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A RESCUE SHOT – RESOLVING HOSTAGE SITUATIONS IN POLICE OPERATIONS

Kuba Jałoszyński

ABSTRACT

The issue of a rescue shot and a shot on command is a matter that presently needs a more precise legal definition. The author presents the issue, which requires a most urgent solution, while comparing it with relevant regulations in the

United Kingdom, the Netherlands, Germany and Spain. Thus he provides a broad picture of possible solutions to the critical problem of a rescue shot and a shot on command.

KEY WORDS

rescuing shot, shot on command, law

Direct coercive measures encroach on the sphere of fundamental liberties and human rights guaranteed by law. The use of these measures consists in a physical action on a human being (by causing physical discomfort, most frequently pain) aimed at forcing them to behave in a specific manner that is in accordance with law. At the same time, it would not be possible to fully implement the tasks associated with human safety without solutions based on direct coercive measures. Firearms are means of a special and ultimate nature in the armoury of direct coercive measures used by state agencies. This is why their use has been precisely regulated, with legal provisions strictly providing who, how and under what circumstances may use firearms¹.

Prescriptive regulation of the issue of the use of weapons by a sniper has proven extremely difficult. This is, among other considerations, because a sniper operates away from any direct threat to his person and may use weapons either under his own decision or when authorised by his commander². Experiences resulting from intensive training and real life operations form a potential of

a personal safety philosophy³ while the responsibility for effects of his actions is distributed between two individuals. As can be seen, the issue in question fits in the first, mental, and second, organisational and legal, pillar of the safety culture.⁴ The issue in question requires legal regulation of the two following areas:

1. The possibility of a sniper firing a shot on command. At present, the concept of a shot on command applies solely to prevention troops and such shot must be preceded by a warning salvo;
2. Permitting elimination of a person against whom a sniper is using his weapon (a shot that is highly likely to be lethal – a situation that is unacceptable

¹ J. Mróz, *Użycie broni palnej w działaniach ratowniczych – sytuacja zakładnicza*, [in:] *Zagadnienia fizycznej walki z zagrożeniami terrorystycznymi. Aspekty organizacyjne i prawne*, edit. K. Jałoszyński, Warszawa 2010, p. 290.

² P. Brookesmith, *Strzelec wyborowy. Szkolenia, uzbrojenie, technika działania*, Warszawa 2001, p. 127 et seq.

³ G. Michałowska, *Bezpieczeństwo ludzkie*, [in:] *Świat wobec współczesnych wyzwań i zagrożeń*, sci. edit. J. Symonides, Wydawnictwo Naukowe SCHOLAR, Warszawa 2010, pp. 227-234; J. Piwowarski, *Bezpieczeństwo jako pożądaný stan oraz jako wartość*, [in:] *Bezpieczeństwo jako wartość*, "Wydanie pokonferencyjne z II Konferencji Naukowej z cyklu "Bezpieczeństwo jako wartość" zorganizowanej przez Wyższą Szkołę Bezpieczeństwa Publicznego i Indywidualnego "Apeiron" w Krakowie, 18 kwietnia 2008", Kraków 2010, p. 56.

⁴ J. Piwowarski, *Trzy składowe kultury bezpieczeństwa*, Słowo wstępne, [in:] "Kultura Bezpieczeństwa. Nauka – Praktyka – Refleksje." WSBPil "Apeiron", nr 9, p. 5.

under Polish legislation)⁵.

The issue of permitting a rescue shot – *i.e. a shot that neutralises the threat of a hostage's/hostages' death by eliminating the person who poses a real threat of perpetrating such action, fired either under the sniper's own judgement or when authorised by the commander* – is a situation that has not been regulated in Polish legislation.

