of others, and principles of necessity, proportionality, and precaution?

It was highlighted that the term ‘custody’ lends itself to different interpretations, many of which may be broader than simple physical custody. The purpose of the discussion was to cover incidents of the use of force that occur outside prison or *intra muros* custody more widely, and do not involve lethal force. There are a wide range of contexts where this occurs.

The discussion was aimed at examining whether the extra-custodial use of force which does not prove lethal can be tied to the prohibition of torture and CIDTP in human rights law. If excessive force is used, but the right to life is not directly threatened, then which human right is relevant? Is it, or can the framework be, torture or CIDTP? One purpose of the exercise is to clarify for States that even where the context does not involve detention or lethal force, there could still be a human rights violation. Questions were asked such as: While detention or control is not explicitly in the art 1 of the UN Convention against Torture definition of torture, the assumption is that it is there – why?

The debates of the second day (especially the morning session) will inform the forthcoming report of the Special Rapporteur on torture (Dr Nils Melzer) on the extra-custodial use of force.

II. OUTCOME: WHAT ARE THE MAIN CHALLENGES IN THE FUTURE? HOW SHOULD THE COLLECTIVE AGENDA BE FRAMED? WHAT IS (OR SHOULD BE) THE ROLE OF THE UN, IN PARTICULAR THE HUMAN RIGHTS COUNCIL, SPECIAL PROCEDURES MANDATE-HOLDERS, AND THE RELEVANT TREATY BODIES?

NB: The content which follows has been deduced from discussions by the organizers. It has not been necessarily pronounced as such during the seminar itself.

A. IMPLEMENTATION OF THE ‘PROPER MANAGEMENT OF ASSEMBLIES’ INITIATIVE

The efforts of implementation of the recommendations presented in the joint report A/HRC/31/66 on the proper management of assemblies could be prioritised by the relevant mandate-holders. One way is to maintain ongoing discussions with the new SR on summary executions (Dr Agnes Callamard) as well as the new SR on freedom of assembly and association (Professor Annalisa Ciampi) are needed to establish the directions these mandate-holders wish to take towards implementation.

The seminar did not produce a clear-cut recommendation on how best to continue the resolution under the same name. However, it may well be that an approach from the perspective of the ‘use of force’ could be appropriate.

B. Use of Force and Policing of Assemblies

From this perspective, there is a great deal of debate and research that could be undertaken, both around cross-cutting thematic issues (such as weapons technology or tactics) as well as with respect to regional practice or impacts. Law enforcement experts and considerations might be involved in the Human Rights Council work. The involvement of relevant regional human rights mechanisms would also be helpful.

From the perspective of 'extra custodial use of force', the Special Rapporteur Nils Melzer will develop the question of torture in extra custodial settings in his next thematic report. However, as the seminar showed, while this overlaps with the policing of assemblies, it is in fact a much broader project and may remain a parallel initiative.

C. Human Rights guidance on use of 'new technologies' (example title)

Reference was made in the discussions to recommendation 67(i) of the joint report of the Special Rapporteurs, on the issue of 'less lethal weapons', or what may more broadly be addressed as 'new technologies'. The Special Rapporteurs recommended that:

'The United Nations High Commissioner for Human Rights should convene an expert group to examine the application of the international human rights framework to less-lethal weapons and unmanned systems for law enforcement purposes, including with a focus on their use in the context of assemblies'.

OHCHR has engaged in preliminary discussions on this issue, including on the question of funding for taking these issues forward, and on the potential for a Human Rights Council resolution which could provide a framework for further discussion.

It was suggested also that a side event could be organised at the 2018 March session of the Human Rights Council and/or at the General Assembly Third Committee in New York. The guidance provided on these issues by the UN human rights treaty bodies and regional courts could helpfully inform these discussions.

A further dedicated expert meeting on less lethal weapons/new technologies could be included in the annual platform run by the Geneva Academy and its partners in 2018, to deepen the issue and prepare the policy thinking. A more diverse range of different law enforcement expertise should be sought.

The forthcoming joint Resource Book which will be published in May 2017 by the UNODC and OHCHR on the Use of Force and Firearms in Law Enforcement, as well as the updated OHCHR training package on Human Rights and Law Enforcement, were referred to as providing an important baseline for further discussion.²

² See also ICRC position on the use of toxic chemicals as weapons for law enforcement, from 2013, on www.icrc.org

NB: VILLA MOYNIER RULES

In order to facilitate frank and open discussions, this seminar is held under the Villa Moynier Rules:

RULE 1

Discussions during and on the margins of the meeting are strictly confidential. A participant is free to report his/her own comments but may not cite or summarize remarks by any other participant.

RULE 2

The identity of the participants is confidential. An individual participant is free to refer to his/her own participation in the meeting, but may not identify any other participant.

RULE 3

A summary report is prepared by the organizers of the sense of the discussions. A draft is circulated to the participants for comment before being finalized. Once the summary report has been made public it may be freely quoted.

FOR FURTHER CONSULTATIONS

Handbook on Police Accountability, Oversight and Integrity (http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/PoliceAccountability_Oversight_and_Integrity_10-57991_Ebook.pdf)

UNODC-OHCHR Resource Book on Use of Force and Firearms in Law Enforcement (forthcoming, 2017)

OHCHR revised training package on Human Rights and Law Enforcement (forthcoming, 2017)