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Arming the Police in Britain: a Human Rights Analysis

Ian Turner¹

Abstract

In 2010 Derrick Bird shot and killed 12 people, as well as injuring a further 11, in Cumbria. A legitimate question that arose after the tragedy was whether the outcome would have been different if the British police had been armed? This paper explores whether human rights law requires, or at least justifies, the UK authorities to arm the police in the pursuit of public protection? Derrick Bird was licensed to possess his firearms. Is a more proportionate response amendments to the existing weapons certification process? These are some of the questions which this article seeks to address.

Keywords

Human rights, armed police, TASERS, firearms licensing.

Introduction

In June 2010, Derrick Bird, a taxi driver, shot and killed 12 people in and around Whitehaven, Cumbria, with a 12-bore shotgun and a .22 rifle, before turning a gun on himself. The ages of those who died ranged from 23 to 71. 11 other people were injured, including a 14 year old schoolgirl. But soon after killing his first victims, three unarmed police officers tried and failed to stop Bird. He was to go on and kill a further nine people, criss-crossing 45 miles of the Cumbrian countryside in his taxi. Bird's shooting spree in 2010 is not the only atrocity committed in the UK with firearms: in August 1987 there was the 'Hungerford Massacre' in Hungerford, Wiltshire. Michael Ryan, armed with two 'semi-automatic' rifles and a handgun, shot and killed 16 people including his mother, and wounded 15 others, before fatally shooting himself. Nine years later, in 1996, the 'Dunblane Massacre' took place at Dunblane Primary School, Dunblane, Scotland, where Thomas Hamilton, armed with four handguns, shot and killed 16 children, together with their teacher, before committing suicide. More recently, two women police officers, Fiona Bone and Nicola Hughes, were killed in a gun and grenade attack in Greater Manchester, in

September 2012. Questions at the time of all of these shootings, most recently in the case of the murder of the two police officers, centred on the arming of all officers in mainland Britain.² Indeed, does human rights law require, or least justify, this state response for reasons of the protection of the public from either a random shooting by owners of licensed weapons such as Derrick Bird, or a terrorist attack by groups such as Islamic State in Iraq and the Levant (ISIL)? Fatalities caused by the unlawful possession of firearms are outside the scope of this paper, though the conclusions drawn here may still be relevant to any such analysis about homicides caused by unlicensed weapons. Before examining human rights obligations, and Article 2 of the ECHR, the right to life, which is the most relevant to this discussion, the existing statutory regime governing the lawful possession of guns will be considered.

The legal control of firearms in the UK

The principal statute governing the lawful possession of guns in the UK is the Firearms Act 1968. At the time of the shooting in Cumbria in 2010 Bird was in possession of a 'shotgun', which under the Firearms Act 1968, section 2, required a separate licence to a 'firearm', such as Bird's .22 rifle, which was governed by section 1. It is a criminal offence to possess either a firearm or a shotgun without a licence: Firearms Act 1968, sections 1(1) and 2(1) respectively. In the aftermath of the Hungerford Massacre the Firearms (Amendment) Act 1988 was passed, restricting the lawful possession of some guns by extending the classification of 'prohibited' weapons under the Firearms Act 1968, section 5, to include, for example, semi-automatic and pump action rifles. Furthermore, following the Dunblane Massacre, the Firearms (Amendment) Act 1997, and later in that year the Firearms (Amendment) (No.2) Act 1997, were passed, outlawing, for example, the lawful possession of handguns by also classifying these as 'prohibited weapons' under the Firearms Act 1968, section 5.³

Under the Firearms Act 1968, section 27, an applicant for a certificate to lawfully possess a 'firearm' has to demonstrate that they are a fit person to possess the weapon and have a good reason for its possession. The latter condition applies to shotgun possessions, too, as per section 28. In the case of firearms, the applicant must provide a separate good reason for possessing each weapon, as per section 27, but not so for each shotgun: section 28. A further condition of either a firearm or a shotgun certificate stipulates that the guns

must be stored securely so as to prevent access by an unlicensed person. Licences for firearms and shotguns are currently valid for a five year period.

Article 2 of the ECHR, the right to life

Article 2 of the ECHR confers a 'negative' right upon an individual, that is, a right not to be arbitrarily killed by the state (see, for example, Article 2(2)). But it also creates a 'positive' obligation on the state to prevent violations of the right by non-state actors, as per Article 2(1). The European Court of Human Rights (ECtHR) considered this 'positive' duty to protect life in *Osman v United Kingdom* (2000) 29 EHRR 245. For a breach of the state's duty to be established, it must be shown that the authorities knew, or ought to have known, of the existence of a real and immediate risk to the life of an identified individual or individuals. If so, the state is then expected to act reasonably in averting that risk. **Derrick Bird was licensed to use firearms. In granting him a license, did the state fail in its human rights duty to protect life, as per Article 2(1)? Examining this issue, and other human rights considerations related to the lawful ownership of weapons by members of the public, is the purpose of the following sub-sections.**

1. Bird: did the police fail in protecting life?

After the shootings in 2010 suspicions were raised about the suitability of Derrick Bird to possess guns. Bird was granted a shotgun licence for the first time in 1974 (he was not granted a separate licence to possess his .22 rifle – a 'firearm' – until much later, in 2007). Cumbria Police no longer have the original record granting Bird his first shotgun licence so questioning whether the force was in breach of human rights law, at least in 1974, is not possible. In 1982 Bird was convicted of 'drink-driving', fined £100 and disqualified from driving for 12 months; and in 1990 he was convicted on two counts of theft and one count of handling stolen goods and sentenced to six months imprisonment, suspended for 12 months (Whiting, 2010a). Maybe these incidents should have triggered the removal of his shotgun licence? Perhaps so after his first transgression in 1982; and maybe more so after his more serious brush with the law in 1990, which was considered sufficiently serious enough to warrant a custodial sentence, albeit one that was suspended. But a conviction for drink driving is fairly minor in criminal law terms; and his later conviction in 1990, which, although much more serious, was an offence of dishonesty, not violence. Even if this later

incident was sufficient to engage the state's positive obligation, as time wore on the obvious risks posed by Bird decreased; so at the time of the shootings, in 2010, his last punishment had been twenty years earlier – this is hardly a risk that the authorities should have anticipated. Indeed, he did not lawfully possess a firearm for the first time until 2007, seventeen years after his suspended sentence for dishonesty.