Despite a number of demands, including the ones arising from the findings made by the commission established to investigate the event in Magdalenka near Warsaw⁶, Polish law does not provide for the use of firearms by a sniper under provisions other than referring to the currently binding cases and conditions applicable to the use of firearms. The same provisions do not permit firing a shot on command either. Opponents of introducing regulations of this nature point to the ruling by the Constitutional Tribunal that questioned the right to shoot down a passenger aircraft as being in conflict with the Constitution. One should note, however, that in their reasons for their ruling, the Tribunal referred to an unacceptable situation of killing innocent people. Therefore, one should not presume that the two situations are analogous. Indeed, [the sniper's] weapon would be used against an offender, for what else can one call a situation when one person is putting a weapon to another's person's head or using another dangerous tool to threaten to take that person's life. Such situation meets the legal prerequisites for a crime that the Penal Code defines as an attempted homicide. It is the States role to prevent crimes. So, it is better to allow a sniper to take a rescue shot to prevent an attempted homicide than to allow such an act to

be committed as a result of a legislative omission⁷.

June 2013 saw the entry into force of the Coercive Measures and Firearms Act⁸, which regulates when direct coercive measures and firearms may be used. Specific cases in which firearms may be used are enumerated in Chapter 3 – *Firearms*, Article 45, while the use of firearms is regulated in Article 46.

The legislators resigned from allowing prevention troops to use firearms, except for when a state of emergency has been announced, which was permitted under the previous legislative solution. At present, prevention troops have a wide range of direct coercive measures available that allow them to control crisis situations without resorting to the ultimate measure of firearms. In the case of a direct threat to one's life or health, an authorised person may use firearms under generally applicable provisions⁹. Although this solution is by all means pragmatic, the legislator omitted the possibility of using firearms on command in a rescue shot scenario.

The new regulation still contains the principle for the use of firearms under which they should be used *in a manner that is possibly least damaging*¹⁰. One cannot clearly define "the extent" of damage in relation to the health of a person against whom a firearm has been used. Whether such damage is *small* or *big* differs for different people and is determined by various factors. Furthermore, how can one aim to *cause the least damage possible* in a situation when a firearm is used that fires rifle bullets (a rifle bullet's energy ranges from 2,200 J to 10,000J¹¹), whose

⁵ K. Jałoszyński, *Jednostka kontrterrorystyczna – element działań bojowych w systemie bezpieczeństwa antyterrorystycznego*, Szczytno 2011, p. 114.

⁶ During the operation in Magdalenka near Warsaw on 5/6 March 2003, launched to detain two perpetrators of the killing of a police officer that took place in the town of Parole near Warsaw in 2002, two police officers of the Combat Directorate of the Central Bureau of Investigation lost their lives in the blast of an explosive device planted by the criminals. Both criminals were killed in the firefight. (author's footnote)

⁷ K. Jałoszyński, *Jednostka kontrterrorystyczna*, op. cit., p. 117.

⁸ Coercive Measures and Firearms Act of 24 May 2013, Journal of Laws of 3 June 2013, Item 628.

⁹ Ustawa o środkach przymusu bezpośredniego weszła w życie http://www.msw.gov.pl/portal/pl/2/10963/Ustawa_o_srodkach_h_przymusu_bezposredniego_weszla_w_zycie.html – 19 June 2013

¹⁰ Biuro Prewencji i Ruchu Drogowego KGP, *Uprawnienia funkcjonariusza policji w zakresie użycia lub wykorzystania środków przymusu bezpośredniego i broni palnej*, Warszawa 2013, p. 34 (a training material for police officers).

¹¹ <http://docs6.chomikuj.pl/1916469491,PL,0,0,artyk.docx> 19.06.2013 r.

stopping power [a ballistic injury after which the target is unable to move or shoot within 30 seconds (...)] The term is used for evaluating ammunition and short weapons designed for fighting at distances of up to 20 yards (e.g. in the course of police operations) as well as in reference to long weapons (...) ¹² is undoubtedly in the region of more than 95%.

One should clearly differentiate between the term use of a sniper weapon and situations when sniper weapons are used as part of the so-called sniper option, which is an element of a tactical solution to the arising crisis situation. In the former case, the sniper uses his weapon under generally applicable provisions (cases and conditions set forth in the Act) in a situation when a criminal has already used weapons and a direct threat to one's life or health has occurred. Still, the sniper is bound by restrictions arising from the firearms regulations.

