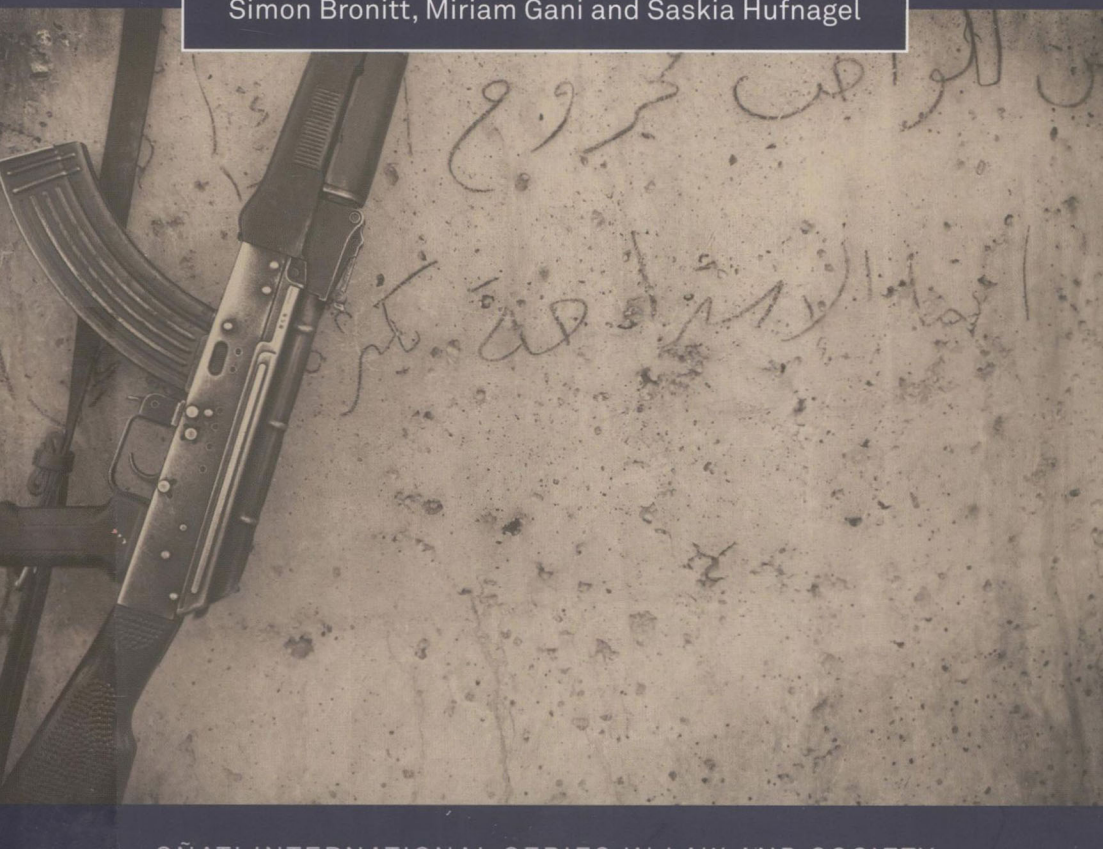


Shooting to Kill

Socio-Legal Perspectives on the Use of Lethal Force

EDITED BY

Simon Bronitt, Miriam Gani and Saskia Hufnagel



OÑATI INTERNATIONAL SERIES IN LAW AND SOCIETY

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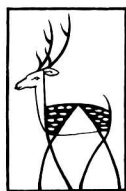
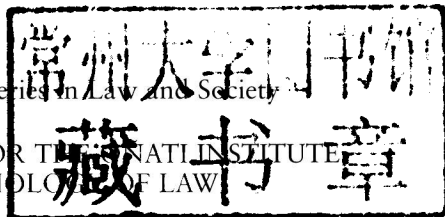
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SHOOTING TO KILL

The present book brings together perspectives from different disciplinary fields to examine the significant legal, moral and political issues which arise in relation to the use of lethal force in both domestic and international law. These issues have particular salience in the counter terrorism context following 9/11 (which brought with it the spectre of shooting down hijacked airplanes) and the use of force in Operation Kratos that led to the tragic shooting of Jean Charles de Menezes. Concerns about the use of excessive force, however, are not confined to the terrorist situation. The essays in this collection examine how the state sanctions the use of lethal force in varied ways: through the doctrines of public and private self-defence and the development of legislation and case law that excuses or justifies the use of lethal force in the course of executing an arrest, preventing crime or disorder or protecting private property. An important theme is how the domestic and international legal orders intersect and continually influence one another. While legal approaches to the use of lethal force share common features, the context within which force is deployed varies greatly. Key issues explored in this volume are the extent to which domestic and international law authorise pre-emptive use of force, and how necessity and reasonableness are legally constructed in this context.