Moreover, the Independent Police Complaints Commission (IPCC), who carried out an investigation following the shooting spree, concluded that a criminal prosecution of the Cumbria force was not warranted, as this was 'a police response to a murderous spree on an almost unprecedented scale' (IPCC, 2011a).⁴ Indeed, several months after the shooting, in November 2010, Adrian Whiting, an Assistant Chief Constable at Dorset Police, and the Chair of the Firearms and Explosives Licensing Working Group of the Association of Chief Police Officers (ACPO), produced an independent report – 'Part 1'⁵– into the licensing of Derrick Bird's weapons by Cumbria Police. Whiting found that the force's decisions, and the actions taken in respect of the grant and renewals of Bird's shotgun certificate, were 'in accordance with the law, regulation, Home Office advice and ACPO policy...[And]...were reasonable in the circumstances'⁶ (Whiting, 2010a). It is very much doubtful, therefore, whether a **human rights** obligation was imposed on Cumbria police, that is, they knew, or ought to have known, that Derrick Bird was a threat to the life of an identifiable individual or individuals, let alone this obligation was breached by them.

Let us not forget, however, that Bird murdered 12 people and injured a further 11. Does this duty imposed on the state to protect life, therefore, pay insufficient regard to the rights of those who died, and those that survived but were injured? If so, the balance is too much in favour of the state at the expense of the individual. But, if in fact one had been able to construct an argument that this positive duty **imposed on the state** had been engaged, the state is then only obliged to act reasonably in averting that risk. Would the routine arming of the police be considered as acting reasonably in the circumstances to discharge that **human rights** obligation? Whether the answer to this question is 'yes', or assuming this duty here did not exist but it should have done, the author does not support an arming of all police officers. Explaining why this is so is the aim of the next sub-section.

2. Should the police be armed? Do they want to be armed?

In considering the reasonableness of a routine arming of the police, **as per human rights law**, it is sobering to recall incidents where individuals have been fatally wounded by existing armed officers. In 1999, for example, Harry Stanley was shot and killed by armed police after leaving a public house in Hackney, London. As he left the pub, a member of the public dialled 999 claiming that Stanley was an Irishman with ‘what actually looks like a sawn off shotgun...tightly wrapped in a blue plastic bag’. In fact, Stanley was not Irish – he was Scottish – and not armed – he was carrying the leg of a coffee table he had recently had repaired. An inquest jury found that Stanley had been ‘unlawfully killed’ by the police. Notwithstanding the court of first instance quashing the inquest verdict, *R (Sharman) v HM Coroner for Inner North London* [2005] EWHC 857 (Admin), which was approved by the Court of Appeal [2005] EWCA Civ 967, questions have remained about the truthfulness of the two firearms officers involved.⁷

More recently, in 2005, Azelle Rodney was a rear seat passenger in a car that was stopped by armed police in Mill Hill, London. All those in the car were believed to be on their way to commit a robbery. Intelligence suggested that the men had at least one automatic weapon in their possession. An armed officer, ‘E7’, shot at Azelle Rodney eight times, hitting him on six occasions. There was a Colt automatic pistol on the rear seat next to Rodney but it had been deactivated, so could not be fired even if it had been loaded. In a bag in the rear footwell area were two further guns which were loaded and could fire. In June 2010 an inquiry was established under the Inquiries Act 2005 to examine the Rodney shooting.⁸ At the inquiry E7 believed that Rodney had picked up the pistol and was about to use it. But the inquiry did not accept this because of other evidence. E7’s lack of a clear view of Rodney for one. Thus, the Inquiry found that the operation ‘was not planned and controlled so as to minimise, to the greatest extent possible, recourse to the lethal force’. In response to E7 alone firing a total of eight shots, of which at least the last three would have proved fatal, the Inquiry further found that the force used was disproportionate to the aim of public protection. It was concluded, therefore, that Rodney had been unlawfully killed (Holland, 2013).⁹ Following the Inquiry, there was a review of the shooting by the Crown Prosecution Service (CPS). The CPS decided that there was sufficient evidence, and it was in the public interest, for E7 – later to be named as Anthony Long – to be charged with murder. Long was later acquitted of the charge (Dodd, 2015).