In order to make it possible to execute the above tasks, as may be required by the assumed tactics, it is essential to legally provide for firing a rescue (neutralising) shot and a shot on command. Both these situations must be legally permitted.

The issue of firing a rescue shot has been contemplated in a number of European countries. Majority of German Lands have regulated it under relevant police law provisions as well as in the Constitution, which does not shut the door for a further discussion regarding the interesting and complex point of permissibility of a lethal shot ¹³. Although the aforementioned issue is not new and was discussed in the subject literature on a number of occasions, arguments for and against permissibility of the use of snipers are not all presented clearly ¹⁴.

A deliberately lethal shot comes as a special police situation where events must evolve in a way that puts the police officer before a choice: either to passively observe as the perpetrator will most probably and very soon kill or seriously

wound (further) people, or to allow a police sniper to deliberately fire a lethal shot that will prevent the criminal from continuing his/her actions or finalising his/her plans ¹⁵.

In the European Council's system, the standard regarding the use of force is set forth in *the European Convention on Human Rights* of 1950 (ECHR) and *the Declaration on the Police*, which was attached to Resolution 690 (1979), adopted by the Parliamentary Assembly of the Council of Europe on 8 May 1979. As an international treaty, the ECHR is included in the body of hard international law. On the other hand, *the Declaration of the Police* is part of the so-called soft international law ¹⁶.

The ECHR does not contain provisions directly regarding the use of firearms by law enforcement officers. The task to establish such provisions was given to the European Tribunal of Human Rights (and the previously existing Human Rights Commission). However, this sphere is referred to, albeit indirectly, in Article 2 of the ECHR, which regards the right to life, and particularly its Clauses 2 a, b and c. The Article is addressed not only to the legislator but also inter alia to the Police, whose competencies must be within the remit defined by that provision. Article 2.2 of the ECHR permits deprivation of life when it is inflicted as a result of the use of force which is no more than absolutely necessary:

1. in defence of any person from unlawful violence,
2. in order to prevent a lawful arrest or to prevent the escape of a person lawfully detained,
3. in action lawfully taken for the purpose of quelling a riot or insurrection ¹⁷.

In its Point A12, the Declaration on the Police states that state officers shall use all necessary determination to achieve an aim which is legally required or allowed, but they may never use more force than is necessary. In accordance with Point A13, state officers shall receive clear

¹² Stopping power – http://pl.wikipedia.org/wiki/Ra%C5%BCenie_obalaj%C4%85ce – 19 June 2013

¹³ Based on: F. Thiede, *Zulässigkeit des gezielten Todesschusses (sogenannter "finaler Rettungsschuss") durch Polizeivollzugsbeamte des Bundes und der Länder*, "Kriminalistik" 3/00, pp. 207-210, 2000.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Based on a material by Biuro Operacji Antyterrorystycznych KGP of 2008, podinsp. M. Pałka, Warszawa 2008 (typescript).

¹⁷ Ibid.

and precise instructions as to the manner and circumstances in which they should make use of arms. In a footnote to the document, it is explained that Part A covers all individuals and organisations, including such bodies as secret services, military police forces, armed forces or militias performing police duties, that are responsible for enforcing the law, investigating offences and maintaining public order and state security¹⁸.

Standards regarding the use of firearms in certain European countries refer directly to the rescue shot situation.

The United Kingdom – a great majority of British police officers do not routinely carry firearms, as the country professes the police non-gun policy. However, each formation has specially designated officers, Authorised Firearms Officers, who have received training in using firearms¹⁹.

British law does not contain provisions that precisely regulate the use of arms by police officers. The use of direct coercion by a police officer must be viewed in the light of Section 3 of *the Criminal Law Act 1967*, which permits using such force as is "reasonable" in the circumstances. What force is "reasonable" is decided by the jury. In addition to the Act, there is the principle of *common law*, a justification for private defence that gives the right to use a reasonable force in defending oneself, another person or property. Also in such cases it is the jury who decide whether a measure used in the circumstances was "reasonable". There are two perspectives in which one can view mistakes regarding the above justification: the objective one that takes into consideration whether the defendant's fair belief regarding the course of events has reasonable grounds, and the subjective one that focuses on analysing the defendant's belief regardless of whether it is reasonable or not²⁰.