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Introduction

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane, he had to fly them. If he flew them, he was crazy and didn't have to; but if he didn't want to, he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

Joseph Heller, *Catch-22* (1961)

Joseph Heller's famous satirical war novel *Catch-22* captures some of the absurdities of war, the soldiers' dilemma and specifically the pervasive fears of those flying B-25 bombers. Yossarian, a member of one such squadron, experiences the constant fear of being a target of lethal force—in effect, the 'killer' fears being killed—but fears even more the bureaucracy steering him. His fears underscore legitimate justifications of acting in self-defence and necessity, but also reveal the psychological coercion arising through the system of military chain of command and superior orders. Musing about the insanity arising from that constant fear of being killed, which he regarded as a form of sanity, in turn justifies further killing, as legally cemented in the 'Catch-22'. Yossarian's dilemma illustrates the instability of the legal categories of justification or excuse, as well as the malleability of the distinct legal subjects of 'culpable offender' and 'innocent victim'. This conceptual instability is one that recurs throughout this edited collection.

The 'Catch-22' has acquired new significance in the debates in the decade post-9/11. The 'War on Terror' provides a new context in which legal systems have struggled to determine the legitimate boundaries on the use of force to prevent acts of terrorism, including the deployment of lethal force. Much of the academic debate has focussed on the legal questions of necessity, reasonableness and proportionality including inter alia the extent to which the law authorises the pre-emptive uses of lethal force in both policing and military operations. Legal concerns about unjustified or illegitimate uses of force are not limited to terrorist situations. The authors of this collection examine the myriad of ways in which the state and the law (both domestic and international) sanction the use of lethal force across a wide spectrum of contexts. Authors in this edited collection traverse a wide terrain—from violence perpetrated in the name of the state by military or

police, to private forms of self-defence in the ‘domestic’ context. The law across all these domains seeks to regulate—to define, limit and legitimate (or not)—these acts of violence.

Failures to take action against unjustified violence perpetrated by military or police personnel undermines the rule of law, as well as the legitimacy of the state in whose name the violence is perpetrated. The recent shooting of Osama bin Laden by US Special Forces in Pakistan on 2 May 2011 raised questions of necessity, reasonableness and proportionality of the force used by the US Special Forces. The focus on the legality of that action has centred around the language of self-defence, respect for the rule of law and compliance with the military’s rules of engagement.¹ The operation was described by US Attorney General Eric Holder as a ‘kill or capture mission’, so that ‘if there was the possibility of a feasible surrender, that would have occurred’.² Despite revised official descriptions of the event indicating that bin Laden was in fact unarmed,³ in the absence of a clear indication of surrender from him, it has been concluded that the Special Forces acted ‘in an appropriate way’. As one senior military officer involved in the operation noted, ‘the protection of the force that went into that compound, was I think uppermost in our minds’.⁴ How legal systems, both national and international, respond to such security threats is crucially important. Getting it ‘wrong’ can have serious and devastating consequences, as illustrated in the Jean Charles de Menezes shooting by counter terrorism police and more recently, the UK riots in August 2011 that followed in the week after the police shooting of Mark Duggan. The authors of this collection are under no illusion that the difference between on the one hand, the use of force being a justified act of heroism, or on the other hand, an abuse of power or serious criminal offence, is highly contingent on context.

New and nuanced insights into use of force require legal rules to be examined in a variety of contexts. Legal doctrine and theory must be interrogated through a range of critical and applied perspectives (which include military and policing practitioners). While some chapters approach the topic using a theoretical or ethical perspective, others have a predominantly doctrinal and sociological perspective on the law. The use of the case study method in some of these chapters enables a highly contextual picture of the law relationship with state-authorised or state-sanctioned violence to emerge.

¹ See R Khatchadourian, ‘Bin Laden: The Rules of Engagement’, *New Yorker*, 4 May 2011, www.newyorker.com/online/blogs/newsdesk/2011/05/bin-laden-the-rules-of-engagement.html.

² See BBC report, ‘Bin Laden death “not an assassination”—Eric Holder’, *BBC*, 2 May 2011, www.bbc.co.uk/news/world-us-canada-13370919.

³ Khatchadourian, above n 1.

⁴ BBC report, above n 2.

For thematic coherence and convenience, the book adopts a tri-partite structure (although we recognise that many of the themes and perspectives are overlapping and interrelated). Part I deals with Theoretical and Ethical Perspectives; Part II examines Legal Frameworks for Shooting to Kill; and Part III looks at Shooting to Kill in Context: Case Studies.