In the same year as the death of Azelle Rodney, Jean Charles de Menezes was also killed by firearms officers in London; de Menezes was shot nine times on an underground train at Stockwell tube station. Initially, de Menezes was believed to have been a bomber, Hussain Osman, linked to the four suicide bombings in London on 7th July 2005 and the four failed suicide bombings two weeks later. The day after the shooting, the then Metropolitan Police Commissioner (MPC), Sir Iain Blair, announced that the police operation had been a tragic mistake: he was not the suspect, Hussain Osman, a black man from North Africa; he was Jean Charles de Menezes, an unarmed white man from Brazil. Of the many questions raised about the de Menezes killing, the police surveillance prior to the shooting was of particular concern, notably the half an hour before he boarded the train at Stockwell. First, the leader of the surveillance team, 'James', described de Menezes as a 'good possible' match to the suspect, Hussein Osman; secondly, 'Harry' said de Menezes 'may or may not' be the suspect; five minutes later, 'Ivor' came to a similar conclusion to 'Harry'. De Menezes was then recorded by 'Trojan 80', a tactical officer advising senior officers at police headquarters, as 'not identical' to the suspect. This was then confirmed minutes later by 'Laurence'. But about five minutes before the shooting, the team leader 'James' 'thought that [de Menezes] was [the] suspect'. The IPCC report into the incident was scathing of the surveillance operation, and the conduct of 'James' in particular (IPCC, 2007). But no individual police officer was ever charged over the shooting.¹⁰ In late 2008 an inquest jury into the death of de Menezes returned an 'open verdict' (the coroner having previously excluded a verdict of 'unlawful killing' from the jury's consideration), which criticised all aspects of the police operation (BBC News, 2008b). Indeed, the coroner himself called for police practices to be reviewed, saying 'systematic failures' had occurred (BBC News, 2009).

Controversy has also surrounded the killing of Mark Duggan who was a passenger in a taxi, which was stopped by armed officers in Tottenham, north London, in August 2011. Duggan got out of the taxi and was then fatally shot in the chest. Initial reports that Duggan had shot at police were later dismissed by ballistic tests, as the only two bullets found at the scene, had come from a single officer's weapon (IPCC, 2011c), though another gun, which was not standard police issue, was also recovered (Peck, 2011). By a majority of 8-2 the inquest jury decided that Mark Duggan had been lawfully killed (Duggan Inquest, 2014). Nevertheless, many questions still remain about the shooting. In reference to the gun found at the scene, for example, the jury, also by a majority of 8-2, found that it had belonged to Duggan, and that he had thrown it into the grass, prior to being killed. Eight jurors therefore

believed that Duggan was not brandishing a weapon when he was shot. Inevitably, therefore, why did they find that he was lawfully killed (Dodd, 2014a)?¹¹ Police officers giving evidence at the inquest said that Duggan was in fact pointing a gun at them; but if the jury believed that Duggan had discarded his gun before being shot, surely they must have thought that the officers were lying (Inquest, 2014)? In 2015, following a three-and-a-half year investigation into the killing, the IPCC cleared the armed officers of any wrongdoing (Gayle, 2015). More recent controversy has surrounded the police shooting of Anthony Grainger, who was unarmed, in Cheshire in 2012 (Dodd, 2014b)¹² and Jermaine Baker in London in 2015; in the case of the latter, for example, the officer who shot Baker, 'W80', was later arrested on suspicion of murder, having allegedly shot the victim when he was asleep (Halliday, 2015).¹³

Also of particular concern in the shooting of Mark Duggan was the conferring by the officers after the incident, which some believe had created the perception of police collusion (Dodd, 2014d). 'V53', for example, the officer, who actually shot Duggan, had said that his substantive account of the shooting was compiled three days later, with he and his colleagues spending more than eight hours sitting in a room together writing their statements (Dodd, 2013). The issue of police conferring after a fatal shooting also arose following the shooting of barrister Mark Saunders in 2008, who was shot and killed by armed police after a five-hour armed stand-off in Chelsea, south-west London. The deceased's family sought a judicial review of the decision, allowing officers to confer after the shooting: *R (Saunders) v IPCC* [2008] EWHC 2372 (Admin). The Saunders family argued that these actions of the police after the shooting had tainted the IPCC's investigation. The court dismissed the application, though the judge, Underhill J, was still very critical of the practice.¹⁴ The Duggan coroner, HH Judge Cutler, criticised the practice, too.¹⁵ Moreover, Cutler also lamented the absence of a video recording of the scene (Cutler, 2014). To this end, some armed officers have trialled body worn video (BWV), to provide for more accurate records of police shootings (Loeb, 2014). Indeed, the Metropolitan Police is intending to issue all of its firearms officers – in fact all of its police officers, 22,000 of them – with BMV by late 2016 (Press Association, 2016). That said, the IPCC believes that BMV is a 'useful tool, but not the complete answer to fair and effective policing' (IPCC, 2016).

The norm in the UK is to have a dedicated team of 'armed response vehicles' ('ARV's')¹⁶ with teams of authorised firearms officers ('AFO's'). But even with a small number

of AFOs trained for ARV work, who have gone through a seemingly rigorous selection and initial training process lasting about 6 weeks, as well as continuous training for three days every six weeks,¹⁷ armed operations do go wrong, as was the case in the Stanley, Rodney, de Menezes shootings etc. But would it be desirable for the arming of all police officers, **to satisfy the state's positive obligation to protect life, as per Article 2(1) of the ECHR**, since in all likelihood this level of training – initially and subsequently – for all officers would not be practicable? Inevitably, therefore, there would be a significant increase in mistakes. This is maybe a reason why routine arming is not actually supported by the police service, especially those officers on the front line. The last survey of individual officers by the Police Federation of England and Wales, the representative body of all police officers up to and including the rank of Chief Inspector, showed only 22% of rank and file officers were in favour of routine arming (Johnston, 2012).¹⁸