Issued by the Home Office in 1983, guidelines for the police force regarding providing police officers with and their use of firearms state that firearms may be used only as a last resort when conventional methods have proven/would

prove ineffective. The guidelines emphasise the principle of minimum force necessary in the circumstances and impose the obligation of giving an oral warning that firearms will be used unless such warning is not advisable²¹.

Apart from national regulations, the standard regarding the use of firearms in the United Kingdom has been shaped also by the body of Strasbourg rulings. In accordance with Article 46 of the ECHR "The High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties". Indeed, a number of cases in the Court against the United Kingdom regarded the issue of the use of firearms. Numerous judgements issued by the Court emphasised absolute necessity for the use of weapons by British officers to arrest the perpetrator or prevent his/her escape, and also stressed that weapons may never be used with the intention to kill. Any death that may occur in the process may only be accidental²².

Moreover, British police officers are required to conduct any operation involving the use of firearms in accordance with one of the purposes set forth in Article 2.2 of the ECHR²³.

Whether the use of firearms is premeditated or intentional is just one of many factors which British police officers must take into consideration while assessing whether such use is necessary. No use of force can be anything more than an absolutely necessary action leading to the achievement of one or more purposes set forth in Article 2.2 of the ECHR. Also, British police officers should pay particular attention to proper planning, preparation and control of any operation in which weapons are used²⁴.

Finally, there should be no relation whatsoever between officers investigating a firearm incident and officers involved in that incident²⁵.

The Netherlands – The grounds, principles and methods of using firearms by Dutch police officers are regulated under Article 7 of the Police Act 1993 and the police instruction issued in 1994.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

Under the Act, police officers have the right to use force during lawful execution of their responsibilities. While doing so, they must follow the principles of proportionality, subsidiarity, reason and moderation. Article 8.2 of the abovesaid Act requires that a warning must be given of any use of a coercive measure²⁶.

The use of firearms is regulated under Articles 7–12 of the police instruction, which differentiates between non-automatic and automatic weapons and sniper rifles. Non-automatic weapons may be used to force a person suspected of having committed a serious crime to give in to arrest or another restriction of freedom when there are reasonable grounds to believe that such person is armed and will use the weapon against another person, when arresting a person evading arrest who is suspected of having committed a serious crime, and to quell riots. However, no use of weapons in the aforementioned cases shall be regarded as appropriate if the suspect's identity is known and delaying the arrest does not cause any threat. Automatic weapons may be used when there is a serious risk of a direct threat to a person, when arresting dangerous suspects and to protect people or facilities. Finally, sniper rifles may be used only in cases of very serious crimes to prevent a direct threat of a loss of life and then only by a specially trained person and solely on command from the superior. The provision of Article 9 of the instruction constitutes the legal basis for the use of firearms (a sniper rifle) with the intention to kill a person (*shoot to kill*)²⁷.

Spain – Due to the high level of terrorist threat in the country, around 85% of hostage situations are resolved with the use of police snipers. The decision to take the shot is made by the officer commanding the police operation, and that officer is also the one to determine what type of a shot is going to be appropriate for the threat:

- Shot **A** – head,
- Shot **B** - torso,
- Shot **C** – limbs²⁸.

Regardless of what orders are given by the officer commanding a given operation, each case of the use of snipers is considered by the court and assessed in terms of legitimacy and evidence. Distances from which sniper shots are fired do not exceed 100 m²⁹.

The issue of a *rescue shot* and a *shot on command* is a matter that our country cannot possibly "escape". It is directly related with implementation of the constitutional obligation stipulated in Article 5 of the Basic Law.³⁰ The issue must be solved as soon as possible – before we are faced with a real dilemma of whether to resolve a crisis hostage situation with the use of snipers.

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²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰Article 5 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, 1997, Item 483, as amended).

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