Part I examines the core concepts surrounding the use of lethal force such as state of emergency (Campbell), the limits of necessity claims (Kleinig and Kasachkoff), the core principles of proportionality and the right to life (Möller). It also examines the broader philosophical question of whether the state can be held responsible for criminal uses of force by its agents (Vincent), and how political and juridical discourses use language to legitimate lethal force in the war on terror (Hogg). Campbell's chapter on 'The Rule of Law, Legal Positivism and States of Emergency' focuses on the question of how domestic states of emergency could be hedged in by utilising the traditional patterns of checks and balances within a constitutional state. Using the example of police use of lethal force, he examines whether expanded police powers and competences in the field of terrorism response are held at bay by the rule of law or whether they are, in fact, consolidated by it. Kleinig and Kasachkoff, in their chapter on 'Civil Emergencies and the Claims of Innocence' also focus on powers and competences attributed to state officials in the fight against terrorism, in the particular context of the use of lethal force against hijacked aircraft. The validity of legislation (moral, legal and ethical) enacted in many countries after the 9/11 attacks authorising the use of pre-emptive lethal force in a 9/11 World Trade Centre (WTC) scenario is examined in several of the contributions to this book. Kleinig and Kasachkoff approach this problem from the perspective of the moral dilemmas of key decision-makers. Other authors adopt a different approach to the scenario, focussing on the constitutional, legal and practical issues. Möller, in chapter three, for example, reviews the legality of shooting down hijacked aircraft from a distinctly legal constitutional perspective, drawing on hypotheticals from the field of applied ethics. Using this extreme example, Möller investigates the constitutional principle of proportionality in relation to the use of lethal force and offers some fresh insights into whether certain 'absolute' constitutional rights—such as the right to human dignity—do, in fact, exist.

Drawing on his field of political philosophy, Vincent approaches the topic by asking the deceptively simple (but ultimately complex) question, reflected in the chapter title, 'Can States Commit Crimes?'. While the legal answer to the question might appear relatively straightforward, the disciplinary lens of political philosophy reveals multiple facets of the issue of how far the state can legitimately go in its efforts to protect its citizens. Part I concludes with a chapter on 'Death and Denial in the "Global War on Terror"' by Hogg. Referring to the specific issue of terrorism, but this time from a distinctly socio-legal and criminological perspective, Hogg focuses

on the international rather than domestic aspect of the ‘global war on terror’ and compares the strategies used to deny the ‘resemblances between similar sets of facts’ in contemporary violent conflicts, in particular those connected with global terrorism.

Part II delves into further detailed analysis of the ‘common’ legal concepts that serve to legitimise the use of lethal force, such as necessity, reasonableness, proportionality, as well as exploring how these concepts are given effect in substantive legal defences and how these are operationalised in police administrative guidelines. Leader-Elliot provides a structured analysis of Australian model criminal law defences and how these affect the criminal liability of individuals who use lethal force. This involves a detailed analysis of all existing defences under Australian criminal law. He stresses, however, that what all defences have in common is the requirement of a ‘reasonable response’, which serves as a limit to state abuse of power. This however hands the assessment to the judges rather than the legislature. The next chapter (Bronitt and Gani) moves to the frontline decision-making of those who use force, exposing the fact that decisions to use force are highly contextual, shaped by legal norms as well as administrative practices and guidelines. A gender perspective is offered in a comparison of the law’s treatment of police who use lethal force to combat violent crime and terrorism, and of women who kill to escape from violent partners (Weston-Scheuber). The contours of law’s doctrines are undeniably shaped by gender, but also by legal culture—this is apparent in relation to the paramount status of human dignity in German law that has severely limited the scope for using lethal force pre-emptively in counter terrorism operations (Hufnagel). Adopting a comparative legal methodology, this chapter returns again to the 9/11 WTC scenario, but the approach adopted is an applied legal focus (rather than legal theoretical) on the operation of available criminal law defences in German and Australian law.

Part III concludes with a series of case studies, providing the opportunity for further contextualisation of both domestic and international law governing the use of lethal force. While the governing legal doctrines share ‘common features’ (legal rules authorising the use of necessary, reasonable and proportionate force in self-defence and defence of others, or to prevent crime and disorder, or to protect property, etc), the *contexts* within which lethal force is deployed vary greatly. The first chapter by Gordon and Miller asks the question ‘The Fatal Police Shooting Of Jean Charles de Menezes: Is Anyone Responsible?’. The authors employ an innovative methodological approach to analyse the shooting of de Menezes (and the use of force protocols applied in Operation Kratos) that melds philosophical and ethical insights (Miller) with practical perspectives of a former operational senior police officer (Gordon). The chapter also provides an in-depth assessment of the criminal law, human rights, ethical and moral arguments raised by this tragic case. The next chapter by Guilfoyle and Murdoch is a case study addressing the

use of lethal force in counter-piracy operations off Somalia that similarly combines applied practitioner and academic perspectives on law enforcement operations by the military. It assesses international law and domestic criminal law approaches to the use of lethal force against pirates and concludes that the interaction between these different types of laws still poses considerable problems in the field. The penultimate chapter by O'Connell examines the legality of combat drones deployed in Pakistan (2004–09) by the US military from an international law perspective. The final chapter by Kinley and Murray, titled 'Corporations that Kill: Prosecuting Blackwater', raises the question whether outsourcing of military and policing services to the corporate sector permits states to evade or escape liability for the harms and crimes caused by private military contractors corporations. The transnational and global dimension of private security offers another perspective on the topic, providing an epilogue on future trends of global corporate misuse of power.

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Part I

Theoretical and Ethical Perspectives