Notwithstanding the fact that fatal mistakes have happened in existing police firearms operations, **from a human rights perspective** it is important to place these in the context of the total number of occasions when teams of armed police have actually been deployed. For example, between April 2014 and March 2015, which is the latest period for published statistics on incidents involving armed officers, there were 14,666 operations in which firearms were authorised. This is a 2% decrease on the previous year, April 2013 to March 2014 (Home Office, 2016a). Since 2002/03 the lowest number of operations in a year in which firearms were authorised was 10,996 (2012/13) and the highest was 19,595 (2007/08) (Gov.UK, 2013a). The average number of armed deployments per year over a ten year period was therefore about 16,000. Between April 2014 and March 2015 the police discharged a firearm in only six incidents (Home Office, 2016a). Since 2002/03 the lowest number of firearms discharges in a year was two (2013/14) and the highest was ten (2002/03) (Gov.UK, 2013b). The average number of firearms discharges per year over a ten year period was therefore about seven. Indeed, there has been no more than six discharges per year in the last five years (Home Office, 2016a). Even in the year with the highest number of police shootings – 2002/03, where there were 10 instances of police discharging their weapons – this accounted for only 0.067 % of armed operations (Gov.UK, 2013c). So there is arguably no reason to be concerned (or at the very least overly concerned) at the lack of restraint of AFOs.

Moreover, in reply to the question about the routine arming of the police in Britain, other current officers have said: 'Of course if you armed the police, would violent offenders then feel they had to carry guns all the time?' (Wilkinson, 2013). Inevitably, therefore, further questions would be raised about the risks to public safety since in all likelihood there would then be a proliferation in the number of illegally held firearms by criminal gangs. Which of these competing public interests would be more desirable: protecting the human rights of a seemingly small number of individuals at some risk from the criminal acts of licensed gun holders or preventing a substantial increase in illicit gun crime?

3. Reforming the UK's firearms licensing scheme

This section seeks to advance further arguments opposing the routine arming of the British police **on human rights grounds**, in that reform of the current firearms licensing regime is much more preferable. In the case of Derrick Bird, Adrian Whiting's independent review did not find any specific fault in Cumbria police's granting of his shotgun and firearms certificates. However the police were criticised in the case of Michael Atherton, who fatally shot his partner and two other members of his family, as well as himself, following a family argument at his home in Horden, Peterlee, on New Year's Day 2012. Atherton lawfully owned six guns – a combination of firearms and shotguns – despite a history of domestic abuse and threats to self-harm. In November 2008 Atherton's weapons were confiscated by Durham police after threats that he would 'blow his head off' during a domestic argument with his partner. He was given a written warning by the police – in fact, this was a final written warning – and the weapons were returned to him six weeks later (Brown, 2013). An investigation by the IPCC was highly critical of the Durham police's firearms licensing processes and procedures (IPCC, 2012a).¹⁹

Certificates have been granted to individuals whose records suggest reasonable grounds for refusal. Different police forces have different approaches to domestic violence, for example. While Durham granted a licence to Michael Atherton, an application from a man with a history of domestic abuse in Hampshire would have been rejected (Edwards, 2013). Edwards observes:

'When the various inquiries into the [Peterlee] shootings exposed the inner workings of the Durham Constabulary firearms licensing unit to scrutiny they revealed a body

that was unfit for purpose operating an important regulatory scheme in a shambolic manner...This, of course begs the question, if the Durham unit was so chaotic how many other firearms units are similarly unfit for purpose, and thus how many 'unfit' individuals have licences for lethal weapons? This is not the rigorous form of regulation that Article 2 ECHR demands of dangerous activities.' (Edwards, 2013)

There is also concern about the mental and alcohol related problems of potential licensees. When processing applications, the police do not routinely approach an applicant's doctor but do so only when there are concerns about their medical history that require further information, meaning serious mental health issues will often be overlooked (Edwards, 2013).

This article seeks to assess whether human rights law can be used to support the routine arming of the police in Britain. But in the aftermath of the Atherton shootings, for example, there is arguably a more pressing human rights issue: the adequacy of the UK's current regime of gun licensing. Evidence to the Cullen Inquiry following the shootings in Dunblane stated that between 1992 and 1994 there were 152 deaths involving firearms, of which 33 were perpetrated by those who owned their guns legitimately (Cullen, 1996). More recent figures suggest a significant decline in the number of homicides committed by licensed weapons – perhaps as a direct result of further restrictions on guns since the massacre in 1996 – but still maybe a cause for concern. In 2010, for example, the House of Commons Home Affairs Committee published a report on firearms control in which it stated that in 2008/09 there were 39 homicides involving firearms, of which four were held lawfully (Home Affairs Committee, 2013).²⁰

As of March 2016 there were 153,404 firearm certificates and 567,015 shotgun certificates on issue (Gov.UK, 2016). Why is there a need for so many licensed weapons? As per the Firearms Act 1968, section 28, there is no need to possess a certificate for each individual shotgun (albeit only those with two cartridges or less), unlike each individual firearm, so the figure of more than half a million shotgun licences is clearly only a minimum in terms of the total number of shotguns that are currently lawfully held. What is also significant are the very low numbers of certificates that are refused and revoked. In 2015/16, for example, of the 9,755 new applications for firearms certificate, only 221 (2%) were refused, and of the 22,596 new applications for shotgun certificates, only 712 (3%)

were refused; 396 (0.3%) firearms certificates and 1,349 (0.2%) shotgun certificates were revoked in the same period (Gov.UK, 2016).

In 2010 the Home Affairs Committee urged the Government to codify and simplify the existing law. It suggested that interpreting and applying the current 34 pieces of legislation governing the control of firearms placed an 'onerous burden' on the police and on members of the public who wished to abide by the law (Home Affairs Committee, 2013). The Committee therefore made several recommendations, such as the introduction of one system to cover all licensed weapons; and tighter restrictions on the granting of certificates to those who had engaged in criminal activity. Individuals given suspended jail terms should be stripped of any s.1 licences they hold, being one example. The committee was also concerned about the use of legally-owned weapons in domestic shootings, often linked to domestic violence. It suggested, therefore, that the government should require the police to consult the partners and recent ex-partners of applicants in making the decision to grant a licence (Home Affairs Committee, 2013). The committee also welcomed the then agreement between ACPO and the British Medical Association (BMA) that doctors were to be consulted on every new and repeat licence application, to ensure that individuals were assessed on the basis of accurate information about an applicant's health (Home Affairs Committee, 2013).

Indeed, the UK has sought to amend the existing licensing scheme in recent years, since the Bird shootings, to better reflect concerns about public safety and simplify the certification process; for example, the government's latest explanation of the licensing regime states that an incident of domestic violence taking place 'should trigger a need for police to review whether the certificate holder can be permitted to possess the firearm or shotgun without causing a danger to public safety or to the peace'. It further states that, in general, evidence of domestic violence and abuse suggests that an individual should not possess a firearm or shotgun (Home Office, 2013b). In addition, the Firearms (Amendment) Rules 2013 introduced a new single application form for a firearm and/or a shotgun certificate: the 'Form 201'. Section 1 of the explanatory notes to the Form 201, 'Form 201A', oblige applicants not to withhold information about any conviction, including binding overs and cautions (Gov.UK, 2013d). Section 6 states that where an application is successful a letter will be sent to a person's doctor and where there is a good reason a medical report may be required.²¹

4. Are 'Less lethal weapons' such as Tasers Reasonable Alternatives to the Routine Arming of all Police Officers with 'Conventional' Firearms?

The recurring theme of this article is the opposition to the routine arming of the British police on **human rights** grounds, that is, security of the individual, public protection etc. But a greater arming of the police with 'less-lethal' weapons²² such as TASERS may be a reasonable compromise **in discharging the state's duty to protect life**. In fact debate over the wider use of tasers was particularly keen following the killings of PCs Fiona Bone and Nicola Hughes, as a taser was found close to their bodies, suggesting that one of the women had attempted to use it in self-defence (Ward, 2013). When 'fired', tasers deliver a high-voltage electric shock to incapacitate a target.

Attention was also drawn to the greater police use of tasers after the Northumbria Police manhunt of Raoul Moat in July 2010. Moat had shot three people, including a police officer, in and around Rothbury, Northumberland, before killing himself during an armed siege. But immediately before Moat shot himself, a West Yorkshire Police AFO armed with an X-12 taser fired it at Moat in an effort to prevent him from taking his own life. But the X-12 taser was an unauthorised weapon – it was a shotgun taser – unlike the standard, Home office authorised X-26 taser pistol. Northumbria Police allowed AFOs from another police force – West Yorkshire – to use the X-12 taser because they had had specific training in the use of shotguns; and the X-12 taser could deliver a projectile over a significantly greater distance – 30 metres – than one from a conventional taser which only had a maximum distance of seven metres (IPCC, 2011b). The IPCC report into the incident found that there was a clear rationale for the decision by Northumbria Police to use non-lethal force in this instance, believing its intention to use whatever means they had to try to capture Moat alive overrode any questions of authorisation (IPCC, 2012b).

There is great potential, therefore, for the wider police use of tasers – the X-26, and even the X-12 in situations where the subject is not close enough to be incapacitated by an X-26 – as a way of honouring **the state's human rights obligations**, in protecting the community from the risks of armed individuals, and, at the same time, respecting the rights of those who are armed. Some academics have questioned whether a taser firing is in fact a violation of Article 3 of the ECHR, the prohibition on inhuman and degrading treatment. But they do readily accept that being hit by a taser is more preferable on human rights grounds

than the increase in the deployment of conventional firearms teams, for example, where the risks to life are that much greater (Smith, 2009).

In 2004, following a X-26 trial in five forces, it was agreed to allow chief officers of all police forces in England and Wales to make X-26 tasers available to AFOs. Three years later, in July 2007, it was announced that the deployment of tasers by specially trained police units who were not AFOs would be trialled in ten police forces. Following the success of the trial, in December 2008, X-26 taser use was extended to specially trained units across all police forces. With the wider availability of tasers since 2008 their use has been on the increase: in 2009 tasers were deployed by officers across England and Wales on more than 3000 occasions (Home Office, 2013a). Their use increased to nearly 8000 deployments in 2011 (Home Office, 2013a) and over 10,300 in 2013 (Gov.UK, 2014) but seemed to stabilise in 2015, with, again, over 10,300 deployments (Home Office, 2016b). They were actually 'fired' on nearly 700 occasions in 2009 (Home Office, 2013a), over 1600 occasions in 2011 (Home Office, 2013a), over 1700 occasions in 2013 (Home Office, 2013a) and over 1700 18% of occasions in 2015 (Home Office, 2016b).

It was stated above that the rise in taser use came about after Home Office changes in 2008 allowing the weapons to be used more widely, not just by AFOs; currently 11% of police officers (14,700) are armed with them (Laville, 2013). But the initial training for taser use is only three days, unlike the six weeks for ARV teams. This concerns human rights groups such as Amnesty International who believe tasers should only be used in limited circumstances where there is an imminent threat of loss of life or very serious injury, not in lower-level offences. To handle a 'potentially-lethal weapon', police officers need to receive 'the same level of training as firearms officers', meaning 'months of vigorous and ongoing training not the three days they get now'. Amnesty, therefore, concludes that the whole system needs 'a massive overhaul' if the public are going to have any confidence in the police's use of them (Amnesty International, 2013).

One example of taser misuse was the tasering of a blind man in his sixties, Colin Farmer, by police in Lancashire, following reports of a man walking through Chorley with a samurai sword. Farmer's white stick was mistaken for the weapon (BBC News, 2012). Indeed, there are concerns about possible deaths from tasers; for example, 27-year-old Dale Burns allegedly died after being tasered by police in Barrow, Cumbria, in 2011 (Carter, 2012),

as did Philip Hulmes in Bolton in 2011 (Carter, 2011), and 23-year-old Jordan Begley in Manchester in 2013 (BBC News, 2013). Also in 2013, Andrew Pimlott, who was threatening to self-harm after dousing himself with petrol, died after the petrol ignited, following a tasing by police (Morris, 2015). But the Police Federation wants to equip all police officers with tasers (BBC News, 2016). The human rights charity Inquest is opposed to this, saying: 'We've always said the more weapons you arm police with, the more likely they are to use them...' (Carter, 2012). This claim is seemingly supported by Home Office statistics on police taser use stated above which show an increase of 1000 firings, at least between 2009 and 2013.

It was stated above that tasers were actually fired on more than 18% of occasions in 2015. But of course on at least 80% of occasions the weapon was not fired. Deploying a taser but not firing it can include 'drawing' the weapon, 'aiming' it at the suspect; and 'red dotting', where the taser is 'aimed' and partially activated so that a laser 'red dot' is placed on the suspect. In addition, there is the 'drive-stun' method, where, with a live cartridge installed, the taser is held against the subject's body, causing pain but does not deliver an incapacitating effect (Home Office, 2013a). The 'drive stun' method was used only on about 4% of deployments in 2009-13 (but dropped to less than 2% of deployments in 2015) (Home Office, 2016b); the 'red dot' accounted for the most taser use between 2009 and 2015, averaging about 50% of every deployment (Home Office, 2016b). So is there an argument for the greater (or even routine) availability of 'less lethal weapons' such as tasers on human rights grounds, certainly as an alternative to the arming of the police with conventional firearms? Maybe so; existing statistics suggest that tasers are only fired on about a fifth of deployments. But the 'drive stun' method, which has been the subject of a critical review by the IPCC in the past (Laville, 2013), may violate Article 3 of the ECHR. Also of particular concern is the initial taser training period, only three days, which is much less than the six weeks training for an ARV team. Whilst a member of an ARV team must attend a further three days training every six weeks, a taser trained officer must only retrain for a day once a year. So a move to the wider use of tasers by the police should probably seek to increase the initial training period as well as the frequency of the retraining. Indeed, the IPCC published a comprehensive review of police taser use for the period 2004-2013. In it, the IPCC argued that whilst tasers could be a valuable tool in helping police officers manage difficult and challenging situations, incidents of their use should be closely analysed and each use robustly justified to ensure the device was being used appropriately and not as a default

when other options such as officer communication were available. In particular, the IPCC was concerned about the use of a taser on people in police custody; this was only justified in exceptional cases because of the controlled nature of the custody environment. Furthermore, the IPCC was concerned about the use of a taser generally on vulnerable people, such as those with mental health concerns or young people; use of a taser in such instances should take into account the specific vulnerabilities of an individual and these considerations should be recorded in officers' justifications. In this recent report the IPCC was also concerned about the drive-stun method: 'When [a taser] is used in this way it is purely a means of pain compliance. Yet in several of the cases we reviewed, where it was used for the purpose of gaining compliance, it had the opposite effect, stimulating further resistance.' (IPCC, 2014b)

Conclusion

Article 2 of the ECHR is the right to life. This is a fundamental human right so the freedom not only acts 'negatively', that is, the state undertakes not to arbitrarily kill a person, but also acts 'positively', that is, in particular situations the right is engaged if the state fails to protect the lives of individuals at risk from third parties, for example. This issue is particularly keen with the dramatic increase in terror threats to the UK from non-state actors such as ISIL. The terrible tragedies in Hungerford, Dunblane and Whitehaven could have been averted if police officers in Britain had been routinely armed. This article specifically examined the circumstances surrounding the Derrick Bird shootings and found that the facts did not therefore meet the threshold for Article 2 to be engaged (certainly at the time of the killings in 2010). Even if the authorities had been aware, or at the very least should have been aware (perhaps in 1990 after Bird had been convicted of an offence of dishonesty), existing human rights law obliges authorities to act only reasonably in averting that risk. So would the routine arming of the police be a reasonable response to prevent that risk from materialising? The conclusion of this article is no. But that is not to say that the further weaponisation of the police with 'less lethal' options such as tasers is not without merit, however. A firing of a taser, such as that used to try and disable Raoul Moat in Northumberland in 2010, is designed to incapacitate a subject, such that there is less need for the use of lethal force. Yes, concern has been expressed about the alleged fatalities caused by police taser use, but the IPCC has since reported that of the deaths reported to it between 2004 and 2013, where there was a suspicion that a person had died because of a

direct consequence of having been tasered, all the inquests into these deaths have found that the use of the taser was not the direct cause (IPCC, 2014b) (though since this IPCC finding the inquest into the death of Jordan Begley has concluded that being tasered did contribute to his death (Gander, 2015)). Nonetheless, the previous concerns expressed by human rights groups such as Amnesty International and Inquest about the current police use of tasers cannot be ignored. To this end, in moving forward, the period for training in the use of the tasers maybe should be increased and subject to more regular and continuous review; and following the recent reservations expressed by the IPCC the deployment of a taser in a police custody suite, for example, as well as its deployment against vulnerable individuals, should be reduced.

Arguably, the original nature of this article in presuming that armed officers in Britain would have prevented the majority of deaths in Cumbria was misplaced and that a more acceptable human rights approach would have been the strengthening of the existing firearms licensing scheme. The Home Affairs Committee made many recommendations to the current regime of firearms control in 2010, for example, one of which was the greater involvement of the applicant's doctor in the granting and renewing of weapons certificates. This is now reflected in the Firearms (Amendment) Rules 2013, in that where an application is successful a letter will be sent to a person's doctor to collect information about a person's medical history. What is of particular interest to the questions of public safety and licensed firearms is the use of certificated guns in domestic disputes. The Home Affairs Committee recommended the possible involvement of the individual's family in the application process. This also seems to have been addressed to a large degree in the Home Office's current explanatory notes to the firearms licensing scheme, dated November 2013.

Firearms certificates are only renewed every five years. The shootings in Cumbria took place in 2010; Derrick Bird's last renewal of his license was in 2005, so he was very close to making another application. If the standard renewal period was arguably shorter than five years, then Derrick Bird's renewal application may have been rejected (but the current statistics on the proportion of refusals, being very small, would suggest the contrary).²³ Nevertheless, in the aftermath of the Atherton shootings it was noted that it is individuals who kill, not guns (Sainsbury, 2012). Blaming the perpetrator, not the weapon, is a trite argument but a similarly relevant one, nonetheless. Should the large number of licensed gun owners suffer further restrictions on their lawful possession, at the expense of

a small number of individuals who have abused their rights or privileges (which is the phrase adopted by the British government in explaining the existing firearms licensing scheme²⁴)? This is to miss the point: human rights are about ‘balance’. The number of licensed weapons – whether they be firearms and/or shotguns – is still very high and requires some addressing. The existing certification scheme is maybe not for want of some amendment and further reform such as a reduction in the licensing renewal period could be implemented without disproportionately affecting the freedoms of legitimate users.

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² Officers from the Police Service of Northern Ireland (PSNI) are already armed because of the on-going terror threat there. Some police forces in mainland Britain are in fact already routinely armed but these are specialist forces such as the Ministry of Defence Police and the Civil Nuclear Constabulary.

³ Whilst the possession of handguns by private individuals is prohibited, there is small exception: for the humane despatch of animals or for pest control.

⁴ This is a view seemingly shared by the coroner, Andrew Lansley, who presided over the inquests of Bird’s victims and Bird himself (Wainwright, 2011).

⁵ ‘Part 2’ of Whiting’s report (Whiting, 2010b) suggests possible changes to the existing law permitting weapons’ certification.

⁶ Interestingly, Whiting’s report does note that had Bird’s sentence of imprisonment in 1990 not been suspended then Bird would have become a “prohibited person”, under the Firearms Act 1968, section 21, meaning he would have been ineligible for a shotgun licence for a period of five years from the date of his release [5.5]. In reply, the author of this article suggests that even then, this “prohibited person” period would have lapsed in 1995, 15 years before 2010 (but as Whiting notes: “...[this] would have been a specific consideration in any such decision to grant [a licence] again.” [5.5]).

⁷ For example, the officers claimed that they had shot Stanley when he was facing them but forensic evidence later suggested that he had been shot from behind (Wistrich, 2009.)Indeed, the failure to prosecute the two officers involved, believing that they would eventually be acquitted, has prompted others to question whether the criminal law defence of self-defence is compatible with Article 2 of the ECHR, the right to life: Fiona Leverick (2002a). But the defence of self-defence now seems to conform to ECHR law in the opinion of the Administrative Court: *R (Bennett) v HM Coroner for Inner South London* [2006] EWHC 196 (Admin). This case was subject to an appeal – [2007] EWCA Civ 617 – but the issue about the compatibility of self-defence with Article 2 of the ECHR was not pursued. On this issue see also, in reference to the ‘householder’s defence’, as per s.76(5A) of the Criminal Justice and Immigration Act 2008: *R (Collins) v. Secretary of State for Justice* [2016] EWHC 33 (Admin). Here the court held that the defence in criminal law was compatible with Article 2 of the ECHR.

⁸ The family of Azelle Rodney did complain to the ECtHR about the UK's apparent delay in holding an Article 2 compliant investigation into the shooting (Rodney was shot in 2005 and the inquiry did not start until 2011): *Alexander v United Kingdom* (application no. 23276/09). Before the case came to court, however, the UK government accepted that there had been a breach of Article 2 of the ECHR and paid the applicant £6100 in compensation.

⁹ Notwithstanding the fact that E7 had seemingly unlawfully killed Azelle Rodney, at least in civil law, the inquiry raised several other concerns about the management of the police operation: the suspects' car should not have been deliberately rammed in the operation; rounds were fired into the car's wheels after it had been stopped despite the fact that it presented no further risk of escape; firearms officers failed to wear caps identifying themselves as police officers; and there was a failure to consider the risks posed by the chosen location for the stop – directly in front of a pub – where members of the public were sitting outside on the pavement. See, further, Singh (2013).

¹⁰ Instead, the Metropolitan Police Service (MPS) (in fact the Office of the MPC as the employer of the individual officers) was prosecuted for failures under the Health and Safety at Work Act 1974, section 3(1). An application to judicially review the decision not to charge the police with a more serious offence, such as manslaughter, was unsuccessful in 2006: *R (da Silva) v the DPP and the IPCC* [2006] EWHC 3204 (Admin). The de Menezes family also sought a judicial review of the UK's delay in holding an Article 2 compliant investigation into the shooting (de Menezes was shot in 2005 and the inquest into his death did not take place until 2008), but this was rejected: *R (Pereira) v Inner South London Coroner* [2007] EWHC 1723 (Admin). Subsequent proceedings before the ECtHR held that there had no violation of the procedural aspect of Article 2 of the ECHR: *Armani da Silva v United Kingdom* (application number 5878/08).

¹¹ A judicial review of the inquest verdict was dismissed by the High Court: *R (Duggan) v. HM Assistant Deputy Coroner for the Northern District of Greater London* [2014] EWHC 3343 (Admin.).

¹² In fact the inquest into the shooting of Anthony Grainger is to be converted into a judge-led statutory inquiry as per the Inquiries Act 2005 (Gov.UK, 2016a).

¹³ The arrest of the officer who shot Jermaine Baker, 'W80', has affected morale amongst the police force. Senior officers now say that it is more difficult to recruit officers willing to carry firearms, because of concerns about a possible arrest if they discharge their weapons in the line of duty (Dodd, 2016). There is, therefore, a belief that the law inadequately protects officers who carry firearms, so much so there is to be a review into the existing law (Mason, 2015).

¹⁴ The judge said: '[Where] action by police officers had caused death or serious injury to members of the public...a close scrutiny of the detailed sequence of events is likely to be of crucial importance to the carrying out of a thorough investigation...[The] attendant risk of contamination and possibly collusion, is particularly high; and that risk is exacerbated if they collaborate in the production of their first accounts. Even if ultimately the inquiry is not seriously prejudiced, the possibility of collusion is bound to have an impact on the confidence of interested parties and the wider public in the effectiveness of the [IPCC's] investigation.' [19-20].

¹⁵ Indeed, following the killing of Mark Duggan, the IPCC was considering whether to ban the conferring by officers after a police shooting, in a more general consultation on the management of post-incident police practices which have resulted in death or serious injury (IPCC, 2014a).

¹⁶ But Police Codes of Practice use the term armed 'support' rather than 'response' suggesting a more proactive approach by the police service to firearms incidents.

¹⁷ To become an AFO requires two week's training on the Glock 17 pistol. Assuming a person passes the AFO test, they can train for an ARV team – involving further firearms training on the Heckler and Koch MP5 – for four weeks. Officers who are members of an ARV team must undertake continuous training for three days every six weeks. AFOs from ARVs in the MPS, for example, can then train to be Specialist Firearms Officers ('SFO's) where their shooting skills will involve such operations as hostage rescue and maritime operations.

¹⁸ A recent survey conducted by the Police Federation in Hampshire, amongst all its 2,830 officers, came to a similar conclusion (though those surveyed did want an increase in the total number of firearms officers) (Hickey, 2016). Indeed, the President of ACPO, Sir Hugh Orde, counselled against a rush to arm all police following the killing of PCs Fiona Hughes and Nicola Bone: 'It [is] the clear view of the British police service from top to bottom that officers prefer to be unarmed because the public dislike approaching constables bearing weapons...The minimum use of force and intervention [is] the bedrock of Britain's policing model' (Glaze, 2012).

¹⁹ IPCC Commissioner Nicholas Long said: 'Had just one person obtained a complete picture of Atherton's history as a perpetrator of domestic violence...then it may have alerted police to a pattern of behaviour which required far greater scrutiny...It is beyond doubt that Durham Constabulary missed valuable opportunities to assess his suitability to be granted a licence and remain a gun owner...At each stage of the decision-making process every person involved, irrespective of their position within Durham Constabulary, had a responsibility to gather additional information, especially given the history of domestic incidents involving Atherton...Not only did the IPCC investigation uncover a reprehensible lack of intrusive enquiries by Durham Constabulary it also identified poor practices which reflect woeful record keeping...While some of the failings were down to individuals the underlying issue was Durham Constabulary's lack of adequate systems and safeguards. The force did not have clear policies or procedures in place for dealing with issues presented by an applicant like Atherton...'

²⁰ And despite the increase in the classification of 'prohibited' weapons, since, for example, Hungerford, Dunblane etc, misgivings also remain about the types of guns that can still be lawfully possessed: rifles, muzzle-loading revolvers and shotguns that are capable of holding more than two cartridges (Cooper, 2011).

²¹ Indeed, further reform is in the offing after the Law Commission's recent firearms scoping consultation paper (Law Commission, 2015). An outcome of which is the attempt to simplify the legal definition of the word 'firearm' in the Policing and Crime Bill 2016.

²² 'Less lethal' weapons could also include baton rounds where the bullets are made from either rubber or plastic. Since the 1970s rubber bullets have been gradually replaced by plastic ones. The police largely no longer use baton rounds, especially in situations where they would now normally deploy a. In addition, the Home Office is to undertake an evaluation of an acoustic weapon which fires "a highly directional beam of sound towards targeted individuals or small groups" from a distance of up to 400 feet. The purpose of the device, called the A-WASP, is to "disrupt perpetrators of violence or crime and make them aware that they are individually the subject of asserted police attention," according to the manufacturers (Statewatch, 2014).

²³ Interestingly, in its 2010 report on Firearms Control the House of Commons Home Affairs Committee was not convinced by the argument that the renewal period for a gun licence

should be reduced from five years to two since they had not seen any evidence that there had been misuse of legal firearms since the period was increased from three years in 1995.

²⁴ In explaining the existing firearms licensing scheme, the Home Office maintains that British firearms policy is based on the fact that firearms 'are dangerous weapons and the State has a duty to protect the public from their misuse'.

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